S139073

IN THE SUPREME COURT OF CALIFORNIA

JEFFREY ELKINS,
Petitioner,

vs.

SUPERIOR COURT OF CONTRA COSTA COUNTY,
Respondent,

MARILYN ELKINS,
Real Party in Interest

AFTER A DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION ONE, CASE NO. A111923

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF JEFFREY ELKINS; PROPOSED BRIEF

Southern California Chapter of the American Academy of Matrimonial Lawyers ,
Northern California Chapter of the American Academy of Matrimonial Lawyers,
and
Los Angeles County Bar Association, Los Angeles County Bar Association Family Law Section, Orange County Bar Association, Hon. Donald B. King, Justice of the Court of Appeal (Ret.), Hon. Sheila Prell Sonenshine, Justice of the Court of Appeal (Ret.), Hon. J.E.T Rutter, Judge of the Superior Court (Ret.), Hon. Richard Denner, Judge of the Superior Court (Ret.)

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

The amici curiae named herein respectfully request leave to file the attached brief in support of the petitioner, Jeffrey Elkins, pursuant to California Rules of Court, Rule 29.1(f).

This application is timely made within thirty days of the filing of the petitioner's reply brief on the merits.

THE AMICI CURIAE

The American Academy of Matrimonial Lawyers was founded in 1962 "to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be protected". The purpose of the Academy of Matrimonial Lawyers is to improve the practice of law and the administration of justice in the area of dissolution of marriage and family law. Fellowship in the American Academy of Matrimonial Lawyers represents both a recognition of achievements in family law and a commitment to the highest standards of legal practice.

This brief represents the views of the Southern California and Northern California chapters of the American Academy of Matrimonial

Lawyers, consisting of over 150 highly skilled negotiators and litigators who represent individuals throughout the state in all facets of family law.[1]

The Los Angeles County Bar Association is the largest voluntary bar association in the nation, with more than 26,000 members, many of whom participate in court proceedings and who are concerned about providing due process, equal protection, and equal access to the courts to all litigants that seek assistance from the courts. The Los Angeles County Bar Association also provides educational services related to litigation and court processes, and committees under the auspices of the LACBA provide comments to changes in local rules, statewide rules of court and California legislation.

The Los Angeles County Bar Association Family Law Section, with 1 220 members, is the largest active practicing family law bar in California, if not the nation. The LACBA Family Law Section educates attorneys and the public on family law issues, and monitors legislation and appellate cases involving family law issues as well as providing comment on changes in local rules, statewide rules of court and Judicial Council forms relating to family law.

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[1] This brief does not necessarily reflect the views of the American Academy of Matrimonial Lawyers or of any judge who is a member. No inference should be drawn that any judge who is a member of the Academy participated in the preparation of the brief or reviewed it before submission.

The Orange County Bar Association has over 9,800 members, making it the second largest voluntary bar association in California and the eighth largest in the country. The Orange County Bar Association is made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings. The bar association supports access to justice and due process of law for all litigants.

Hon. Donald B. King (Ret.), former Associate Justice of the First District Court of Appeal, is recognized as a leading family law authority. He has authored more published opinions in family law cases then any appellate justice in California's history. He served over six years as presiding judge of the San Francisco Superior Court Family Law Department. As Chairman of the San Francisco Bay Area judges' committee, he developed uniform local rules for domestic relations cases for Bay Area superior courts. He is an author of the authoritative California Practice Guide, Family Law (Hogoboom & King, Cal. Practice Guide: Family Law (Rutter 2005).)

Hon. Sheila Prell Sonenshine (Ret.), former Associate Justice of the Fourth District Court of Appeal, Division Three, is also recognized as a leading family law authority. She was one of the first Certified Family Law Specialists in California, and served as presiding judge of the Family Law

Panel of the Orange County Superior Court. She is a member of the American Academy of Matrimonial Lawyers, and has received, among many other honors, the Family Law Person of the Year Award from the AAML, and the prestigious J.E.T. Rutter Award for Outstanding Contributions to Family Law.

Hon. J.E.T Rutter (Ret.), former Judge of the Orange County Superior Court, was one of the founders of the Family Law Panel of the Orange County Superior Court, and was its senior judge until his retirement. The J.E.T. Rutter award for excellence in family law is named in his honor. He served on the faculty of the California Judicial Education Project, and lectures on family law issues and legislation for legal associations. He has returned to the practice of law, and is now of counsel to the firm that prepared this brief.

Hon. Richard Denner (Ret.), former Judge of the Los Angeles County Superior Court, spent nearly three decades assigned to Family Cases. He served as presiding judge of the Los Angeles Family Law courts. Judge Denner was a member of the CJER Family Law Education Committee for six years, and is a frequent panelist and lecturer on family law issues.

None of the amici curiae represent any party in this matter. None of them has received any compensation for acting as amici; each has done so pro bono publico.

INTEREST OF AMICI CURIAE

The amici curiae are familiar with the issues in this case and the scope of their presentation, and believe further argument is needed on matters not fully addressed by the parties' briefs. As experienced judicial officers and lawyers, they are deeply concerned with the conduct of family law trials (and all trials), and the need to ensure the court has adequate opportunity to observe witnesses, and to evaluate their credibility during both direct and cross examination. Without this ability, a trial judge cannot make an informed decision, and the integrity of the process is seriously impaired.

This brief is the attempt of those most experienced in the area of the law to assist this Honorable Court in obviating the harm that results where a Superior Court local rule is allowed to supercede the right of one class of litigants to full and meaningful trials. The amici curiae's only interest is to see our court system and the community it serves be protected.

CONCLUSION

For these reasons these amici curiae respectfully request this Honorable Court accept the accompanying brief for filing in this matter.

