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# The *Elkins* Legislation: Will California Change Family Law Again?

Steven K. Berenson\*

## INTRODUCTION

For many years, California has been at the forefront of innovations in the area of family law. For example, in 1970, California became the first state to apply a no-fault law relating to dissolutions of marriage.<sup>1</sup> California was the first state to mandate mediation in child custody and visitation disputes.<sup>2</sup> California was also the first state to recognize that unmarried cohabitants might have rights to share in property accumulated by their partner during the course of their relationship.<sup>3</sup>

Recently, California enacted what may prove to be the most significant changes to its Family Code in the last two decades.<sup>4</sup> While the legislation contains a large number of changes, three of the changes will be the focus of this article. First, California law now contains a preference for the introduction of live testimony in court hearings in family law matters. Second, the legislation modifies the role of minor's counsel in child custody proceedings to more closely resemble that of an attorney for one of the adult parties to a lawsuit, than that of a guardian ad litem. Third, the legislation increases the likelihood that children will testify in custody proceedings.<sup>5</sup>

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<sup>1</sup> See Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 291-92 (1987).

<sup>2</sup> Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1552 (1991).

<sup>3</sup> Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 314 (2008).

<sup>4</sup> See *infra* Part III. The California Legislature passed two bills amending the California Family Code. See Assemb. B. 939, 2009-2010 Assemb., Reg. Sess. (Cal. 2010); Assemb. B. 1050, 2009-2010 Assemb., Reg. Sess. (Cal. 2010).

<sup>5</sup> See *infra* Part III.

These changes are significant because they represent a clear break from a decades-long trend in family law, both in California and across the entire country away from reliance on traditional methods of adversary litigation in resolving family law disputes, particularly in cases involving issues of child custody and visitation. This trend has been so dramatic that it has been described by scholars as a “paradigm shift”<sup>6</sup> and a “revolution.”<sup>7</sup> Indeed, the move to no-fault divorce in California, and then elsewhere across the country, as well as the introduction of mandatory mediation in child custody cases, first in California and then elsewhere across the country, represent major contributions to the trend away from adversarial litigation in family law cases. Other examples of this trend include the advent and spread of collaborative divorce methods, parenting coordination, high conflict couples counseling, and hybrid-mediation-evaluation processes.<sup>8</sup> The California legislative changes that are the focus here represent a stunning reversal of course for a state that has led the movement away from traditional adversary litigation methods in family law cases and represent a movement back in the direction of resolving family law matters in California through traditional adversary litigation.

The genesis of the statutory changes in discussion here lies in the recent decision of the California Supreme Court in the case of *Elkins v. Superior Court*.<sup>9</sup> *Elkins* involved a dissolution of marriage action from Contra Costa County, California.<sup>10</sup> Pursuant to local rules of court, all direct testimony in family law trials was to be provided in the form of written declarations,

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<sup>6</sup> See, e.g., Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 894 (2010); ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 175 (2004) [hereinafter SCHEPARD, CHILDREN, COURTS]; Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 363 (2009).

<sup>7</sup> Deborah J. Cantrell, *The Role of Equipoise in Family Law 2* (Univ. of Colo. Law Sch. Legal Studies Research Paper Series, Working Paper No. 04-11, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1805927](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1805927).

<sup>8</sup> See, e.g., John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 280–88 (2004) (discussing the advantages and disadvantages of mediation, collaborative law, and cooperative law in family law proceedings); Peter Salem, Debra Kulak & Robin M. Deutsch, *Triaging Court Services: The Connecticut Judicial Branch's Family Civil Intake Screen*, 27 PACE L. REV. 741, 745 (2007) (discussing high conflict counseling, hybrid mediation-evaluation processes, and collaborative divorce methods); Andrew Shepard & Peter Salem, *Foreword to the Special Issue on the Family Law Education Reform Project*, 44 FAM. CT. REV. 513, 516 (2006) (noting the rise of collaborative dispute resolution in family law cases); Singer, *supra* note 6, at 364 & n.5.

<sup>9</sup> *Elkins v. Superior Court*, 163 P.3d 160 (Cal. 2007).

<sup>10</sup> *Id.* at 161.

though cross-examination would be permitted at the hearing.<sup>11</sup> Additionally, all trial exhibits were required to be filed prior to the hearing, with the evidentiary basis for each exhibit set forth in the written declarations.<sup>12</sup> In *Elkins*, the husband, who was not represented by counsel, ultimately failed to comply with the aforementioned local rules by not submitting any admissible evidence for the court to consider in the divorce trial.<sup>13</sup> Given the absence of any evidence submitted on behalf of the husband, the trial court, not surprisingly, issued a ruling that favored the wife with regard to each of the disputed issues.<sup>14</sup> On appeal,<sup>15</sup> the California Supreme Court ruled that the superior court's local rules violated state statutes relating to hearsay evidence and affording litigants a "day in court."<sup>16</sup> The high court struck down the local court's rules,<sup>17</sup> and reversed the judgment in the dissolution of marriage case, remanding the case for further proceedings consistent with its opinion.<sup>18</sup>

More importantly for present purposes, numerous counties around California had adopted local rules that were similar to those that were struck down in *Elkins*.<sup>19</sup> The purpose behind such rules was to increase efficiency and the timely resolution of cases in light of the crushingly large caseloads in family courts around California.<sup>20</sup> While the California Supreme Court acknowledged the legitimacy of these goals, it went on to conclude that courts' bona fide interests in efficiency cannot trump individual litigants' right to fair judicial proceedings.<sup>21</sup> In any event, recognizing that the issues involved went well beyond the interests of solely the parties to the *Elkins* case, the court recommended that the California Judicial Council set up a task force to review issues relating to the competing goals of efficiency and access to justice in California's family courts.<sup>22</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 163–64.

<sup>14</sup> *Id.* at 165.

<sup>15</sup> The intermediate appellate court summarily denied Mr. Elkins' petition for a writ of mandate or prohibition. *Id.*

<sup>16</sup> *Id.* at 169, 170. Thus, the court was able to avoid ruling on Mr. Elkins' claims that the local rules violated his constitutional rights to due process of law. *Id.* at 170 ("The conclusion we reach also permits us to avoid the difficult question whether the local rule and order violate petitioner's right to due process of law . . .").

<sup>17</sup> *Id.* at 171.

<sup>18</sup> *Id.* at 178.

<sup>19</sup> *Id.* at 177 ("A recent statewide survey reflects a similar concern with court procedures that do not permit family law litigants to tell their story . . .").

