Family Law Jurists Need to Let Lawyers Present Their Cases

By Fred Silberberg

The family law system is, in many ways, different from any other part of our trial court system. Not only are the substantive issues which are addressed in family law court different from the issues addressed in most other parts of the court system, the procedures involved in disposing of those issues are also different from the manner in which they are typically disposed of in other parts of the court system.

Family law courts do not conduct jury trials. Family law courts typically call upon the expertise of others, some of whom are court-appointed, in order to obtain information necessary to assist in the resolution of the disputes that are brought before it.

At the same time, there are similarities to the rest of the judicial system. Family law courts follow the same rules of evidence as the rest of our courts. To the extent that parties are permitted to conduct trials, or evidentiary hearings, the same procedures apply in family law courts as in other branches of the court system.

The main difference with this aspect of the proceedings is that the judicial officer presiding over a family law case has significant control and discretion to handle matters in a way that he or she feels is appropriate. The absence of a jury gives the court significantly more latitude to control the proceedings, and in the process, to dictate to the lawyers and to the parties what the court will or won't permit during the course of a proceeding. The court is significantly more hands-on in a domestic relations courtroom than in a general civil trial courtroom simply because there is no jury present.

That the family law assignment is typically more burdensome than other court assignments is common knowledge. The volume of cases is higher, the amount of paperwork is exponentially higher and the number of litigants who represent themselves is significantly higher than in any other part of our court system. All of these matters lead to frustration on the part not only of family law judicial officers but also of family law court staff and attorneys.

While most family law jurists go out of their way to deal with these issues, others tend to control the legal process unnecessarily in a way that undermines not only a lawyer's ability to put on his or her case but also public confidence in the legal system — leading to clients questioning whether their cases are getting due consideration.

Our family law courts exist for a purpose: to resolve disputes that the parties themselves cannot resolve. If judicial officers are not of the mind-set that they are assigned to their benches to be problem solvers, then perhaps they have the wrong job.

Judicial officers also must keep in mind the fact that, as lawyers, we have to present our cases in a manner consistent with civil trial procedures and the use of the California Evidence Code. While listening to lawyers arguing all day long may be unpleasant at times, that is the nature of the beast.

While family law disputes are different in many respects from those in other courts, there is a manner of presenting one's case. In an evidentiary hearing or trial, lawyers will attempt to introduce as much evidence as they can in regard to certain subjects. Opposing counsel will attempt to keep out as much of the other side's evidence as is possible, especially if that evidence is potentially harmful to counsel's client. We are all familiar with, or should be familiar with, the rules of evidence. If a lawyer avails himself or herself of an objection to the form of a question or to the competency of the evidence, then the court should allow that lawyer to make the objection and the court should rule on it, and move on. Unfortunately, some judicial officers have taken to the practice of trying to expedite hearings by telling lawyers that they should not make objections and that the court knows what evidence is competent and what is not.

Such admonitions to counsel are inappropriate. Encouraging counsel to refrain from objecting to evidence is not appropriate. There are rules in place intended to safeguard the competency of evidence presented. If a lawyer is told not to object and an error is made by the court, the lawyer has potentially committed malpractice by failing to raise the objection. If the matter is the proper subject of an appeal, the lawyer may have lost the ability to have an error corrected or a decision overturned if the objection is not asserted.

Additionally, when a lawyer is admonished by a bench officer not to make objections, it undermines the client's confidence in his or her lawyer — and in the court system. Bench officers must understand that people who come before them are already emotionally distraught. Causing further unrest in the mind of these litigants does not help matters.

Some judicial officers believe they will expedite matters by reprimanding counsel about the type of evidence being presented. They feel the need to tell attorneys that they have "heard enough" or that they "don't need to hear that, they already know that the parties do not get along." Some judicial officers feel the need to spend time lecturing counsel rather than sitting back and allowing lawyers to put on their cases.

Each county has rules and procedures detailing how cases are tried. If counsel is following those rules, then the judicial officer should allow counsel to put on his or her case. While hearing about people's problems over and over again may become rote, that is the nature of the assignment. While some bench officers may have "heard it all before," that concept is something the litigants neither understand nor appreciate.

Some judicial officers seem to think that commenting repeatedly on the size of a particular file will dissuade the parties, or counsel, from coming to court so often. Some cases, however — especially custody disputes — are, by their nature, high-conflict cases. These matters are not always easily resolved. Facts change, people change and things happen in the lives of the parties and their children. There may be legitimate reasons to return to court. Complaining about the size of a file or the volume of paperwork connected to the case only creates an impression among litigants and the public that the court is not interested in reading the file — and that, therefore, the court will make neither an adequate nor an informed decision.

Members of the bench are under public scrutiny, whether they like it or not. The public sees them as society's elite. They are regarded as wise and as holding a significant amount of power over people's lives, especially in the family law courts. They are there to resolve disputes. Doing so requires listening to the evidence, letting lawyers put on their cases, and refraining, despite dwindling patience, from criticizing or lecturing counsel and the parties who are only following long-established litigation procedure.

It's time for some judges and commissioners to rethink the way matters are being conducted in their courtrooms.

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