Date: June ___, 2006

Respectfully submitted,

THE LAW OFFICES OF MARJORIE G. FULLER

By:_____
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BRIEF OF AMICI CURIAE IN SUPPORT OF JEFFREY ELKINS

INTRODUCTION

Amici Curiae

The Southern and Northern California Chapters of the American Academy of Matrimonial Lawyers, retired Justices of the Court of Appeal

Donald B. King and Sheila Prell Sonenshine, retired Family Court Senior and Presiding Judges J.E.T. Rutter and Richard Denner, the Los Angeles County Bar Association, the Los Angeles County Bar Association Family Law Section, and the Orange County Bar Association submit this brief as amici curiae in support of petitioner Jeffrey Elkins in his constitutional challenge to the local rules and procedures adopted by the Contra Costa Superior Court.

The extensive experience and expertise of the amici curiae as judges and lawyers should assist this Honorable Court in determining the overarching issues in this case. While the briefs of the litigants and the respondent court are restricted to this case's particular issues, the amici can consider the broader picture. The amici curiae support the arguments presented by the petitioner, and supplement them by addressing the practical effect of the challenged rules and procedures on the courts and litigants, and the policies that should militate against these rules.

Overview

Contra Costa County Superior Court instituted local rules and procedures providing that in all family law proceedings, direct examination testimony may be presented in declaration form only. The rules also severely limit the presentation of impeachment and documentary evidence.

These rules and procedures violate the litigants' constitutional right to due process of law, denying them the right present evidence, to confront witnesses, and to have a full, fair, and meaningful hearing before a neutral fact finder.

The rules are also constitutionally impermissible because they are discriminatory, applying only to family law litigants. All other California litigant classes possess the right to present direct oral testimony at trial. As Thomas Jefferson wrote, "The best principles (of our republic) secure to all its citizens a perfect equality of rights." (*Reply to the Citizens of Wilmington, 1809* in The Writings of Thomas Jefferson, Memorial Edition (Lipscomb and Bergh, edits., 1903-04) 16:336.) This court should also strike down the local rule and trial scheduling order because they violate the fundamental principles of our system of jurisprudence: they interfere with the trial court's search for truth, they restrict access to justice for litigants, and they contravene the public policy of an open and transparent court system.

Representing himself in his divorce case, Petitioner Jeffrey Elkins did not comply with the Contra Costa family court rules. Consequently he was barred from testifying in his own divorce trial, and from introducing documentary evidence.

This Court has granted review on the question of whether the Contra Costa County local rule and trial scheduling order are consistent with constitutional principles and the statutes governing trial court procedures.

The amici curiae urge this Court to find the trial court's rules and orders constitutionally impermissible for all classes of litigants. A litigant has the right to present oral testimony and admissible evidence at trial except as provided by statute, and only in situations inapt here. That right may not be abrogated by local rule, and in no event pursuant to rules applicable to only one class of cases.

Moreover, the Contra Costa rules – promulgated for the ostensible purpose of increasing the efficiency of the family law courts and making them more responsive to the needs of the litigants – have the opposite effect. These rules prevent the parties from achieving access to justice, because they deny litigants the opportunity to be heard. These amici curiae respectfully request this Court grant the petitioner, Jeffrey Elkins, extraordinary relief from the enforcement of the respondent court's orders and rules by writ of mandate, and declare the Contra Costa Court's local rules and trial setting orders limiting oral testimony and the presentation of evidence in family law trials invalid.

I.

STATEMENT OF THE CASE

Local Rule 12.5(b)(3) of the Contra Costa County Superior Court provides that in family law proceedings:

> Subject to legal objection, amendment, and cross-examination, all declarations shall be considered received in evidence at the hearing. Direct examination on factual matters shall not be permitted except in unusual circumstances or for proper rebuttal. The Court may decide contested issues on the basis of the pleadings submitted by the parties without live testimony.

(Super. Ct. Contra Costa County, Local Court Rules, rule 12.5(b)(3), Appellant's Appendix (AA), Tab 1)

The family law trial court "Trial Scheduling Order" provides, in part:

> 1. Unless otherwise approved in advance by the court, all direct testimony shall be in the form of declarations filed in lieu of oral direct testimony, subject to cross-examination.
>
> 2. All exhibits to be introduced at trial shall be attached to, and explained in, the declarations. Any required evidentiary foundation for admission of the proposed exhibits shall be completely set forth in the declaration(s). Documents and exhibits to be used, in good faith, only for purposes of impeachment need not be submitted with the declarations.
>
> 3. Initial declarations by each party and any witnesses shall be filed and exchanged not later than ten (10) court days prior to trial, together with any trial briefs which any party wishes to submit. . . . Failure to provide a declaration because a witness refused to sign it shall not excuse the filing of the unsigned declaration.
>
> **Failure to comply with these requirements will constitute good cause to exclude evidence or testimony at trial and/or to make adverse inferences or findings of fact against the non-complying party. Willful non-compliance may also be subject to imposition of monetary sanctions and will be**

considered by the court in assessing and awarding attorney fees and costs.

(Trial Scheduling Order, April 22, 2005, AA, Tab 2, emphasis in original.)

Representing himself at his divorce trial on division of property, Petitioner Jeffrey Elkins failed to fully comply with Local Court Rule 12.5(b)(3) and the trial scheduling order. His declarations failed to identify all of his exhibits and their evidentiary foundations. The trial court denied Jeffrey's[2] request to testify to establish the foundation. (Reporter's Transcript (RT) pp. 6:11-11:15.)

The trial court also denied Jeffrey's request to submit oral direct testimony. Marilyn's counsel declined to cross-examine. With most of his evidence thus excluded, Jeffrey realized he could not adequately present his case, and rested. (RT, p. 14:16-17.)

The trial court awarded and divided the community assets solely on the evidence presented by Jeffrey's former wife, the real party in interest, Marilyn Elkins.

The First District Court of Appeal summarily denied Jeffrey's application for extraordinary relief, but this Court granted review and ordered

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[2] As is common in family law cases, the parties may be referred to by their first names. No disrespect is intended. (See *In re Marriage of Smith* (1990) 225 Cal. App. 3d 469.)

the Contra Costa County Superior Court to show cause why it should not declare Contra Costa County Local Rule 12.5(b)(3) and the trial scheduling order invalid.