<sup>20</sup> *Id.* at 175–77.

<sup>21</sup> *Id.* at 176–77 ("That a procedure is efficient and moves cases through the system is admirable, but even more important is for the courts to provide fair and accessible justice.").

<sup>22</sup> *Id.* at 178 n.20.

The Judicial Council followed the court's recommendation, and established the Elkins Family Law Task Force (hereinafter "Elkins Task Force" or "Task Force").<sup>23</sup> The Task Force contained a broad representation of actors from within the family law practice community.<sup>24</sup> It conducted its work over a period of two years, holding public meetings and receiving comments from a wide range of sources.<sup>25</sup> Eventually, the Task Force issued a lengthy report, along with numerous recommendations for actions to be taken to improve the practice of family law in California.<sup>26</sup> Many of the Task Force's recommendations were subsequently enacted into law as part of the legislative changes discussed above including the preference for live testimony in family law hearings and the changes to the role of minor's counsel in child custody proceedings.<sup>27</sup> The legislative changes relating to child testimony in custody cases did not result from recommendations made by the Task Force, though those changes were enacted around the same time as the Task Force's recommendations were enacted.<sup>28</sup>

Of course, only time will tell if the aforementioned legislative changes will be emulated around the country as other innovations in California family law have been, and whether they will usher in a broad pendulum swing in family law back in the direction of traditional modes of adversary litigation. Regardless, there are reasons to be skeptical of the wisdom of the legislative changes under discussion here. These reasons relate to both the process engaged in to arrive at the Elkins Task Force's recommendations and the substance of the three legislative changes discussed here.

First, the Task Force's recommendations and the subsequent legislation seem to be overreactions to one particularly bad trial court decision. Second, the Task Force took what I describe as a "consumerist" approach to the fact-finding and investigation that preceded its issuance of its recommendations. The Task Force

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<sup>23</sup> ADMIN. OFFICE OF THE COURTS, JUDICIAL COUNCIL OF CAL., THE ELKINS FAMILY LAW TASK FORCE FINAL REPORT: EXECUTIVE SUMMARY 1 (2010), available at <http://www.courts.ca.gov/xbcr/cc/elkins-executive.pdf>.

<sup>24</sup> *Id.* ("The 38-member task force included appellate court justices, judges, court commissioners, private attorneys, legal aid attorneys, family law facilitators, self-help-center attorneys, court executives, family court managers, family court child custody mediators, court administrators, and legislative staff.")

<sup>25</sup> *Id.* at 2.

<sup>26</sup> ADMIN. OFFICE OF THE COURTS, THE ELKINS FAMILY LAW TASK FORCE: FINAL REPORT AND RECOMMENDATIONS (2010), available at <http://www.courts.ca.gov/xbcr/cc/elkins-finalreport.pdf> [hereinafter ELKINS FINAL REPORT].

<sup>27</sup> See *supra* note 4.

<sup>28</sup> Ciaran McEvoy, *Family Law System Reformed*, DAILY JOURNAL, Oct. 29, 2010, [http://www.fmbklaw.com/10daily\\_journal\\_family\\_law.pdf](http://www.fmbklaw.com/10daily_journal_family_law.pdf).

surveyed the opinions of a wide range of the users of family court services including lawyers, judges, litigants, and court personnel.<sup>29</sup> The Task Force then took great pains to make its recommendations responsive to the opinions expressed. There is definitely something laudable about the efforts of a government entity to be responsive to expressed views of its constituents in policy-making activities. However, the Task Force may have taken this notion of “customer satisfaction” a bit too far. Indeed, there are perspectives other than those of the consumers of court services that are worthy of consideration in any court reform effort. In particular, the Task Force seemed to make no effort to engage academic or other scholarly perspectives that might have been valuable to consider in making its recommendations. Had the Task Force considered these perspectives, it would have encountered a voluminous literature that demonstrates the ineffectiveness of, and indeed the harms caused by traditional adversary litigation methods of dispute resolution in family law disputes, particularly those involving issues of child custody.<sup>30</sup>

Perhaps the Task Force’s lack of consideration of academic or scholarly writings regarding effective dispute resolution procedures in part led to what I consider to be the substantive failings of the recent legislative changes. For example, the move toward increased use of live testimony in family law hearings will do nothing to improve the accuracy and reliability of child custody decision making, while at the same time unleashing the harms associated with contested custody litigation, as demonstrated by the literature mentioned above. Further, the move toward live testimony in family court hearings seems inconsistent with caseload and budgetary realities that must be considered in conjunction with any movement toward family court reform. This article contends that the Elkins Task Force’s move toward live testimony is ill advised in light of the Task Force’s failure to confront these issues.

One of the main forces driving the legislation’s return to live testimony is the virtual explosion in the number of litigants representing themselves in family court.<sup>31</sup> The Elkins Task

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<sup>29</sup> See ELKINS FINAL REPORT, *supra* note 26, at 11.

<sup>30</sup> See *supra* notes 6–8 and accompanying text.

<sup>31</sup> See Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 105, 110 (2001) [hereinafter Berenson, *Family Law*] (“[T]he percentage of cases in which one or both of the parties appears without a lawyer is significantly higher in family law cases than in any other area of the law.”); Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIMONIAL LAW. 193, 194 (2008) (“[D]epending on the type of proceeding, studies show that in between fifty-five and eighty percent of domestic relation matters, at least one party appears pro se.”); Jona

Force and the California Legislature seem convinced that self-represented litigants will encounter the same difficulties that Mr. Elkins did in complying with local rules similar to those that were in issue in that case, and will be better able to present their cases through live testimony than under the time-saving procedures adopted by Contra Costa County and other California courts. Certainly, though courts have adopted many innovations to address the challenges created by self-represented litigants, more work needs to be done to provide adequate access to justice for such litigants.<sup>32</sup> Nonetheless, this article contends that it is misguided to believe that self-represented litigants will be more successful as trial practitioners than they are in pre-trial practice. Moreover, the move to live testimony, at least in the case of self-represented litigants, will place judges and other court personnel in unfamiliar and uncomfortable positions, which may limit the effectiveness of the move in increasing access to justice.<sup>33</sup>

This article also questions the legislative changes regarding the role of minor's counsel in custody cases. There is a long-standing and unresolved debate regarding whether or not children should be represented in custody proceedings,<sup>34</sup> and if

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Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 36 (2002) ("The surge in pro se litigation, particularly in the family courts of every common law country, is reported in official reports and anecdotally by judges and court managers and in systematic studies.").

