Forum

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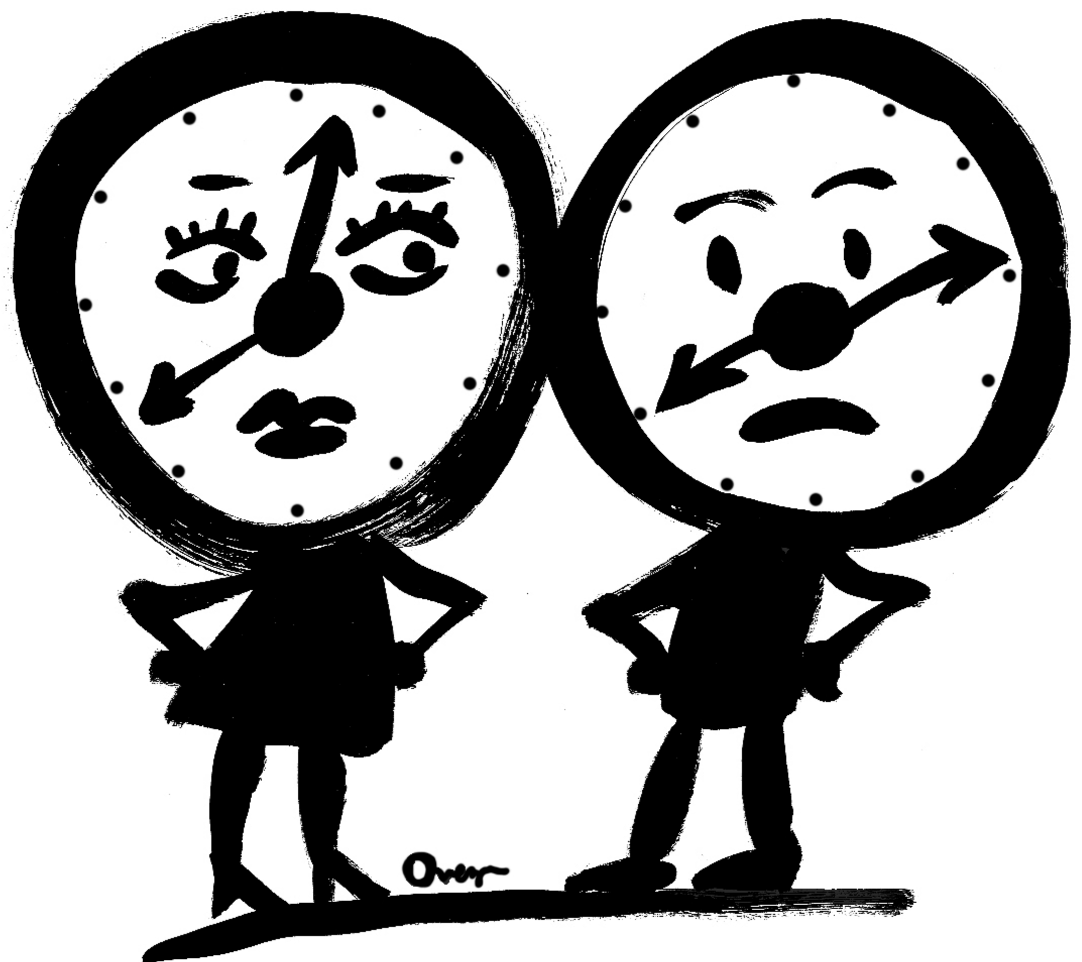
New Filing Rules Play Havoc With Family-Court Calendars

By Fred Silberberg



Periodically, someone in Sacramento gets an idea that he or she thinks is a good one and convinces the Legislature to implement it as new law. In fact, despite what people may think, some of these ideas are downright idiotic. The Legislature is often out of touch with reality, especially when it comes to court operations. As a result, the implementation of such concepts often wreaks havoc.

Such is the case with two code amendments effective Jan. 1: Code of Civil Procedure Section 1005 and Family Code Section 2031.

Section 1005 deals with the timing of notices of motion or orders to show cause. These procedures are at the heart of most family law proceedings at some point, except for those cases in which virtually no litigation is taking place. Section 1005 used to provide that a notice of motion or order to show cause had to be served at least 21 days before a hearing, that any responsive declarations must be served at least 10 days before a hearing and that any replies must be served at least five days before the hearing.