II.

LOCAL RULE 12.5(b)(3) AND THE TRIAL SCHEDULING ORDER ARE UNCONSTITUTIONAL

First and foremost, the local rule and trial scheduling order must be invalidated because they are constitutionally impermissible.

A. The Local Rule and Trial Scheduling Order Violate Due Process

Contra Costa Family Court Local Rule 12.5(b)(3) and the trial scheduling order prevent litigants from presenting live direct testimony, requiring all direct testimony to be presented by declarations submitted in advance of the trial. (AA Tabs 1 and 2.) Due process requires the opportunity to be heard at a meaningful time and in a meaningful manner. This procedure allows for neither. (*Goldberg v. Kelly* (1970) 397 U.S. 254, 267 [90 S.Ct. 1011].)

The trial court explains the rules are "sound policy . . . essential to the fair, efficient and expeditious resolution of family law cases . . . ." (Respondent Court's Return, p. 27.)

While courts are properly concerned with efficiency and case loads, measures to conserve judicial resources cannot jeopardize the constitutional integrity of the judicial process. (See Petition for Review, pp. 18-19; *Lammers v. Superior Court* (2000) 83 Cal.App.4th 1309, 1319 (hereafter *Lammers*.) The local rule and trial scheduling order deprive parties of their rights to present all relevant evidence at trial, purportedly in the name of efficiency.

"[C]ourt congestion and 'the press of business' will not justify depriving parties of fundamental rights and a full and fair opportunity to present all competent and material evidence relevant to the matter to be adjudicated." (*Lammers, supra,* 83 Cal.App.4th at p. 1319.) "[W]hile trial courts are responsible for managing their cases so as to avoid unnecessary delay, they must not elevate misguided notions of efficiency (*e.g.* a speeded up trial, or a settlement forced on a party who has been deprived of a key witness) over due process." (*Fatica v. Superior Court* (2002) 99 Cal.App.4th 350, 353.)

B. The Local Rule and Trial Scheduling Order are Discriminatory

The local rule and trial scheduling order also violate equal protection because they treat different classes of litigants unequally. Of all criminal and civil cases, only family law is subjected to these strictures. Disparities among "local court rules" have the effect of guaranteeing due process in some superior courts but not in others. This is constitutionally impermissible. (*McLaughlin v. Superior Court of San Mateo County.* (1983) 140 Cal. App. 3d 473.)

The Fourteenth Amendment to the United States Constitution provides no state shall "deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., 14th Amend.) California's Constitution expressly prohibits the denial of equal protection of the laws. (Cal. Const., art I, § 7(a).) The California and federal tests for equal protection are substantially the same. (*County of Los Angeles v. Southern California Tel. Co.* (1948) 32 Cal.2d 378, 389.) "In ordinary equal protection cases not involving suspect classifications or the alleged infringement of a fundamental interest, the classification is upheld if it bears a rational relationship to a legitimate state purpose." (*Weber v. City Council of Thousand Oaks* (1973) 9 Cal.3d 950, 958.)

The local rule and trial scheduling order deny the right to oral direct testimony only to family law litigants. The rule and order require onerous, lengthy, and burdensome procedures for the submission of written declarations

in lieu of direct oral testimony and for the introduction of evidence; this increased burden is borne only by family law litigants.

There is no legitimate purpose for treating family law litigants differently from any other class of litigants. Family law cases have been held to be no different from other civil cases such as breach of contract or personal injury; in each parties use the judicial system to resolve their legal disputes, and the same rules must apply to each. (See *In re Marriage of Burkle* **(**2006) 135 Cal.App.4th 1045, 1055, 1070, review den. May 17, 2006, S141394 [finding right of public access to court records in divorce proceedings, just as in other civil cases]; *In re Marriage of Lechowick* (1998) 65 Cal.App.4th 1406, 1414 ["In general, court files in family law cases should be treated no differently than the court files in any other cases for purposes of considering the appropriateness of granting a motion to seal any of those files."].)

The Respondent Court's claim that the local rule benefits family law litigants, particularly self-represented litigants, cannot justify the resulting unequal treatment. (Respondent Court's Return Brief, p. 29.)

Laws or rules which are characterized as helping or beneficial to certain classes are often anything but. For example, in *Sail'Er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, this Court struck down a law prohibiting the employment of female bartenders unless they held the liquor license or were married to the

licensee. The law was promoted as protective of women. The Court found it a discriminatory violation of equal rights.

This Court must find the Contra Costa local rule invalid on the same basis.

III.

THE LOCAL RULE AND TRIAL SCHEDULING ORDER INTERFERE WITH THE TRIAL COURT'S SEARCH FOR THE TRUTH

The local rule and trial scheduling order dispose of hundreds of years of developed law and wisdom regarding trial procedure and a trial's fundamental charge. Trials are ultimately a search for truth. (See *LaSalle v. Peterson* (1934) 220 Cal. 739, 741 ["'the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence; and that, necessarily, the truth or falsity of the testimony must be determined in deciding the issue.'"], quoting *Pico v. Cohn* (1891) 91 Cal.129, 134; *In re Marriage of Chakko* (2004) 115 Cal.App.4th 104, 110 ["Those who interfere with the truth-seeking function of the trial court strike at the very heart of the justice system."].) The opportunity to be heard in a meaningful manner is an essential part of the constitutionally protected search for truth. (*Goldberg v, Kelly, supra,* 397 U.S. at p. 267.)

A. Oral Testimony is Essential to Assessing Credibility

Trials of necessity include the oral testimony of witnesses, both on direct and cross-examination, where the trier of fact can observe the witness and assess his or her credibility.

1. Statutory Law Provides for Oral Testimony at Trial

California statutory law reflects the role oral testimony plays in assessing witness credibility. Evidence Code section 772(a) provides witness examination consists of "direct examination, cross-examination, redirect examination, recross-examination, and continuing thereafter by redirect and recross-examination."