<sup>32</sup> See, e.g., Steven Berenson, *Homeless Veterans and Child Support*, 45 FAM. L.Q. 173, 180–81 (2011).

<sup>33</sup> But cf. Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 659, 661–62 (2006) (explaining that court rules and policies, which systematically silence *pro se* litigants in New York City's Housing Court, impede their ability to receive a fair trial); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2028–31 (1999) (arguing that judges must be as active as necessary to ensure that self-represented litigants receive a fair trial because "[i]f the courts hold out the promise of fairness and justice, but claim for practical reasons to be unable to achieve such a result, the advertising is false"); Goldschmidt, *supra* note 31, at 53 (advocating for an expansion of judges' roles in pro se litigation in order to improve access to justice).

<sup>34</sup> Compare MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 164 (2005) (arguing that appointing counsel for the child in custody cases is misguided most of the time), with Linda Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 FAM. L.Q. 53, 69 (1992) [hereinafter Elrod, *Counsel for the Child*] (concluding that children need "court-appointed counsel" and that it is time "to give children a voice in the legal determinations that so substantially affect their physical and mental well-being"). By contrast, there is a broad consensus that children should be represented in juvenile court matters, such as delinquency proceedings, where the U.S. Supreme Court has recognized a right on the part of the child to be represented by counsel. See *In re Gault*, 387 U.S. 1, 41 (1967). There is also a broad consensus that children should be represented in dependency matters, where abuse or neglect of the child is alleged. See, e.g., 42 U.S.C. § 5106(a)(b)(2)(A)(xiii) (2006) (requiring the appointment of a Guardian Ad Litem in child protection cases). The focus of this article is exclusively on the question of

they are represented, what form that representation should take.<sup>35</sup> The traditional approaches are to provide a Guardian Ad Litem (GAL) for the child, an attorney to represent the child (minor's counsel), or both.<sup>36</sup> If minor's counsel is appointed, that attorney might be charged with advancing the best interests of the child, or with advancing the child's expressed preference as to the outcome of the custody dispute.<sup>37</sup> Prior California law did not provide for the appointment of a GAL in custody proceedings.<sup>38</sup> However, California law did provide for appointment of minor's counsel,<sup>39</sup> and set forth a role for minor's counsel that was quite similar to that of a GAL as traditionally understood.<sup>40</sup> For example, minor's counsel might be required to submit a statement of issues and contentions that was essentially the same as a report traditionally submitted by a GAL to the court.<sup>41</sup> Further, minor's counsel was charged with representing the best interests of the child.<sup>42</sup>

A consensus has developed among academic commentators both that it is inappropriate for minor's counsel to play the neutral role of a GAL,<sup>43</sup> and that best interests representation is incompatible with attorneys' proper professional role and the autonomy interests of children.<sup>44</sup> The Elkins legislation satisfies one of these critiques, by modifying the role of minor's counsel to more closely resemble that of an attorney representing an adult client than that of a GAL.<sup>45</sup> However, the relevant statutes, as

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representation in custody cases in family court.

<sup>35</sup> See Elrod, *Counsel for the Child*, *supra* note 34, at 57 (discussing the confusion over the roles for attorneys in representing children).

<sup>36</sup> Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the "Right" Thing to Do*, 27 PACE L. REV. 869, 907–09 (2007) [hereinafter Elrod, *Client-Directed Lawyers*].

<sup>37</sup> *Id.* at 910.

<sup>38</sup> See *In re Marriage of Lloyd*, 64 Cal. Rptr. 2d 37, 41 (Cal. Ct. App. 1997).

<sup>39</sup> CAL. FAM. CODE § 3150 (West 2004), amended by Stats. 2010 ch. 352 § 14 (AB 939) (effective Jan. 1, 2011).

<sup>40</sup> See Elrod, *Client-Directed Lawyers*, *supra* note 36, at 907–08 (“[A] guardian ad litem . . . advocates for the best interests of the child by conducting an investigation, writing reports or otherwise making recommendations . . .”).

<sup>41</sup> FAM. § 3151(b), amended by Stats. 2010 ch. 352 § 15 (AB 939) (effective Jan. 1, 2011); Amy Pellman, Robert Jacobs & Dara K. Reiner, *A Child-Centered Response to the Elkins Family Law Task Force*, 20 WM. & MARY BILL RTS. J. 81, 115–16 (2011) [hereinafter Pellman, *A Child-Centered Response*].

<sup>42</sup> FAM. § 3151(a).

<sup>43</sup> See, e.g., ABA, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES § III(b) (2003), reprinted in 37 FAM. L.Q. 131, 131–60 (stating that a lawyer for a child should not testify, file a report, or make a recommendation as to custody); Elrod, *Client-Directed Lawyers*, *supra* note 36, at 908–10.

<sup>44</sup> See, e.g., Barbara A. Atwood, *Representing Children Who Can't or Won't Direct Counsel: Best Interests Lawyering or No Lawyer at All?*, 53 ARIZ. L. REV. 381, 382 & n.1 [hereinafter Atwood, *Best Interests*] (citing numerous articles); Elrod, *Client-Directed Lawyers*, *supra* note 36, at 910–12.

<sup>45</sup> FAM. § 3151(b) (West 2011) (eliminating authority of the court to require minor's counsel to prepare a statement of issues and contentions, and prohibiting minor's counsel

modified, still retain best interests representation by minor's counsel.<sup>46</sup> The result is something of an incoherent or at least conflicted role for minor's counsel in California that also fails to account adequately for the autonomy interests of older children. Further, it is argued here that something important is lost in depriving courts of the neutral and reliable information that formerly came in the form of minor's counsels' statements of issues and contentions. This article takes the position that a better solution for the *Elkins* legislation to have taken would have been to recognize expressly a GAL role in custody cases, and further, to modify minor's counsels' role to abandon best interests representation for children old enough to express a mature preference as to the outcome of the custody case. The interests of younger children would be protected adequately by a GAL appointment, or a GAL appointment along with a minor's counsel appointed to represent the child.

Lastly, this article also questions the legislation increasing the use of child testimony in custody cases.<sup>47</sup> There is an overwhelming consensus among child psychologists that heavy involvement by children in their parents' custody disputes puts the children at serious risk of psychological harm.<sup>48</sup> Yet there is no activity that puts children squarely in the cross-hairs of their parents' dispute to the degree that testifying in open court, and being subject to cross-examination does. Prior law gave judges ample authority to allow children to testify in court, when it was necessary and important to do so.<sup>49</sup> However, prior law's preference for using alternative means to take children's views into account in custody cases was more in line with children's best psychological interests than the amended statute's move toward child testimony. Indeed, this change, along with the previously mentioned changes that will increase the adversarial aspect of child custody proceedings, will serve primarily to exacerbate the necessary harm caused to children by being the subject of contested custody proceedings.

