

Slight of Pen

Live Testimony Ensures That Truth Emerges In Family Law Proceedings

By Fred Silberberg

Finding the truth in a full hearing with all witnesses present is of paramount importance in family law cases. Failing to find the truth can result in children being placed in homes that are not appropriate, in support orders that are too little or too high and in the inequitable distribution of property.

When most people think of a family law case going to court, they visualize the drama seen in the courtrooms created by David Kelley. The parties get on the stand, say what they have to say and are skillfully cross-examined by opposing counsel. In the end, the truth comes out and justice prevails. On prime-time television, the Evidence Code is alive and well. Not so in the majority of family law proceedings that come before our courts, especially in busier judicial districts.

Way back in the olden days of 1974, the 2nd District Court of Appeal approved conducting certain family law proceedings by written declaration rather than by oral testimony. In the mid-1980s, that holding was expanded, such that at present, in family law districts such as Los Angeles, nearly all proceedings other than actual trials are conducted by a judge reviewing written declarations.

In family law cases, where orders to show cause are more common than trials, the future of a family can be determined solely by the court reading written statements prepared by each side. More often than not, the declarations are prepared by counsel, not by the parties themselves. Even though orders to show cause are intended only to offer temporary resolutions pending settlement or trial, they can and frequently do have a significant impact on how a case unfolds from that point forward.

Order-to-show-cause hearings and written declarations were designed to promote efficiency in overburdened family law courts. Budgetary constraints up until now have not allowed for expansion of family law departments to meet the needs of increased filings.

Although moving things along may be meritorious, we have placed judicial economy above learning the truth. In the high-stakes drama of a family law proceeding, the truth is rather important.



When justice is administered via written documents, the right to confront and cross-examine witnesses is obliterated. Although some judges are willing to admit some declarations subject to cross-examination, it rarely happens. When it does, the impact is usually less than that which occurs with cross-examination after oral testimony. Moreover, the use of declarations in this manner creates a situation in which the court, in many instances, must decide whose word is more accurate with no means of assessing credibility. The court cannot review the demeanor of a witness in the way it could if the witness were testifying.

Additionally, in the course of reading many declarations, it is easy to see how the testimony of various parties can be blurred in the mind of a judge. The human mind is capable of retaining only so much information at one time. Under the current system, it is not uncommon for a truly dedicated judge to spend hours reading declarations the night before court in an effort to afford all litigants the fairest hearing possible. However,

when there is no actual testimony, fairness only goes so far. The impact of testimony is thereby diminished.

This type of procedure enables parties to lie or "misrepresent" with few repercussions. The lack of oral testimony, coupled with the number of cases that need to be processed that day, makes it fairly easy to get away with a lie. There is almost no possibility of being cross-examined, and if the person lying is the moving party, he or she has the last word in reply declarations with no fear of the other party challenging that testimony. It seems pointless that the declaration is signed "under penalty of perjury." I have yet to hear of anyone being charged with perjury even when caught lying in a declaration filed in a family law case.

Making decisions based on less-than-candid testimony not only can result in irreparable harm to a family, it diminishes the stature of our court system as well. The time has come to put an end to this practice of drive-through justice. All witnesses should be forced to sit on the stand, face the court and allow the

court to assess credibility. There is a reason we have an Evidence Code, and we must follow it, even in a family law case.

We need an expansion of the number of family law courts and a return to the days of actual trials, where we sought out the truth and where judges could make correct decisions. In the past several months, Los Angeles County has seen the unification of superior and municipal courts, which has resulted in increased funding for family law departments. The number of departments has increased. This trend needs to continue throughout our state and should be coupled with a return to the traditional method of trying matters.



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