Evidence Code section 780 provides the trier of fact shall determine credibility based on factors which may only be evaluated in oral testimony, including the witness' "demeanor while testifying and manner in which he testifies" and the "extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies."

This Court has recently confirmed the requirement for oral testimony where credibility may be at issue. In *People v. Johnson* (May 22, 2006; S119230) ___ Cal.4th___ (hereafter *Johnson*), it held the People could not present their case by affidavit on a motion to suppress evidence in a criminal case; live testimony was required where a witness' credibility would be at issue.

The Court analyzed whether a suppression hearing fell within the procedures allowing the use of affidavits set forth in Code of Civil Procedure section 2009[3] and concluded it did not. (*Johnson, supra,* ___ Cal.4th ___ [pp. 16-18].)

The Court explained Penal Code section 1538.5 suppression hearings, "were intended, and have been understood, to involve the testimony of investigating officers and other pertinent witnesses whose credibility is to be determined by the magistrate or judge presiding at the hearing." (*Johnson, supra, __ Cal.4th __* [p. 2].) "[U]nlike the generally ancillary matters addressed by Code of Civil Procedure section 2009, a motion to suppress evidence on the grounds a search was unconstitutional presents issues as to which the credibility of witnesses often is of critical significance." (*Id.* at ___ [p. 17].)

Although *Johnson* analyzes a criminal procedure, the same reasoning applies to civil cases in which the credibility of witnesses is of critical significance. This concept is particularly apt in family law proceedings, where the trier of fact is deciding such issues as which parent is best suited to have

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[3] Section 2009 of the Code of Civil Procedure provides in full: "An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, and in uncontested proceedings to establish a record of birth, or upon a motion, and in any other case expressly permitted by statute."

custody of the parties' children, when property was acquired, whether a spouse intended to make a gift, when date of separation occurred, and a myriad of other matters – all dependent on which spouse is more to be believed.[4] (See *In re Marriage of Lewin* (1986) 186 Cal.App.3d 1482, 1490 [relying on witness credibility assessment for child custody judgment]; *In re Marriage of Delgado* (1986) 176 Cal.App.3d 666, 669 [finding of separate property based, in part, on sufficiency of wife's trial testimony].)

Courts have approved the use of declarations in lieu of live testimony in family law matters only in very limited proceedings: motions and orders to show cause. *(Reifler v. Superior Court* (1974) 39 Cal.App.3d 479 (hereafter *Reifler*).)

The *Reifler* court never intended its holding to apply to trials and the evidence necessary to enter judgment. The *Reifler* court specified declarations could not be used to prove a fact necessary for a judgment, and this holding has never been disturbed. (*Reifler, supra,* 39 Cal.App.3d at p. 484.)

As well-explained in Petitioner's Reply to the Respondent Court's Return (pp. 22-23), the only categories of cases in which it has been held

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[4] Family law trials may determine, inter alia, parentage, custody and visitation of children, characterization (community versus separate), valuation, and division of property, each party's need for and ability to pay support and/or fees, validity of pre-marital and post-marital agreements, imposition of restraining orders, etc. (Fam. Code §§ 2550 et seq., 2581, 2600 et seq., 3010-11, 3022 et seq., 3100 et seq., 4000 et seq., 4300 et seq., 7540-41, 7550 et seq.)

acceptable to bar oral testimony at trial are those where assessment of credibility of witnesses is not crucial, such as bankruptcy or administrative cases in which the key evidence is almost exclusively documentary. (*See, e.g., In re Adair* (9th Cir. 1992) 965 F.2d 777; *Phonetele, Inc. v. American Tel. &Tel.Co.* (9th Cir. 1989) 889 F.2d 224.) There is no proper justification for denying family law litigants the right to oral direct testimony, where testimony of witnesses and credibility is crucial to decision.

2. Written Declarations Do Not Allow the Assessment of Credibility that Live Testimony Provides

In *Johnson, supra,* __ Cal.4th __, this Court explained written affidavits and oral testimony do not allow the trier of fact the same ability to assess witness credibility. "[A]llowing a prosecutor to oppose a suppression motion with written affidavits in lieu of live testimony would be inconsistent with the trial court's vital function of assessing the credibility of witnesses." (*Id.* at ___ [p.14, fn. 8].)

The amici curiae judicial officers concur that observing a witness testify, both on direct and cross-examination, is crucial to assessing witness credibility. Based on their experience they agree it is impossible to discover the truth when considering only declarations. In those instances, creative writing ability trumps testimonial integrity.

The right to cross-examine is an inadequate substitute for live direct testimony. A witness' demeanor is often quite different on direct examination than on cross-examination; seeing both allows for comparison and a more complete picture of the witness' credibility.

Additionally, the amici curiae attorneys concede while declarations are technically supposed to be written by the declarant, in practicality, the declarations are generally prepared by the attorney for the declarant's review, revision and approval.

The trier of fact is able to make a better decision about witness credibility when he or she can hear the witnesses' live direct testimony, using their own words to tell their own story, instead of the words selected and approved by their counsel.

The appellate court gives deference to the factual findings of the trial court because of its direct observation of the witnesses and presentation of evidence. (*Maslow v. Maslow* (1953) 117 Cal.App.2d 237, 243, disapproved on other grounds in *Liodas v. Sahadi* (1977) 19 Cal.3d 278.) "[T]he trial judge having heard the evidence, observed the witnesses, their demeanor, attitude, candor or lack of candor, is best qualified to pass upon and determine the factual issues presented by their testimony. . . ." (*Ducharme v. Ducharme* (1957) 152 Cal.App.2d 189, 193; see also *In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 494 ["The role of the appellate court is not to second guess

the trial judge. Reading a typed reporter's transcript does not enable us to view the witnesses, determine credibility, or determine which conflicting evidence is to be given greater weight."].)

Without oral testimony, there can be no proper assessment of credibility. Where the court has no ability to determine credibility, there can be no fair trial. Where the trial court is denied the ability to perform its proper task of making findings of fact based on its assessment of the evidence, there can be no meaningful appellate review. Where all these processes fail, there can be no search for truth.