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from testifying as a witness in custody proceedings); Pellman, *A Child-Centered Response*, *supra* note 41, at 115–16.

<sup>46</sup> FAM. § 3151(a).

<sup>47</sup> Pellman, *A Child-Centered Response*, *supra* note 41, at 115.

<sup>48</sup> See, e.g., ROBERT E. EMERY, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT 20 (2d ed. 1999) [hereinafter EMERY, MARRIAGE, DIVORCE] ("Many negative consequences of divorce for children in the United States today could be avoided if family, social, and economic disruptions could be minimized.").

<sup>49</sup> See FAM. § 3042 (West 2004), amended by Stats. 2010 ch. 187 § 1 (AB 1050) (effective Jan. 1, 2012).

The article proceeds as follows. First, the article engages in a more detailed description of the *Elkins* case and decision.<sup>50</sup> Next, the article describes the work of the Elkins Task Force,<sup>51</sup> and the legislation that followed the Task Force's Report.<sup>52</sup> The article then engages in a critique of the *Elkins* family law changes.<sup>53</sup> It begins at a general level,<sup>54</sup> first characterizing the changes as an overreaction to one particularly bad judicial decision,<sup>55</sup> second, questioning the process utilized by the Task Force to arrive at its recommendations,<sup>56</sup> and third, questioning the legislation's turn away from the trend against adversary litigation as the primary means of resolving family law disputes.<sup>57</sup> The article then proceeds to offer a more specific critique of the three aspects of the recent California family law changes that are the focus here,<sup>58</sup> the preference for live testimony in family law hearings,<sup>59</sup> the revisions to the role of minor's counsel in custody cases,<sup>60</sup> and the increased likelihood of child testimony in custody disputes.<sup>61</sup> The article concludes by offering a revised set of recommendations that would accomplish many of the goals set forth by the Elkins Task Force, but without imposing the negative consequences of the changes that have actually been adopted.<sup>62</sup>

#### I. THE *ELKINS* DECISION

Marilyn Elkins filed for dissolution of her more than two-decade marriage to Jeffrey Elkins.<sup>63</sup> The financial issues were scheduled to be tried on September 19, 2005.<sup>64</sup> Pursuant to a local rule of the Contra Costa County (California) Superior Court, the matter was to be decided based upon "the pleadings submitted by the parties without live testimony."<sup>65</sup> The rule further provided that "direct examination on factual matters

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<sup>50</sup> See *infra* Part I.

<sup>51</sup> See *infra* Part II.

<sup>52</sup> See *infra* Part III.

<sup>53</sup> See *infra* Part IV.

<sup>54</sup> See *infra* Part IV(A).

<sup>55</sup> See *infra* Part IV(A)(i).

<sup>56</sup> See *infra* Part IV(A)(ii).

<sup>57</sup> See *infra* Part IV(A)(iii).

<sup>58</sup> See *infra* Part IV(B).

<sup>59</sup> See *infra* Part IV(B)(i).

<sup>60</sup> See *infra* Part IV(B)(ii).

<sup>61</sup> See *infra* Part IV(B)(iii).

<sup>62</sup> See *infra* Part V.

<sup>63</sup> Respondent's Return by Answer to Petition for Writ of Mandate or Prohibition at 11 *Elkins v. Superior Court*, 163 P.3d 160 (Cal. 2007) (No. S139073), 2006 WL 1267810. The parties were married in 1980 and separated in 2001. *Id.*

<sup>64</sup> *Elkins*, 163 P.3d at 162.

<sup>65</sup> *Id.* at 163 (quoting SUP. CT. CONTRA COSTA CNTY. R. 12.5(b)(3) (effective July 1, 2005) (repealed 2008)).

shall not be permitted except in unusual circumstances or for proper rebuttal.”<sup>66</sup> The parties’ declarations would be admitted in evidence at the hearing, “subject to legal objection, amendment, and cross-examination . . . .”<sup>67</sup> A local trial scheduling order (TSO) further restricted the parties’ ability to submit evidence at the hearing.<sup>68</sup> The TSO reiterated that direct testimony would be presented at trial in the form of declarations submitted prior to trial “in lieu of oral direct testimony, subject to cross-examination.”<sup>69</sup> Declarations from the parties and their witnesses were required to be filed ten court days prior to trial, along with trial briefs.<sup>70</sup> The TSO further provided that all trial exhibits needed to be appended to the declarations and that the evidentiary basis for the admissibility of the exhibits needed to be set forth in the declarations as well.<sup>71</sup>

Marilyn was represented by counsel for purposes of the hearing, but Jeffrey was not.<sup>72</sup> Both parties submitted their trial briefs and declarations on September 2, 2005.<sup>73</sup> Jeffrey, however, did not attach his exhibits to his declaration as required by the TSO, but rather delivered a binder with thirty-six exhibits to the court and opposing counsel one court day prior to the hearing.<sup>74</sup> Marilyn filed a responsive declaration on September 8, 2005.<sup>75</sup> At the hearing, Marilyn’s attorney objected to the introduction of all but two of Jeffrey’s exhibits on grounds that only those two exhibits were described in his declaration as required by the TSO.<sup>76</sup> The court ultimately sustained counsel’s objection to the introduction of the exhibits.<sup>77</sup> After a lengthy colloquy with the court regarding its reasons for disallowing the exhibits, Jeffrey also declined to offer his declaration in evidence.<sup>78</sup> With no evidence from Jeffrey to consider, the matter proceeded “quasi by default, so to speak,” in the words of the trial judge.<sup>79</sup> Though

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<sup>66</sup> *Id.* (quoting SUP. CT. CONTRA COSTA CNTY. R. 12.5(b)(3) (effective July 1, 2005) (repealed 2008)).

<sup>67</sup> *Id.* (quoting SUP. CT. CONTRA COSTA CNTY. R. 12.5(b)(3) (effective July 1, 2005) (repealed 2008)).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* The TSO required these documents to be filed ten court days before the hearing. *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* The TSO required responsive declarations and exhibits to be filed five court days before the hearing. *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 164. The TSO did provide that “[f]ailure to comply with [its] requirements will constitute good cause to exclude evidence or testimony at trial . . . .” *Id.* at 163.