That section was amended to provide a variance for both the calculation of the filing dates themselves and the number of days that are needed. Under the presently effective section, all notices are to be filed and served at least 16 court days before the hearing, all responses documents are due nine court days before the hearing and all reply documents are due five court days before the hearing.

This amendment creates several problems, which are dramatically more apparent in family law proceedings than they are in other cases. The reason for this is that the number of family law cases in which the litigants represent themselves is significant. In fact, recent surveys claim that the majority of cases brought before court in family law departments are brought by self-represented litigants. In some counties, as many as 70 percent of the cases filed are filed by litigants representing themselves.

The implementation of filing rules that turn on what one might consider "nonstandard numbers," which are tied to court days and not calendar days, is going to add to the chaos of overburdened court calendars. It is hard enough for the judges to keep track of all of the cases they have, and even more difficult to manage the pro per cases in which the parties don't follow, let alone know, the rules of court.

This problem is going to be exacerbated by the fact that most individual litigants don't know the court calendar. When a motion had to be filed 21 calendar days before the hearing, that was a relatively easy thing to determine. A motion now having to be filed 16 court days before the hearing is not.

Each month, the court holidays change. Some months, such as August, have no court holidays. Other months, such as February, have multiple court holidays. In Los Angeles County, Cesar Chavez Day has become a court holiday. In other counties, it is not. This means no standardization in terms of the amount of notice required. It all turns on the month in which you file the proceedings.

As the cases are called to bar, more court time is going to be taken up making sure that the unwitting gave appropriate notice, especially if the other side is represented by counsel who knows the rules. Judges, already attempting to move pro per litigants through the system without giving legal advice, are going to have to explain why notice is deficient.

All of this has a trickle-down effect on parties represented by counsel. Cases are called in no particularly logical order. Pro-per cases are intermixed with represented cases. The wait times to get a case called in some courtrooms is ghastly.

Those wait times are going to increase while the bench tries to handle all the discrepancies that will arise out of this rule change. In addition, family law attorneys and staff members are going to have to double- and triple-check the notice that they give on pleadings to make sure that they have complied with the odd rules.

Arguments undoubtedly will arise about notice in represented cases, as well, along with increased issues of malpractice when someone makes a rather simple error, not realizing a court holiday was missed. Determining 21, 10 and five calendar days was easy and had been the rule for many years. There was no good reason to change it.

The other questionable modification to existing law, encompassed in Family Code Section 2031, concerns governance of temporary attorney-fee awards. In family law proceedings, the court has the ability to make an award of attorney fees during the pendency of a case such that the party receiving the award has the ability to procure or maintain representation.

Fee awards in this regard, as with all other requests, were considered on notice and an opportunity to be heard. This seemed logical and consistent with one's rights of due process. After all, in order to respond to such a request, one had to be given notice of it, which allowed a party to present evidence defending against that specific claim. In turn, the court was able to make a determination with all of the facts before it.

Section 2031, oddly enough, provides that a court may consider a fee award made on oral notice in open court at "the time of the hearing of the cause on the merits." This rather ambiguous language seems to imply that, once an aspect of the case is before the court, a party simply can stand up and make a fee request, and the court can, in fact, make a fee order. In other words, surprise fee orders may, in fact, become the order of the day.

The code fails to define the specific types of proceedings to which this may apply. Arguably, any issue before the court is one "of the cause on the merits." Thus, litigants likely will be requesting attorney fees at every hearing.

The problem with this amendment, similar to that of Section 1005, is that no one thought it through. The rules of court require that a current income and expense declaration be on file at any proceeding involving financial issues. Section 2031 does not seem to limit its applicability to such hearings.

Thus, at the conclusion of a temporary custody hearing, one could request fees, even without financial data in front of the court to enable the court to make an informed decision. One can only wonder what lawmakers in Sacramento were thinking when this section was implemented. There clearly is no good reason that, in regard to a fee award, the side from whom fees are being sought should not have notice and an opportunity to be heard.

The enactment of these latest amendments should make clear that the people in Sacramento have no idea what really takes place in the family law courtroom. Perhaps we'd all have been better served if legislation were implemented requiring our Assembly members to sit in family law court for a week before considering any bills that would affect the operation of those courts.

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