B. The Local Rule and Trial Scheduling Order in Practice Restrict the Right to Present Witness Evidence at Trial

Local Court Rule 12.5 and the trial scheduling order deny parties the right to present evidence of non-party witnesses by erroneously (and naively) presuming that all proposed witnesses will gladly prepare declarations. If they do not, their evidence is excluded.

Local Rule 12.5 provides, in part,

> Direct examination on factual matters shall not be permitted except in unusual circumstances or for proper rebuttal.

(Super. Ct. Contra Costa County, Local Rules, rule 12.5(b)(3), AA Tab 1.)

The Trial Scheduling Order further specifies,

> (1) Unless otherwise approved in advance by the court, all direct testimony shall be in the form of declarations

> filed in lieu of oral direct testimony, subject to cross-examination. . . . (3) . . . **Initial declarations by each party and any witnesses shall be filed and exchanged not later than ten (10) court days prior to trial . . . Failure to provide a declaration because a witness refused to sign it shall not excuse the filing of the unsigned declaration.**

(Trial Scheduling Order ¶¶ 1 and 3, AA Tab 2, emphasis added.)

The local rule and the trial scheduling order do not allow oral direct testimony of witnesses called by subpoena, nor for the presentation of documentary evidence from those witnesses.

Moreover, the local rule and the trial scheduling order ignore the likely scenario that a party may need to present evidence from a witness who will not provide a declaration because he or she is unwilling to spend the extensive time involved with preparing a written declaration or reviewing a written declaration prepared by counsel, or unwilling to provide testimony unless compelled to do so by subpoena. Family law cases involve many different types of issues. How does a party present evidence from the unwilling bank manager? The loan officer? The neighbors? The accountants? The physician? The children's school teacher? The necessary witness who doesn't write English well?

Nonparty witnesses are not required to prepare declarations. Depositions are the only procedure by which nonparty witnesses can be

compelled to disclose information prior to trial. (Code Civ. Proc. §§ 2020.010, subd. (a), 2025.280, subd. (b), 2028.010.) Thus, the only way for a party to secure the right to present non-party witness testimony is to take all possible witnesses' depositions on all possible issues, and to submit the entire depositions as declarations in lieu of live testimony. This procedure will be required whether or not the testimony turns out to be necessary at trial.

The expense of all this would result in the impossibility of most family law litigants' ability to present witness evidence at trial, further eroding the right to hearing and the search for truth.

C. The Local Rule and Trial Scheduling Order Improperly Limit the Trial Court's Discretion

Pursuant to statute and case law, the trier of fact may exercise discretion to control testimony, to accomplish the ultimate goal of searching for truth. The Contra Costa local rule and the trial scheduling order conflict with the statutory discretion vested by law with the trial court.

As Jeffrey argues, a local rule may not preempt statutory law. (Petition pp. 17-18.) Government Code section 68070 (a) provides, in part: "Every court may make rules for its own government and the government of its officers not inconsistent with law or with rules adopted and prescribed by the Judicial Council . . ." (Govt. Code § 68070, subd. (a).)

Evidence Code section 765 gives the court "reasonable control over the mode of interrogation of a witness. . ." Similarly, the Code of Civil Procedure gives the court discretion to control the proceedings before it. (Code Civ. Proc. § 128.) These statutes give the court the discretion it needs to limit and control testimony as it deems necessary on a case by case basis.

The Contra Costa rule stands trial court discretion on its head. Ordinarily, all relevant evidence is presumed admissible, with the court having discretion to exclude evidence under certain carefully circumscribed circumstances. (Evid. Code §§ 351, 352.) Here, the rules define all oral testimony as presumptively inadmissible, with the court having discretion to admit it under "unusual circumstances".

Such prior restriction of evidence has never been permitted in any civil or criminal trial in the history of California jurisprudence.

IV.

THE LOCAL RULE AND THE TRIAL SCHEDULING ORDER RESTRICT ACCESS TO JUSTICE

A. The Cost of Litigation Takes the Justice System Out of the Reach of Many Litigants.

The Judicial Council has become increasingly concerned with limitations on the access to justice and the resulting increase in the number of

self-represented litigants. The local court rule and the trial scheduling order only exacerbate the problem of increasing numbers of self-represented litigants and the overall costs of litigation.

In 2004-2005, there were 155,600 family law cases filed in California. (Judicial Council of California, 2006 Court Statistics Report, Statewide Caseload Trends 1995-1996 through 2004-2005 (2006) p. 48, Table 4.) Trial courts have reported growing numbers of self-represented litigants. Judicial officers and court staff estimate that in family law, petitioners were self represented at the time of filing an average of 67 percent. (Judicial Council of California, Report of the Task Force on Self-Represented Litigants and Statewide Action Plan for Serving Self-Represented Litigants (February 2004) p. 11.) Data from the Judicial Branch Statistical Information System show that in dissolution of marriage cases, at the time of disposition, the average self-represented rate was 80 percent. (*Ibid.*) The data suggest that while some litigants may be able to afford representation at the time a case is initiated, they cannot maintain it through disposition. (*Ibid.*)

Chief Justice Ronald M. George expressed his concern at the results of a recent poll on access to representation at the annual meeting of the State Bar of California in September 2005: "As the survey showed, the cost of counsel is a barrier to going to court for far too many Californians." (George C.J., *State of the Judiciary* (Fall 2005) California Courts Review, at p. 5.)

The local rule and trial scheduling order increase the cost of family law litigation, placing counsel beyond the reach of more family law litigants and increasing the number of self-represented family law litigants.