<sup>78</sup> *Id.* at 164.

<sup>79</sup> *Id.*

the judge awarded Jeffrey an interest in the marital home and in Marilyn's pension, the court resolved the other property issues in a manner substantially in conformity with the proposed order submitted by Marilyn's counsel.<sup>80</sup>

Jeffrey appealed the judgment of the trial court, arguing that there was no statutory authority for the local requirements preventing direct testimony at the hearing, requiring declarations to be filed, and requiring the evidentiary foundation for trial exhibits to be set forth in the declarations.<sup>81</sup> He also contended that the system of "trial by declaration" deprived him of his due process right to a hearing on the merits of his claim, and that the sanctions available for violation of the local rule and TSO were inconsistent with policies favoring resolution on the merits of disputes.<sup>82</sup> California's intermediate appellate court summarily denied Jeffrey's petition.<sup>83</sup> However, the California Supreme Court granted Jeffrey's petition for review, and ordered the Contra Costa County Superior Court to show cause why the local rule and order should not be deemed invalid for the reasons argued by Jeffrey before the intermediate appellate court.<sup>84</sup>

The California Supreme Court noted that while "some informality and flexibility have been accepted in marital dissolution proceedings," the same statutory rules of evidence and procedure that govern other civil matters remain applicable in the family court.<sup>85</sup> Additionally, declarations of the sort required by Contra Costa County are hearsay, and therefore are inadmissible at trial, unless an exception to the hearsay rule provides for their admission.<sup>86</sup> One such exception appears in section 2009 of the California Code of Civil Procedure, which provides for the admissibility of affidavits or declarations in *motion* proceedings.<sup>87</sup> However, the court made clear that section 2009 did not support the Contra Costa County rule because that rule applied at trial, rather than in motion proceedings.<sup>88</sup>

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<sup>80</sup> *Id.* at 165.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 167–68.

<sup>86</sup> *Id.* at 168.

<sup>87</sup> CAL. CIV. PROC. CODE § 2009 (West 2007) ("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."); *see also Elkins*, 163 P.3d at 168.

<sup>88</sup> *Elkins*, 163 P.3d at 168.

The court went on to discuss the policy in favor of the admissibility of all relevant evidence, that evidence relating to the credibility of other evidence falls within the scope of such relevant evidence, and that live testimony may be particularly important to determining the credibility of witnesses and other evidence presented in marital dissolution and other trials.<sup>89</sup> The court offered numerous examples of statutory and case law support for this proposition, and therefore was able to conclude that the lower court's rules contravened these authorities and were invalid, without having to reach Jeffrey's due process arguments.<sup>90</sup>

The primary justification offered by the County in support of its rules focused on "efficiency" and the desire to provide for the "expeditious resolution of family law cases . . . ."<sup>91</sup> The California Supreme Court praised the County's desire to provide efficient procedures and to move cases quickly through the system.<sup>92</sup> It also acknowledged the particularly heavy volume of marital dissolution cases required to be handled by superior courts, and the additional challenges presented by the fact that such a high percentage of litigants in such cases appear without counsel.<sup>93</sup> Nonetheless, the court concluded that these interests cannot trump the rights of litigants to "fair and accessible justice."<sup>94</sup> Given that trial courts all around the state face similar challenges to those faced by Contra Costa County, and many courts have adopted similar rules and procedures to those that the high court struck down as impermissible, the court concluded by recommending to the Judicial Council<sup>95</sup> that

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<sup>89</sup> *Id.* at 170.

<sup>90</sup> *Id.* at 169–70.

<sup>91</sup> *Id.* at 175.

<sup>92</sup> *Id.* at 176.

<sup>93</sup> *Id.* at 177.

<sup>94</sup> *Id.* at 176.

<sup>95</sup> Created by a state constitutional amendment in 1926, the California Judicial Council is the governing body of California's judicial branch, administering the extremely large California Court system. See Ronald M. George, *Brennan Lecture: Challenges Facing an Independent Judiciary*, 80 N.Y.U. L. REV. 1345, 1353 & n.24 (2005); ADMIN. OFFICE OF THE COURTS, PROFILE: JUDICIAL COUNCIL OF CALIFORNIA 1 (4th ed. 2006), available at <http://www.courts.ca.gov/xbcr/cc/profilejc.pdf>. According to article VI of the California Constitution:

The Judicial Council consists of the Chief Justice and one other judge of the Supreme Court, three judges of courts of appeal, 10 judges of superior courts, two nonvoting court administrators, and any other nonvoting members as determined by the voting membership of the council, each appointed by the Chief Justice for a three-year term pursuant to procedures established by the council; four members of the State Bar appointed by its governing body for three-year terms; and one member of each house of the Legislature appointed as provided by the house.

CAL. CONST. art. VI, § 6(a).

it establish a task force, including representatives of the family law bench and bar and the Judicial Council Advisory Committee on Family and Juvenile Law, to study and propose measures to assist trial courts in achieving efficiency and fairness in marital dissolution 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 statewide rules of practice and procedure for fair and expeditious proceedings in family law, from the initiation of an action to postjudgment motions. Special care might be taken to accommodate self-represented litigants. Proposed rules could be written in a manner easy for laypersons 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.<sup>96</sup>

## II. THE ELKINS FAMILY LAW TASK FORCE

Pursuant to the recommendation of the California Supreme Court, the Judicial Council appointed the Elkins Family Law Task Force in 2008.<sup>97</sup> The Task Force consisted of thirty-eight members, including “appellate court justices, judges, court commissioners, private attorneys, legal aid attorneys, family law facilitators, self-help-center attorneys, court executives, family court managers, family court child custody mediators, court administrators, and legislative staff.”<sup>98</sup> The Task Force worked for nearly two years in formulating its recommendations.<sup>99</sup> It sought input from a variety of sources including: focus groups with court users, attorneys, judicial officers and court staff; comments at public meetings and one public hearing; and numerous e-mail and print letters commenting on the work of the commission.<sup>100</sup> The Task Force also conducted a survey of attorneys, and reviewed available court data.<sup>101</sup> In September 2009 the Task Force released a set of draft recommendations.<sup>102</sup> The Task Force then held additional public hearings and sought additional input regarding the draft recommendations before finalizing its recommendations in an April 2010 report.<sup>103</sup>

The Task Force made recommendations in five broad areas. These areas were: (1) efficient and effective procedures to help

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<sup>96</sup> *Elkins*, 163 P.3d at 178 n.20.

