INSIDE THE MINDS ™

STRATEGIES FOR FAMILY LAW IN CALIFORNIA

LEADING LAWYERS ON NAVIGATING KEY ISSUES AND CASES, INTEGRATING CREATIVE SOLUTIONS, AND COUNSELING CLIENTS

2010 EDITION

ASPATORE

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Streamlining Strategies and Costs in Today's Family Law Cases

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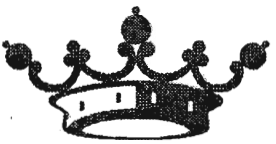

ASPATORE

Introduction: A Unique Approach to Family Law

Because our firm is a full-service law firm with eighty-plus attorneys from all areas of practice, we are able to offer our family law clients a wide spectrum of background and expertise in addressing the specific and unique issues that arise in their cases. Our firm has a strong civil litigation background; thus, we have been able to and are well equipped to handle the changes that the Elkins Commission has recommended regarding case management in the family law arena. From our very first meeting with the client, we establish goals and benchmarks that we wish to achieve for our client. We prepare a game plan that guides us through the case and helps minimize the client's costs while helping to achieve our client's goals in the most expeditious and cost-effective way. Complex cases are identified and strategies regarding the use of discovery, experts, and potential settlements are set forth at the outset of the case.

We are a litigation firm; therefore, we are always preparing our clients and their cases to be litigated, and if necessary, to be tried. We feel strongly that the discovery process is a tool that should be used in every case, whether it is done informally or formally. The more information that you have, the better prepared you are to advocate for your client without being blindsided by unknown facts or information. If we know exactly what information there is and have a strong position as to what a court is likely to order regarding each issue of contention, we feel stronger going into trial and/or settlement discussions. This strategy often lends itself to success in mediation. However, we are never in a position that if the case does not settle, we are not ready to proceed to trial. In that approximately 85 percent of all contested divorce cases settle prior to trial, we feel that our preparedness and willingness to take our client's positions before the court gives us the upper hand on many opposing counsel. Our firm has a strong belief that if a client is provided with the right representation early on, and if they are presented with appropriate options, their case will come to a settlement that is in their best interest and that achieves the goals that they set out at the start of the case.

At the time a client retains our firm to represent them, we identify with them and affirm their goals—i.e., the most important focus of their case, be it establishing a 50/50 custody arrangement, holding onto their business

interest, moving to another country, etc. This identification early on in the case provides both the client and our firm with a structural focus and drives how the case is handled.

California is a community property state and has some of the most aggressive and cutting-edge fiduciary disclosure requirements in the nation. Both spouses have fiduciary obligations to fully disclose all assets, obligations, and other material information concerning property and support to the other. Failure to do so can result in severe and far-reaching sanctions. These disclosure requirements set California apart from other states in that spouses cannot hide assets or withhold material information without repercussions.

Recent Cases and Developments in Family Law

Elkins v. Superior Court

Of the recent family law cases decided in California's courts, *Elkins v. Superior Court*, 41 Cal.4th 1337 (Cal. 2007), decided in 2007, has generated the most impact as it relates to case management for family law matters and how family law cases are handled procedurally in the courts. The recommendations of the Elkins Family Law Task Force, due to be adopted shortly, have already and are sure to have a significant impact on how family law practitioners approach their cases. The Task Force has made it very clear that family law cases are no longer going to be handled in the informal manner in which they once were treated. The task force quotes the decision in *Elkins* as an introduction to their recommendations:

> "In light of the volume of cases faced by trial courts, we understand their efforts to streamline family law procedures. But family 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 proceedings governed by the rules of evidence established by statute. It is at least as important that the 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."
>
> *Elkins v. Superior Court*, 41 Cal.4th 1337, 1368 (Cal. 2007).