The Respondent Court tries to justify the local rule and trial scheduling order on the grounds that they will help the large number of self represented litigants by setting out in great detail how to prepare for trial. (Respondent Court's Return Brief, p. 28.) A quick review of the rules illustrates the absurdity of that claim. The burdens created by the local court rule and the trial scheduling order are so onerous that they overwhelm most attorneys, let alone self-represented litigants. The financial burdens of hiring counsel to be certain the rules are properly complied with take representation out of the reach of most.[5]

"If the motto 'and justice for all' becomes 'and justice for those who can afford it,' we threaten the very underpinnings of our social contract." (Chief Justice Ronald M. George, State of the Judiciary speech (2001).)

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[5] Remember that the petitioner, Jeffrey, a well-educated successful businessman, and native speaker of English, was not able to follow the rules to the court's satisfaction.

B. The Local Rule and Trial Scheduling Order Significantly Increase the Cost of Representation

Requiring parties to prepare lengthy, comprehensive declarations in lieu of direct testimony, especially when those declarations must include the evidentiary foundation for all proposed exhibits, will significantly increase the time counsel must spend preparing a case for trial. The amici curiae members of the bar are, by experience, particularly sensitive to this problem.

The local rule and trial scheduling order require that all direct testimony be by declaration, and that all exhibits must be attached to and explained in the declarations. "Any evidentiary foundation for admission of the proposed exhibits shall be completely set forth in the declaration(s)." (Trial Scheduling Order, ¶ 2, AA, Tab 2.)

Placing these additional procedural burdens on litigants and their counsel only adds to the cost of representation in family law matters. Declarations may be hundreds of pages long, attaching reams, or even boxes of exhibits. To properly protect their clients' rights, counsel necessarily would need to attach every possible exhibit on every possible issue for trial.

As set forth above, parties will also be required to take the depositions of every nonparty witness whose testimony may possibly be used at trial if there is any question regarding a witness' willingness to voluntarily prepare

and execute a declaration. At those depositions, counsel must have the witness establish the evidentiary foundation for every document related to the witness that could possibly be used at trial.

Counsel must also spend the time to prepare motions to strike or objections in response to the opposing party's declarations and proposed exhibits, whether or not all of those exhibits turn out to be necessary at trial. These additional tasks may take hundreds of hours of attorney time, resulting in legal bills that are impossible for ordinary wage earners to pay, and which will either force the huge, and ever-increasing number, of family law litigants into the court system without counsel, or force counsel to be ill-prepared and unable to properly represent their clients.

The local court rule and trial scheduling order drive the cost of counsel up and out of the reach of more litigants.

C. The Local Rule and Trial Scheduling Order Strain Judicial Resources

The Respondent Court claims the local court rule is essential to the efficient resolution of family law cases. (Respondent Court's Return Brief, pp. 27-28.) As family law practitioners and former family law judges and appellate justices, these amici curiae are well aware of the unwieldy caseloads faced by family law courts. But the local rule and trial scheduling order only

increase the burden on the trial courts and further strain limited judicial resources.

Declarations in a "Reiflerized" matter (*Reifler, supra,* 39 Cal.App.3d 379), tend to be replete with hearsay, conclusions and inflammatory matter – submitted either because a party wants to "tell all" to the judicial officer or because the party or attorney can never predict what the judicial officer might consider. Freed from the constraints of the courtroom procedure, the declarations increase in length. Where the issues involve are substantial, lengthy motions to strike and responses thereto are required. The time necessary to properly review such materials increases proportionally. Eventually, the number of declarations and motions exceeds the judicial officers' time available to read them thoroughly. Skim reading becomes necessary as voluminous files stack up in advance of an already heavy calendar.

The heavy caseload in San Diego County previously led to a procedure requiring a request for the court to "pre-read" the documents on the short cause calendar. In *Lammers, supra,* 83 Cal.App.4th at pp. 1327-39, the reviewing court confirmed the litigant's "private interest in having a meaningful hearing and all that right encompasses outweighs any state interest in conserving and allocating finite judicial resources in an efficient and expedient manner." (*Id*.

at p. 1329.) While the pre-read procedure was approved for temporary orders, the court held the trial judge erred by delivering a ruling which was an admitted "guesstimate." (*Id.* at pp. 1328-29.)

In Contra Costa County, to be properly prepared for to hear a trial, the family law judge must review declarations and exhibits, foundational material, motions to strike, objections, and opposition papers in advance of the trial. He or she must make at least tentative rulings on admissibility of evidence.

Hearing one hour of live testimony only takes one hour of the judicial officer's time. Reading through lengthy declarations and accompanying materials covering all possible issues and areas of testimony takes much more of a judicial officer's time – time which must be in addition to the time the judicial officer spends on the bench. The caseload burden and time limitations facing trial court judges thus essentially leave them with two options: (1) spend more time than they have available at court to read the lengthy materials, or (2) just give the written materials a cursory review, and rule by "guesstimate." This is not a choice favored by litigants, lawyers, or judicial officers. Worse, the time taken for review reduces the court time that should be provided to give the enormous number of family law litigants access to the courts, access that is often now restricted by too few judicial officers with too little time.

And family law lawyers and judges know that most family law cases settle – often on the date of trial. The enormous waste of judicial time and effort in needless review of documents does not increase the efficiency of the court, nor the mood of the already overburdened family law bench.

The local court rule and trial scheduling order do not increase the efficiency of the judicial system. Instead, they decrease it by requiring impossible time commitments from judicial officers, and the ultimate loss is to the litigants and the justice system.

V.

THE LOCAL RULE AND TRIAL SCHEDULING ORDER VIOLATE LONG STANDING PUBLIC POLICY FAVORING A TRANSPARENT JUSTICE SYSTEM.

A. Transparency of our Judicial System is a Crucial Part of the Public Perception of Fairness.

Trust in the judicial system is shaped by the extent the public believes judges make decisions through fair procedures. (Rottman, *What Californians Think About Their Courts* (Fall 2005) California Courts Review at p. 7.) The perceived fairness of the outcome of the proceedings is secondary to the perceived procedural fairness. (*Id.* at p. 8.)