<sup>97</sup> ADMIN. OFFICE OF THE COURTS, THE ELKINS FAMILY LAW TASK FORCE FINAL REPORT: EXECUTIVE SUMMARY 1 (2010), available at <http://www.courts.ca.gov/xbcr/cc/elkins-executive.pdf>.

<sup>98</sup> *Id.*

<sup>99</sup> ELKINS FINAL REPORT, *supra* note 26, at 11.

<sup>100</sup> *Id.*

<sup>101</sup> See Laurie Zelon, *The Elkins Task Force: Meeting the Challenges of Family Law in California's Courts*, 1 CAL. L. REV. CIR. 25, 27 (2010).

<sup>102</sup> ELKINS FINAL REPORT, *supra* note 26, at 14.

<sup>103</sup> *Id.*

ensure justice, fairness, due process and safety;<sup>104</sup> (2) more effective child custody procedures;<sup>105</sup> (3) ensuring meaningful access to justice for all litigants;<sup>106</sup> (4) enhancing the status of, and respect for, family law litigants and processes;<sup>107</sup> and (5) laying the foundation for future innovation.<sup>108</sup> In total, the Task Force offered 117 separate recommendations.<sup>109</sup> Naturally, discussing each of the recommendations goes well beyond the scope of the present analysis. Moreover, many of the recommendations are laudable. For example, the report recommends: the adoption of caseflow management procedures for family law cases similar to those that have been successfully implemented regarding other civil cases;<sup>110</sup> better information for litigants regarding court processes and procedures;<sup>111</sup> providing increased assistance to those who seek to settle their family law disputes;<sup>112</sup> simplification of mandatory court forms;<sup>113</sup> greater availability of interpreters for those who do not speak English adequately to participate effectively in court proceedings;<sup>114</sup> and greater accessibility of court facilities for persons with disabilities.<sup>115</sup> Thus, the focus here will be on the task force's more controversial recommendations. These include a presumption in favor of live testimony at all family law hearings<sup>116</sup> and a new definition of the role of minors' counsel to more closely approximate the traditional understanding of an attorney representing a client.<sup>117</sup> Further, those recommendations that subsequently led to legislative changes are the most significant for purposes of the present analysis.

### III. THE *ELKINS* FAMILY LAW LEGISLATION

Unlike many "blue-ribbon" task forces whose recommendations quickly end up in the dust-bin of policy analysis,<sup>118</sup> the Elkins Task Force's recommendations led quickly

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<sup>104</sup> *Id.* at 19.

<sup>105</sup> *Id.* at 44.

<sup>106</sup> *Id.* at 58.

<sup>107</sup> *Id.* at 74.

<sup>108</sup> *Id.* at 88.

<sup>109</sup> Pellman, *A Child-Centered Response*, *supra* note 41, at 83.

<sup>110</sup> ELKINS FINAL REPORT, *supra* note 26, at 21.

<sup>111</sup> *Id.* at 23.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 33–36.

<sup>114</sup> *Id.* at 69.

<sup>115</sup> *Id.* at 73.

<sup>116</sup> *Id.* at 29.

<sup>117</sup> *Id.* at 53–54.

<sup>118</sup> For example, in 2010, President Obama created the National Commission on Fiscal Responsibility and Reform, also known as the Simpson-Bowles Commission, after its co-chairmen, former Senator Alan Simpson (Republican) and former White House

to significant legislative changes to California family law. The two major pieces of legislation were California Assembly Bills 939 and 1050.<sup>119</sup> The highlights of this legislation will be addressed below.

First and foremost, California Assembly Bill 939 added to the California 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.<sup>[120]</sup>

(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.<sup>121</sup>

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Chief-of-Staff Erskine Bowles (Democrat). *See About the National Commission on Fiscal Responsibility and Reform*, NAT'L COMM'N ON FISCAL RESPONSIBILITY AND REFORM, [www.fiscalcommission.gov/about](http://www.fiscalcommission.gov/about) (last visited Nov. 30, 2011). The Commission was charged with "identifying policies to improve the fiscal situation in the medium term and to achieve fiscal sustainability over the long run." *Id.* Despite issuing a very well received report, the Commission's recommendations have not been implemented. *See* Op-Ed, *Let's Take Another Look at Simpson-Bowles*, HOUS. CHRON., Nov. 16, 2011, <http://www.chron.com/opinion/editorials/article/Let-s-take-another-look-at-Simpson-Bowles-2273167.php>; Thomas Friedman, Op-Ed, *Go Big, Mr. Obama*, N.Y. TIMES, Nov. 23, 2011, at A31.

<sup>119</sup> Pellman, *A Child-Centered Response*, *supra* note 41, at 83.

<sup>120</sup> The factors set forth in Rule 5.119(b) of the California Rules of Court are:

- 1) [w]hether a substantive matter is at issue—such as child custody, parenting time (visitation), parentage, child support, spousal support, requests for restraining orders, or the characterization, division, or temporary use and control of the property or debt of the parties;
- 2) [w]hether material facts are in controversy;
- 3) [w]hether live testimony is necessary for the court to assess the credibility of parties or other witnesses;
- 4) [t]he right of the parties to question anyone submitting reports or other information to the court;
- 5) [i]n testimony from persons other than the parties, whether there has been compliance with Family Code section 217(c); and
- 6) [a]ny other factor that is just and equitable.

CAL. R. CT. 5.119(b).

<sup>121</sup> CAL. FAM. CODE § 217 (West 2011) (emphasis added).