Family law cases are governed by the same rules of civil procedure and evidence as any other civil action; however, this fact has been largely ignored by family law practitioners and the bench in the past. In light of the Elkins Task Force Recommendations, it is very apparent that there will be change. Strategically, family law practitioners should prepare themselves now to be held to the standard that is set in the Elkins Recommendations. The Elkins Task Force recommendations regarding case flow management are some of the most important of the recommendations in that they "hit the nail on the head" regarding the problems faced in family law litigation. We feel that early intervention, streamlining procedures, establishing check points, and setting trial dates early on to get a case on a track toward resolution is of the utmost importance. The setting of trial dates is what drives cases toward settlement.

Responding to Elkins

The Elkins Task Force points out that California is facing unprecedented fiscal challenges, and that it is unlikely that the courts will soon be receiving significant additional resources given current budget cuts in the state. Thus, it appears that even the Elkins Task Force, in acknowledging the need for reform, is giving deference that it may not be feasible during these hard times. This puts the onus on family law practitioners to take the recommendations of the Task Force and implement the spirit of them in their everyday practice. Family law practitioners should establish a strategy for resolution of their cases from the outset and keep their cases on track.

The Elkins Task Force clearly states that family law cases will no longer take a backseat to other types of cases, thus, family law practitioners should prepare themselves to handle family law matters as they would any other

civil litigation matter. The rules of California Civil Procedure should be strictly followed and counsel should hold their opposing counsel to this standard as well. Likewise, evidence should be presented to the court consistent with the Evidence Code. Any pleadings that are presented to the court in support of your case should be pristine, free from typographical errors, well supported by the law, and filed timely. It is our firm's practice to always submit a Memorandum of Points and Authorities with every Order to Show Cause or Responsive Declaration to an Order to Show Cause, no matter how "routine" the issues are. Counsel should assume that they will be presenting their case to a judge who is not familiar with family law. In assuming this, family law practitioners are forced to "get back to the basics" and set forth strong pleadings that are well grounded in the law. Your pleadings are what set you apart from the average family law practitioner. Superior pleadings can both facilitate settlement and, in the event the matter is tried, put you a step ahead of your opponent in the eyes of the court.

Developing Effective Family Law Litigation Strategies

From the outset of a family law case, the parties and counsel must establish uniform goals and decide on a strategy and approach to achieve those goals. Curtailed to the goals set, benchmarks should be set to accomplish both procedural and strategic landmarks in a case. Similar to a "Case Management Order" in a complex civil litigation matter, family law practitioners need to strive to have a matter accessed and set for trial as soon as they have a grasp on the issues at hand. A trial date does not necessarily need to be set in the near future; however, one should be set nonetheless, because a trial date is oftentimes what drives the discovery process, and ultimately, settlement. A trial date drives discovery deadlines, and can keep a case on track and avoid a long and drawn-out litigation.

Sample benchmarks in a family law case include:

- Initial intake interview and establishment of case goals
- Determination of contested issues versus issues likely to be resolved amicably
- Preparation, filing, and service of initial pleadings

- Preparation and service of client's Preliminary Declaration of Disclosure, inclusive of a Declaration of Disclosure, Income and Expense Declaration, and Schedule of Assets and Debts
- Analysis of whether or not any temporary orders are needed, and if so, filing of an Order to Show Cause. For example if there are children involved, are temporary custody and visitation orders needed, or does your client require pendente lite child or spousal support orders to get them through until the time of settlement or trial, or is there domestic violence involved that requires the file of a Request for Temporary Restraining Order and a "kick-out" order to allow your client to have sole use of the marital residence, or does your client need assistance from the other party with regard to payment of attorney fees, etc.
- Demand for opposing party's Preliminary Declaration of Disclosure
- Written discovery served (Form Interrogatories, Request for Production of Documents, Special Interrogatories, Requests for Admissions)
- Subpoenaing of documents from third parties
- Appointment of experts, if necessary. For example, if there are complex custody issues in which the court would require the opinion of an expert to determine what is in the best interest of the children, or is a community property business involved and a forensic accountant is needed to determine its value, or if the opposing party is a sole practitioner whose income available for support needs to be determined by a forensic accountant
- Noticing of Depositions
- Filing of At-Issue Memorandum for Trial Setting when you feel that your case is ready to go to trial
- Four-way settlement conference or mediation, if appropriate
- Consideration of bifurcated trial on contested issues
- Trial Setting Conference
- Mandatory Settlement conference
- Trial

The large majority of divorces in California (in that it is a no-fault and a community property state) are not complex cases. If parties and counsel are held to task in providing necessary information and documents to the other side, cases can and should be resolved in a timely manner. If a case cannot be resolved through mediation and/or settlement negotiations, but the parties are on task with their case timeline and discovery deadlines, the case should be ready to be litigated in a timely manner.

