Family Code Section 217 can dramatically change the way all family court proceedings are adjudicated

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The most important new rule in decades affecting the experience of California Family Law litigants was unleashed on January 1, 2011.

It promises a radical change in the way that all family court proceedings - whether they be dissolutions, legal separations, annulments, support applications, custody, and modifications of all of the above - are processed and decided by Superior Court judges and commissioners.

As a result of the Elkins Task Force, which has been operating in the background of the California family law since approximately August 2007, when the game changing case of *Jeffrey Elkins v. Superior Court* (2007) 41 Cal.4th 1337 was decided by our California Supreme Court.

Elkins was a landmark decision which held that the Contra Costa County Superior Court could not through its local rules limit parties in marital dissolution actions to introducing evidence in written declaration form that had to be submitted in advance of trial, or prohibiting except in "unusual circumstances" one party from cross-examining the other about the contents of those declarations. Such a rule, intended for the sake of calendar management and judicial economy, not only had the practical if unintended consequence of favoring parties with attorneys who understood how to work with these rules but fundamentally it violated due process by cutting off litigants' abilities to present all relevant, competent evidence on material issues. Judges, as the trier of fact, are not able to assess witness demeanor and credibility without live testimony.

What is important about this decision in these economic times is that the Contra Costa Superior Court had urged that its policies and local rules were essential for the "expeditious resolution of family law cases." Chief Justice Ronald George rejected this justification: "We are aware that superior courts face a heavy volume of marital dissolution matters, and the case load is made all the more difficult because a substantial majority of cases are litigated by parties who are not represented by counsel. [Reference omitted]....

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 trail proceeding governed by the rules of evidence established by statute. It is at least as important that 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....

Trial courts certainly require resources adequate to enable them to perform their function. If sufficient resources are lacking in the superior court or have not been allocated to the family courts, courts should not obscure the source of their difficulties by adopting programs that exalt efficiency over fairness, but instead should devote their efforts to allocating or securing the necessary resources."

Justice George ended by directing the California Judicial Council to create a task force (the 'Elkins Task Force) "to study and propose measures to assist trial courts in achieving efficiency and fairness in marital proceedings and to ensure access to justice for litigants, many of whom are self-represented. Such a task force might wish to consider proposals for adoption of new rules of court establishing state wide rules of practice and procedure for fair and expeditious proceedings in family law, from the initiation of an action to post judgment motions. Special care might be taken to accommodate self-represented litigants. Proposed rules could be written in a manner easy for a layperson to follow, be economical to comply with, and ensure that a litigant be afforded a satisfactory opportunity to present his or her case to the court." Hence, the Elkins decision is essentially a Jeffersonian ruling that its intended to empower family law litigants and to require counties and courts to adapt.

The Elkins Task force completed its work and has issued lengthy recommendations. The first changes take place on January 1, 2011. Possibly the most important change is embodied in Family Code, Section 217, which provides that:

"(a) At a hearing on any order to show cause or notice of motion brought pursuant to this code, absent a stipulation of the parties or a finding of good cause pursuant to subdivision (b), the court shall receive any live, competent testimony that is relevant and within the scope of the hearing and the court may ask questions of the parties.

(b) In appropriate cases, a court may make a finding of good cause to refuse to receive live testimony and shall state its reasons for the finding on the record or in writing. The Judicial Council shall, by January 1, 2012, adopt a statewide rule of court regarding the factors a court shall consider in making a finding of good cause.

(c) A party seeking to present live testimony from witnesses other than the parties shall, prior to the hearing, file and serve a witness list with a brief description of the anticipated testimony.

If the witness list is not served prior to the hearing, the court may, on request, grant a brief continuance and may make appropriate temporary orders pending the continued hearing."

The costs of taking live testimony will skyrocket and will undoubtably put pressure parties to consider mediation, and collaborative processes which occur outside congested courthouses, much more carefully. Mediation should now be even more appealing from a financial perspective. For more information about an alternative method for resolving family disputes, please visit us at **www.GigliottiLALaw.com**.