Assembly Bill 939 also contained a number of provisions relating to the award of attorney's fees in family law cases.<sup>122</sup> The Bill also had provisions expanding the availability of the summary dissolution process.<sup>123</sup> Further, it redefined the role of minor's counsel in contested custody cases to more closely approximate the traditional understanding of the role of an attorney representing a client in litigation.<sup>124</sup> Thus, minor's counsel is restricted to presenting admissible evidence to the court, in the form of "notices and pleadings . . . consistent with requirements for parties."<sup>125</sup> Minor's counsel is not to testify as a witness in the proceedings.<sup>126</sup> Minor's counsel is required to present the child's wishes to the court if the child so desires.<sup>127</sup> "Counsel may introduce and examine counsel's own witnesses, present arguments to the court concerning the child's welfare, and participate further in the proceeding to the degree necessary to represent the child adequately."<sup>128</sup>

Under California law, mediation is mandatory in child custody disputes.<sup>129</sup> Moreover, at the election of each county, the county may allow the family court mediator to make a recommendation to the court regarding the custody dispute.<sup>130</sup> Under the *Elkins* legislation, in counties that have opted for this evaluative mediation, the family court services mediator will now be known as the "child custody recommending counselor."<sup>131</sup>

The other major piece of family law legislation enacted following the Elkins Task Force Report was Assembly Bill 1050.<sup>132</sup> However, AB 1050 was not the result of recommendations made by the task force. Still, consistent with the *Elkins* changes, AB 1050 expands the role of child testimony in custody disputes.<sup>133</sup> Thus, AB 1050 amends existing California family law to require judges to allow a child, age fourteen or higher, to address the court on the issues of custody and visitation, unless the court determines that doing so would not be in the child's best interests.<sup>134</sup> Moreover, the revised statute further states that nothing in the law "shall be

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<sup>122</sup> Assemb. B. 939, 2009–2010 Assemb., Reg. Sess., §§ 4–6, 13, 17 (Cal. 2010).

<sup>123</sup> Assemb. B. 939, §§ 8–9.

<sup>124</sup> Assemb. B. 939, § 15.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> CAL. FAM. CODE § 3170(a) (West 2011).

<sup>130</sup> FAM. § 3183.

<sup>131</sup> 2010 Cal. Legis. Serv. 1916, 1924 (West) (to be codified at FAM. § 3183).

<sup>132</sup> Assemb. B. 1050, 2009–2010 Assemb., Reg. Sess., (Cal. 2010).

<sup>133</sup> Assemb. B. 1050 § 1.

<sup>134</sup> Assemb. B. 1050, § 1 (enacted at FAM. § 3042 (West 2011)).

interpreted to prevent a child who is less than 14 years of age from addressing the court regarding custody or visitation . . . .”<sup>135</sup>

#### IV. WHY MANY OF THE *ELKINS* FAMILY LAW CHANGES ARE MISGUIDED

This part of the article outlines some of the many reasons why the *Elkins* family law changes under consideration here are misguided. It first addresses some general criticisms of the changes, then the three specific statutory changes that are the focus here.

##### A. General Criticisms of the *Elkins* Family Law Changes

There are at least three general criticisms of the *Elkins* family law changes. First, they represent an overreaction to a particularly bad decision in a single case. Second, the information gathering processes relied upon by the Elkins Task Force in making its recommendations were lacking in important respects. Third, the changes make an ill-advised reversal of course from the strong trend in family law in recent decades away from adversary litigation.

###### i. Bad Decisions Make Bad Law

One of Justice Oliver Wendell Holmes’ famous aphorisms is that hard cases make bad law.<sup>136</sup> Well, bad decisions make bad law as well, and it is quite clear that Judge Baskin made a bad decision in essentially depriving Jeffrey Elkins of any meaningful opportunity to be heard regarding his divorce trial.<sup>137</sup> However, the changes recommended by the Task Force and adopted by the Legislature go far beyond what would have been required to remedy the injustice caused in the *Elkins* case.

First, as the California Supreme Court’s decision makes abundantly clear, the *Elkins* appeal involved a *trial* rather than a mere motion hearing.<sup>138</sup> And of course, the due process implications of restricting testimony at the final hearing in a proceeding are much more significant than for doing so at a preliminary hearing. Indeed, the court expressly stated that its decision should not be read as applying to motion hearings rather

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<sup>135</sup> FAM. § 3042(d).

<sup>136</sup> See *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

<sup>137</sup> Unfortunately, Mr. Elkins was not able to benefit from the remand ordered by the California Supreme Court in his case. He died in 2008 before the case could be tried. Barbara Kate Repa, *Reform or Wreckage*, CAL. LAW., Aug. 2011, at 26, 30 [hereinafter Repa, *Reform or Wreckage*].

<sup>138</sup> *Elkins v. Superior Court*, 163 P.3d. 160, 168–69 (Cal. 2007).

than trials.<sup>139</sup> Yet, the Task Force and subsequent legislation went well beyond the scope of what the court intended by extending the requirement for live testimony to motion hearings as well as to trials.

The Task Force rightly recognized that the results of motion hearings in family law cases may have a greater impact on the outcome of proceedings than in other areas of practice.<sup>140</sup> Particularly where custody of a child is concerned, a court will be highly reluctant to disturb the results of a *pendente lite* motion where the effect will be changing the custodial arrangement of a minor child.<sup>141</sup> Such disruptions can be highly detrimental to children, and courts' reluctance to change custody back and forth between parents over the course of family law litigation makes sense.<sup>142</sup> Thus, it is arguable that decisions in motion hearings in family court set something of a status quo that courts are reluctant to disturb; therefore, the importance of such pre-trial motions is elevated, and the drawbacks of requiring live testimony at such hearings are nonetheless warranted.

However, it is clear that regardless of the import of pre-trial hearings in family law cases, litigants still get a final (and indeed their most extensive) "bite at the apple," should they choose to exercise their right to a final trial on the contested custody issues in the case. Preserving a right to present live testimony at such a final hearing would address the due process concerns the California Supreme Court raised in *Elkins*, while at the same time failing to unleash all of the negative consequences, discussed below, that will accompany increased use of live testimony in pre-trial motion hearings in family law cases. Thus, the Task Force and the Legislature should have stopped at the court's call for increased use of live testimony at trials, rather than greatly expanding the scope of the court's suggestion.

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<sup>139</sup> *Id.* at 162 n.1.

<sup>140</sup> ELKINS FINAL REPORT, *supra* note 26, at 27–28.

<sup>141</sup> *See, e.g.*, Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 112–13 (1997) (describing this phenomenon as "sequentiality").