Consideration should be given to the possibility of bifurcating and trying contested issues first—for example, a dispute involving the date of separation, custody issues, valuation of a business, etc. If one or two issues are the contentious issues in a case, it is good practice to bifurcate those issues out and get them resolved, as oftentimes when threshold issues are resolved, the rest of the case falls into place for settlement.

Handling the Most Difficult of Cases

The most complex cases in family law are often those that involve children. All family law cases can be filled with emotion. This is true especially in cases where disagreements with regard to the custody of a child are involved. In these types of cases, family law practitioners are often faced with handling clients who are overcome with their emotions and thus very difficult to control. These cases are often the most contentious and most litigated of all cases a family law practitioner will handle. In handling these cases, counsel must always remember that their duty is not only to their client, but to the children as well.

The standard in determining custody issues in a family law matter is the "best interest standard" as defined by Family Code §3011, which reads,

> "In making a determination of the best interest of the child in a proceeding described in Section 3021, the court shall, among any other factors it finds relevant, consider all of the following:
>
> (a) The health, safety, and welfare of the child.
>
> (b) Any history of abuse by one parent or any other person seeking custody against any of the following:

(1) Any child to whom he or she is related by blood or affinity or with whom he or she has had a caretaking relationship, no matter how temporary.

(2) The other parent.

(3) A parent, current spouse, or cohabitant, of the parent or person seeking custody, or a person with whom the parent or person seeking custody has a dating or engagement relationship.

As a prerequisite to the consideration of allegations of abuse, the court may require substantial independent corroboration, including, but not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of sexual assault or domestic violence. As used in this subdivision, "abuse against a child" means "child abuse" as defined in Section 11165.6 of the Penal Code and abuse against any of the other persons described in paragraph (2) or (3) means "abuse" as defined in Section 6203 of this code.

(c) The nature and amount of contact with both parents, except as provided in Section 3046.

(d) The habitual or continual illegal use of controlled substances or habitual or continual abuse of alcohol by either parent. Before considering these allegations, the court may first require independent corroboration, including, but not limited to, written reports from law enforcement agencies, courts, probation departments, social welfare agencies, medical facilities, rehabilitation facilities, or other public agencies or nonprofit organizations providing drug and alcohol abuse services. As used in this subdivision, "controlled substances" has the same meaning as defined in the California Uniform Controlled Substances Act, Division 10 (commencing with Section 11000) of the Health and Safety Code.

(e) (1) Where allegations about a parent pursuant to subdivision (b) or (d) have been brought to the attention

> of the court in the current proceeding, and the court makes an order for sole or joint custody to that parent, the court shall state its reasons in writing or on the record. In these circumstances, the court shall ensure that any order regarding custody or visitation is specific as to time, day, place, and manner of transfer of the child as set forth in subdivision (b) of Section 6323.
>
> (2) The provisions of this subdivision shall not apply if the parties stipulate in writing or on the record regarding custody or visitation."