The Rottman survey also found family law already is perceived to be less procedurally fair than other areas of the law. (Rottman, *What Californians Think About Their Courts*, *supra*, at p. 8.) Family law lawyers agree, rating procedural fairness in the California courts lower than do attorneys practicing in other areas. (*Ibid.)*

Chief Justice George stated, "Procedures in family and juvenile courts in particular need to be evaluated to ensure that they not only are fair, but are perceived to be so." (George C.J., *State of the Judiciary* (Fall 2005) California Courts Review at p. 5.)

The transparency of the judicial system, *i.e.* the extent to which the workings of the judicial system are visible to the public, contributes to the perception of procedural fairness. Trials in open court are one way to ensure the transparency of the judicial system. When the public may observe the testimony, the public has a context to evaluate the court's judgment. If the proceedings are closed, the court's judgment is viewed in a vacuum and the public cannot make an informed decision about fairness.

Requiring direct testimony to be presented by written declaration is tantamount to holding a closed hearing; the judicial officer is provided the evidence to review in private, and the public is unable to observe or evaluate

the fairness of the proceedings or the propriety of the decision in any meaningful fashion.

In *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, this Court concluded that "substantive courtroom proceedings in ordinary civil cases that satisfy "historic tradition/utility considerations" are presumptively open. (*Id.* at p. 1217)

> [P]ublic access plays an important and specific structural role in the conduct of [civil trials]. Public access to civil proceedings serves to (i) demonstrate that justice is meted out fairly, thereby promoting public confidence in such governmental proceedings; (ii) provide a means by which citizens scrutinize and check the use and possible abuse of judicial power; and (iii) enhance the truthfinding function of the proceeding.

(*Id.* at p. 1219.)

In *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555 [100 S.Ct. 2814], the United States Supreme Court reversed a trial court order closing public access to a criminal trial. (See also *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, supra*, 20 Cal.4th at p. 1219 ["Public access to civil proceedings serves to . . . . enhance the truthfinding function of the proceeding"].)

Oliver Wendell Holmes wrote,

> It is desirable that the trial of [civil] causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of

> the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

(*Cowley v. Pulsifer* (1884) 137 Mass. 392, 394 [50 Am.Rep. 318].)

Judicial systems based on the Napoleonic Code treat the concept of public trials differently. In Mexico, for example, trials often consist of a series of fact-gathering hearings at which the court receives documentary evidence or testimony. (U.S. Department of State, Bureau of Public Affairs, Country Reports on Human Rights Practices - Mexico - 2005 (March 8, 2006) p. 5.) A judge in chambers reviews the case file and then issues a final, written ruling. (*Ibid.*) The record of the proceedings is not available to the general public; only the parties have access to the official file, and then only by special motion. (*Ibid.*)

Lack of transparency continues to be a major problem of the justice system in Mexico. (U.S. Department of State, Bureau of Public Affairs, Country Reports on Human Rights Practices - Mexico - 2005 (March 8, 2006) p. 5.) The lack of open trials and the lack of public access to court proceedings has weakened public trust in the justice system in Mexico.

The Contra Costa county local court rule and trial scheduling order remove all direct testimony from open court proceedings, closing off a large

segment of family law trials from the public. This does not comport with our country's philosophy of open trials, procedural fairness, and the importance of public trust in the system.

B. Being Deprived of One's "Day in Court" Diminishes Trust in the Legal System

> Many times a person's only experience with the court system is as a self-represented litigant in a family, small claims, traffic, or unlawful detainer case. This single experience can determine an individual's trust and confidence in the courts and influence his or her perception of government as a whole. People often share their views with family members, friends, and co-workers, so one experience can have a ripple effect, influencing levels of trust in government institutions among the general public, far beyond those with firsthand negative experience.

(Judicial Council of California, Report of the Task Force on Self-Represented Litigants and Statewide Action Plan for Serving Self-Represented Litigants (February 2004) p. 20.)

In re Marriage of Dunn (2002) 103 Cal.App.4th 345, involved a postdissolution modification order effectively barring husband's new wife from participating in the children's activities. The order was granted in chambers, without hearing in open court. In criticizing the lack of a hearing, the court stated, "[w]e have written at length about the importance to litigants of 'preserving a process that not only is just, but also appears to be just. In spite of the need for efficiency, courts should not lose sight of the need that

parties be given their "day in court."'" (*Id.* at p. 348, quoting *Medix Ambulance Service, Inc. v. Superior Court* (2002) 97 Cal.App.4th 109, 112.)

When courts tell parties they must present all their evidence by declaration, there is no reason for them to appear at court. They do not have to observe an empty bench, while the trier of fact reads documents. They have no ability to observe any weighing process by the court. They can not evaluate the proceedings. They might as well mail in their requests, and stay home.

When trust in the system is thus diminished, so too may be respect for the system and its orders. A quest for efficiency does not justify such a result.

VI.

THE COURTS AND LEGISLATURE HAVE REJECTED PRIOR ATTEMPTS TO CURTAIL PRESENTATION OF EVIDENCE IN FAMILY LAW MATTERS

Contra Costa County Local Court Rule 12.5 and the trial scheduling orders are not the first attempt to apply special evidentiary and procedural rules in family law. These prior attempts failed when reviewed by practitioners, judges and the legislature.

In 1995, the Family and Juvenile Law Advisory Committee to the Judicial Council Family Law Subcommittee proposed new rules to streamline

family law practice and procedures. (Gray, *Family Court 2000, AKA Family Court July 1997: Are You Ready?* (1997) vol. 21, No. 3, Cal. Fam. Law Rep. 7457.) The resulting proposals, known as Family Law 2000, or Family Court 2000, included expanding summary dissolution procedures, limiting discovery, and restraining the presentation of evidence. (*Id*. at p. 7460; Long & Lee, *The Pro Per Crisis in Family Law* (May 1996) No. 2, Newsletter of Association of Certified Family Law Specialists 1, 16-17.)

Proposed rule 1264 changed the standard of evidence applicable in family law matters from the Evidence Code to that of administrative proceedings, and allowed the court to take direct testimony by declaration, hold telephonic hearings, and receive evidence by fax, phone, or electronically. (Gray, *Family Court 2000, supra* , 1997 Cal. Fam. Law Rep. at p. 7460.)