While each custody case has its own distinct issues, the core of every custody case is the best interest standard. In preparing your client and developing your case, it is important that counsel fully analyze the client's position with regard to custody and advise the client if you feel that what they are requesting is not likely to be found in the best interest of the children. In many cases, the root of the contentious issues regarding custody is the emotions that go along with the ending of the relationship, and therefore it is hopeful that the issues between the parents will pass over time. Counsel should assist their client in looking to the future and always keeping the child's best interests at heart. If the parties are unable to agree on a custodial arrangement on their own or with the assistance of counsel, a family law practitioner should encourage the parties to participate in mediation through family court services. It is the position of the court (and of family law practitioners) that the two people who are best equipped to decide what is in the best interest of the children are the two people that know the children the best—their parents. If the parties are still unable to reach an agreement in mediation, the court will intervene and make the decision. At this point, counsel should weigh whether or not the assistance of a Evidence Code §730 expert opinion is advisable. In cases where there are allegations of physical or mental abuse, drug or alcohol abuse or parental alienation, it is always advisable that a 730 custody evaluation take place. Additionally, if the parties are so diametrically opposed as to what is in the best interest of the children, it may be advisable to recommend that an expert be appointed to assist the court in determining what is in the best interest of the children. In the cases where no abuse is alleged and the parties are simply of different opinions as to the children's best interest,

counsel may consider seeking the advice of an expert prior to advising a client if a 730 custody evaluation is necessary. This can be accomplished by retaining an expert, showing that expert the pleadings, and informing the expert of all of the facts involved. It may be the case that the parties simply need to take a co-parenting class to learn how to co-parent their children.

In all cases involving the custody of a child, counsel should keep the best interest standard at the forefront of their minds and continually advise their client to do the same. This will hopefully aid the client in coming to an agreement on the issue of custody, thus leaving the court out of it.

Issues Involving Divorce and Asset Valuation in a Struggling Economy

A significant problem arises when the parties' only major asset is the family residence, and it is underwater. We find that many people are living beyond their means to begin with, and attempting to make the same income support two households can sometimes be impossible. In many cases, there is no valuation of the residence to be done, because the parties are losing the home to foreclosure or in a short sale. It is rare in today's economic times to find that one spouse has the ability to buy out the other spouse for the residence.

Assets still need to be allocated, regardless of their negative value. Generally, each party is awarded an equal portion of the community debt while balancing the award of community assets. Recently, we have found that some clients are willing to take on more of the community debt if they are in addition awarded more community assets. This is one creative approach to dispensing with the negative assets; however, it is not always a feasible solution. This approach only works when there are assets to balance out the significant debt the parties share.

Too often we find the parties are not only underwater on the family residence but in totality. This can be seen when there is a total lack of savings and investments or when the debt significantly outweighs the investments of the parties. In rare circumstances, one party may have the good fortune to have substantial separate property assets that can greatly benefit both parties. This potential benefit is rare because in

order for this to be a benefit to both parties, the spouse with good fortune must be willing to accept an uneven division of the community assets and debts to assist the other spouse in getting their feet on the ground, while the fortunate spouse can rely on the separate property assets.

Current Financial Concerns for Family Law Clients

A major financial concern for our clients due to the economic crisis involves the family residence. Oftentimes, during a dissolution, the family residence must be sold because one party cannot afford to maintain the home alone. The parties can then share in the profit of the sale. However, due to the economic crisis, we are finding many clients have homes that are upside down—i.e., their home is worth less than the mortgage they own on it. If the parties cannot continue to maintain the family residence, they must either sell or let the property fall into foreclosure. Either way, if the family residence was the main asset of the family, the parties are left with nothing. The parties are then left to fight over debt.

Many clients are also in a position where they cannot afford to pay their attorney's fees. Recently, we are seeing a trend where not only the "out-spouse" is unable to afford counsel, the "in-spouse" or breadwinner is struggling to pay their attorney's fees as well, not to mention contributing to the attorney's fees of their spouse. In these cases, the parties are faced with the prospect of handling the divorce themselves or going further and further into debt. In our experience, for many clients the latter is the only option that they seem to have, due to the complex issues that arise in many dissolution matters. It is likely that if the parties attempt to represent themselves and the issues are not handled appropriately, they can end up spending more money on attorney's fees in the end to fix the mistakes they made while representing themselves. For example, if the parties make an agreement with regard to child custody but that agreement is not articulated clearly in the order, if a dispute arises as to whose custodial time it is with the child, the order cannot be enforced. Therefore, the parties will have to go back to court to get clarification.

If parties are given good counsel, get their case on the path toward settlement early on, and are able to limit the amount of issues that are litigated, if any, they can then save on attorney's fees that they cannot afford in the first place. The Elkins Task Force calls for courts to get cases on track toward resolution, and part of that effort involves allocating funds toward attorney's fees, and holding attorneys to task on their billing. Where counsel is given direction from the court and is supported by the court in the contention that matters need to be timely handled, the likelihood of cases settling without court intervention increases, and thus, attorney's fees are less likely to be excessive.

Another issue we have seen regarding the family residence is spouses who are forced to continue residing together through the dissolution process due to a lack of financial resources. This can oftentimes lead to a higher conflict rate, because the parties do not have the freedom to emotionally and mentally separate from their soon-to-be ex-spouse. If clients are faced with this issue, we strongly recommend, as we do with all of our clients, that they get some sort of counseling or help in dealing with the emotional upheaval they are undergoing. In these cases, it is even more imperative that cases get on track toward settlement so that the parties can plan for their future. If they have an understanding of what assets, debts, and support they are to receive, they can begin to move on with their lives, and thus begin the healing process.

Conclusion

In the coming year, it is apparent that the economy and financial instability will continue to be the driving forces in the area of California family law. With this in mind, if family law practitioners prepare their clients sufficiently and think creatively with regard to the resolution of all issues in family law matters, clients will be able to "weather the storm." Smart case management and acknowledgement of financial issues early on can lead to satisfied clients even in the most difficult of economies and personal upheaval.

Nicole Whyte is a founding principal and managing partner of Bremer Whyte Brown & O'Meara LLP. Admitted to the California State Bar in 1991, and the Nevada State Bar in 2000, Ms. Whyte has extensive experience in all aspects of litigation, with a focus in the areas of family law, complex civil litigation, trucking law, and insurance defense. Ms. Whyte has successfully handled hundreds of complex multi-million dollar lawsuits and has been awarded the highest accolade in Martindale-Hubbell—an AV rating. This was because of an extensive, confidential review conducted among the legal profession in her community. The AV rating signifies Ms. Whyte's legal abilities are of the very highest standard and her professional ethics are unquestioned. Ms. Whyte also has the honor of being named California "Super Lawyer" by Los Angeles Magazine.

Even more pertinent than her awards and ratings, Ms. Whyte strives to keep her client's interests at heart, and reach timely resolutions of challenging situations with the least amount of confrontation possible. Within the family law field, she handles a multitude of issues such as divorce, custody, visitation, modifications, child support, parentage/paternity, property division, prenuptial agreements, postnuptial agreements, and contempt/enforcement. Ms. Whyte provides individualized counseling and representation in all areas of family law, and listens carefully to her clients' problems to provide representation that is both thoughtful and competent.

Ms. Whyte is a member of the Family, Construction, and Insurance sections of the Orange County Bar Association, the Clark County Bar Association (Nevada), and ABA (American Bar Association). She is also a member of the Civil Procedure and Evidence panels of the Orange County Bar Association's Resolutions Committee, responsible for invoking constructive changes in the legislation. She graduated from the National Institute for Trial Advocacy (NITA) program in trial advocacy in January 1994, and is Master Bencher of the Robert A. Banyard Inn of Court, where she also holds the office of secretary. Ms. Whyte also serves as judge pro tem to the Orange County Superior Court. In addition, Ms. Whyte serves as a mediator and settlement officer for the local Superior Courts.

A native of Johannesburg, Ms. Whyte received her Bachelor of Arts and her LL.B. from the University of the Witwatersrand, Johannesburg, South Africa in 1985 and 1987, respectively. After graduating from law school, she served as state prosecutor at the Johannesburg Magistrate's Court, handling criminal trials. Following her tenure as state prosecutor, she gained civil litigation experience at a general practice civil law firm in Johannesburg, South Africa. Ms. Whyte immigrated to the United States in 1991.

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