The proposals drew criticism and opposition from practitioners throughout California. The Family Law Section of the Bar Association of San Francisco objected to the Family Court 2000 proposal as an attempt to shunt family law disputants into an alternative system in which constitutional and statutory protections, available to all other civil law litigants, do not apply. (Bar Association of San Francisco Family Law Section, Revised Statement of Position on Family Court 2000 Proposal, June 23, 1997, p. 9.)

> Parties in family law cases are entitled to the same level of fairness, due process and access to the courts as are the parties in personal injury cases and all others. The proposed rules appear to create a kind of second-class citizenship for family law.

(South Bay Bar Association of Los Angeles County Family Law Court 2000 Committee, Memorandum to Judicial Council Family Law Advisory Committee, February 7, 1997, p. 5.)

The Orange County Bar Association strongly opposed the adoption of the Family Court 2000 proposal, in part because it, "would reduce trials to quasi-administrative proceedings by permitting suspension of the requirements of the Evidence Code and the relaxation of the rules of formal discovery." (Orange County Bar Association Board of Directors, Resolution 97R-02, June 25, 1997, p. 1.)

The Family Law Section of the Beverly Hills Bar Association stated, "our concern lies with the denigration of due process and certain other rights denied to persons who find themselves in the family law arena, but who may lack the financial ability to access legal counsel, or the ability to comprehend fully the ramifications of the process (or lack thereof) which is being thrust upon them." (Family Law Section of the Beverly Hills Bar Association, Letter to Judicial Council of California Family Law Advisory Subcommittee, March 6, 1997, pp. 2-3.)

The proposed changes were also rejected by the California Senate and Assembly Judiciary Committees. (Romo, *Lawmakers Rip Plan to Revamp Family Courts*, L.A. Daily J. (November 7, 1997) pp. 1, 10.) The legislators specifically expressed their concern that the proposals relaxed the laws of evidence. (*Ibid.*)

Contra Costa County Superior Court Local Rule 12.5 and its trial scheduling order, and the Family Court 2000 proposals, are strikingly similar. Both treat family law litigants differently from other court users, by enacting special, restrictive rules for the introduction of evidence in family law trials. Just like Contra Costa Local Rule 12.5, Family Court 2000 proposed allowing direct testimony only by declaration. After years of controversy and debate, and considerable input from family law practitioners, judicial officers, the legislature, and the public, most of the Family Court 2000 proposals were rejected, including the use of direct testimony by declaration.[6]

The reasoning being no different, and the opinion of the parties most knowledgeable and most affected by the rules remaining unchanged, the same result should obtain here.

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[6] Only very limited portions of the Family Court 2000 proposals for a pilot project to create and fund family law help centers in the courts were put into effect. (Fam. Code § 15000, et seq.)

CONCLUSION

These amici curiae concur wholeheartedly with the petitioner that too often, family law is given second class treatment by the judicial system. (Reply to Respondent's Brief, pp. 10-11.) Justice Gardner recognized this almost thirty years ago, and the eloquence of his description bears repeating where, as here, a trial court has apparently failed to understand its obligation to do justice and to properly balance priorities:

> While the speedy disposition of cases is desirable, speed is not always compatible with justice. Actually, in its use of courtroom time the present judicial process seems to have its priorities confused. Domestic relations litigation, one of the most important and sensitive tasks a judge faces, too often is given the low-man-on-the-totem-pole treatment, quite often being fobbed off on a commissioner. One of the paradoxes of our present legal system is that it is accepted practice to tie up a court for days while a gaggle of professional medical witnesses expound to a jury on just how devastating or just how trivial a personal injury may be, all to the personal enrichment of the trial lawyers involved, yet at the same time we begrudge the judicial resources necessary for careful and reasoned judgments in this most delicate field - - the breakup of a marriage with its resulting trauma and troublesome fiscal aftermath. The courts should not begrudge the time necessary to carefully go over the wreckage of a marriage in order to effect substantial justice to all parties involved.

(*In re Marriage of Brantner* (1977) 67 Cal.App.3d 416, 422.)

The amici curiae therefore respectfully urge this Honorable Court grant a writ of mandate, ordering the respondent Superior Court of Contra Costa County to revoke all rules and orders: (1) abrogating the right of parties to present oral direct testimony at trial, except as provided by statute and (2) applying different evidentiary procedures at trial for any particular class of civil litigants.

Date: June ___, 2006

Respectfully submitted,

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By:_____
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CERTIFICATE OF WORD COUNT

I, Marjorie G. Fuller, hereby certify that, pursuant to California Rules of Court, rules 14 and 29.1(b)(1), the text of this brief consists of 7819 words as counted by the word processing program used to generate this brief.

Date: June ___, 2006

By:_____
MARJORIE G. FULLER

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE:

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 110 E. Wilshire Avenue, Suite 501, Fullerton, California 92832. On June 2006, I served the foregoing document(s) described as: BRIEF OF AMICI CURIAE, IN SUPPORT OF PETITIONER JEFFREY ELKINS on the interested parties in this action as follows:

By placing a true copy thereof, enclosed in sealed envelope(s) addressed as stated on the ATTACHED SERVICE LIST.

X (BY MAIL) I am "readily familiar" with my employer's business practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Fullerton, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

__ (BY OVERNIGHT COURIER) I caused such envelope(s) to be placed for collection and delivery on this date in accordance with standard Federal Express delivery procedures to the designated person(s) on the attached service list.

_ (BY FAX) In addition to service by mail, I transmitted a copy of the foregoing document(s) this date via telecopier to the facsimile numbers shown above.

__ (BY PERSONAL SERVICE) I caused such envelope(s) to be delivered by hand to the offices of the addressees.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

EXECUTED June _, 2006, at Fullerton, California.

EILEEN SIMPSON

Elkins v. Superior Court
Case No S139073
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