<sup>142</sup> *See, e.g.*, *In re Marriage of Burgess*, 913 P.2d 473, 478–79 (Cal. 1996) ("[T]he paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—weigh heavily in favor of maintaining ongoing custody arrangements.").

ii. The Information Gathering Processes Used by the *Elkins* Task Force Were Flawed

It is true that the Elkins Task Force included a broad cross-section of judges, court personnel, and family law practitioners.<sup>143</sup> However, notably absent from the Task Force were any academics. And while the Task Force purports to have examined data available from the California Administrative Office of the Courts regarding the practice of family law in California,<sup>144</sup> there is no indication that the Task Force paid any attention whatsoever to the vast amount of existing scholarly research and literature regarding adversary justice generally and family law litigation in particular. An analysis of that literature reveals a profound skepticism regarding the efficacy of the adversary processes that the Elkins legislation reintroduces into family law practice, and a particular concern about the damage caused to the participants in family law disputes from the employment of adversary processes to resolve such disputes.<sup>145</sup>

Additionally, the Elkins Task Force displayed a “consumerist” approach to its fact-finding and analysis regarding the pre-existing family law dispute resolution processes. The Task Force, prior to issuing its recommendations, surveyed a broad range of “consumers” of the services of the family law department during its fact-finding inquiry.<sup>146</sup> These consumers included lawyers, litigants, court personnel, and judges. Moreover, it is clear that, in issuing its recommendations, the Task Force took great pains to respond to the concerns expressed by these consumers of its services. Indeed, the Task Force’s Final Report frequently states where a particular recommendation is responsive to a comment or comments made by one of its consumers.<sup>147</sup>

Of course it is laudatory when a government entity such as a court seeks to assert a high level of responsiveness to the constituents it exists to serve. More government entities should seek to emulate the customer service orientation of the task force. However, it is also possible to take this customer service orientation too far. For example, the consumers of judicial

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<sup>143</sup> See ELKINS FINAL REPORT, *supra* note 26, at ii–iii (listing the members of the Elkins Task Force).

<sup>144</sup> *Id.* at 14 n.7.

<sup>145</sup> See *infra* notes 148–56 and accompanying text.

<sup>146</sup> ELKINS FINAL REPORT, *supra* note 26, at 11–14.

<sup>147</sup> See, e.g., ELKINS FINAL REPORT, *supra* note 26, at 28 (“According to the surveys conducted and the response of the members of the public who presented testimony to the task force, these limitations on the right to present live testimony and the resulting exclusive use of declarations are significant concerns to attorneys and the self-represented alike.”).

services are unlikely to be experts in important matters such as court administration and substantive family law, let alone broader concepts like due process. And, as pointed out above, the task force seems to have paid little attention to scholarly writing, academic experts, or broader empirical studies regarding the effectiveness of various approaches to dispute resolution in family courts. While the Task Force's customer service orientation is commendable, that orientation would have been more effective coupled with the consideration of the broader range of important information suggested here that the task force should have, but failed, to consider.

### iii. The Paradigm Shift Away from Adversary Litigation

Over the past four decades, many family law scholars have concluded that traditional adversary litigation measures are poorly suited to resolving family law disputes, particularly those involving children.<sup>148</sup> Family law disputes differ significantly from the typical tort, contract, and property disputes that our adversary system was designed to address. Litigation involving most disputes in these other areas of law is "backward looking": courts must determine what happened with regard to a past event or events, and assign blame for what went wrong.<sup>149</sup> By contrast, while custody cases do involve a certain measure of fact finding with regard to past events, the ultimate goal of such proceedings is to make a prediction regarding future possibilities—for example, which potential custody arrangement will serve the best interests of the child.<sup>150</sup> Yet adversarial litigation methods were not designed to predict the future, but rather to assess and assign a remedy regarding past events, and they do a poor job in making such future predictions.<sup>151</sup>

By its very nature, the adversary system encourages litigants to assert extreme positions. Indeed, one of the

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<sup>148</sup> See, e.g., Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 501 (2001) [hereinafter Elrod, *High Conflict*]; Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal To Transform the Adversarial System*, 42 FAM. CT. REV. 203, 203 (2004); Murphy, *supra* note 5, at 894; Andrew Schepard, *The Evolving Judicial Role in Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 428 (2000) [hereinafter Schepard, *Evolving Judicial Role*]; Singer, *supra* note 6, at 363; Weinstein, *supra* note 141, at 82.

<sup>149</sup> Elrod, *High Conflict*, *supra* note 148, at 501; SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 3; Weinstein, *supra* note 141, at 98.

<sup>150</sup> Elrod, *High Conflict*, *supra* note 148, at 501; SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 3; Weinstein, *supra* note 141, at 98.

<sup>151</sup> Elrod, *High Conflict*, *supra* note 148, at 501; Firestone & Weinstein, *supra* note 148, at 205; Weinstein, *supra* note 141, at 111 ("Decisions about the best interests of the child rest upon an effort to predict what will occur in the future . . . [and] [c]learly, neither judges nor attorneys have the training to make such predictions . . .").

foundational premises of the adversary system is that truth is most likely to emerge from the presentation of competing and contrasting positions.<sup>152</sup> The presentation of competing extremes is often enhanced by the zealous advocacy responsibilities of the parties' lawyers.<sup>153</sup> Naturally, this process can create additional friction between the parties to the dispute, who would not be suing one another in the first place if their relationship were not already strained. However, in tort, contract, and property contexts, the increased friction is tolerable because, once the lawsuit is over and the dispute resolved, the parties go their separate ways.<sup>154</sup> Yet, this is not so in most family law contexts, particularly not in custody litigation. Except in unusual cases, both parents will continue to play a major role in their child's life, and they will need to co-parent successfully, often for many years into the future, in order to serve the best interests of the child. Yet, the strains engendered by hotly contested custody litigation may have a highly negative impact on the parents' ability to work together in future co-parenting.<sup>155</sup>

The tendency to assert extreme positions takes place at every stage of the adversarial litigation process.<sup>156</sup> In their pleadings, the parties advance the most extreme positions possible, if only to keep their options open later in the case. Indeed, the "all or nothing" quality of litigation judgments requires parties to ask for everything, or risk receiving nothing at the end of the case.<sup>157</sup> In a typical custody case, parents exaggerate their own parenting strengths, as well as the other parent's weaknesses, in an effort to enhance their position in the litigation. This process of exaggeration continues at every further stage of the litigation process:<sup>158</sup> in discovery events such as depositions, interrogatories, and document requests; in settlement negotiations; and, of course, reaches its apogee during

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<sup>152</sup> See, e.g., Cantrell, *supra* note 7, at 6; Judge Leonard Edwards (ret.), *Comments on the Miller Commission Report: A California Perspective*, 27 PACE L. REV. 627, 635 (2007) [hereinafter, Edwards, *Comments*]; Firestone & Weinstein, *supra* note 148, at 203.

<sup>153</sup> See, e.g., Elrod, *High Conflict*, *supra* note 148, at 501; Firestone & Weinstein, *supra* note 148, at 204; Andrew Schepard, *Kramer vs. Kramer Revisited: A Comment on The Miller Commission Report and the Obligation of Divorce Lawyers for Parents to Discuss Alternative Dispute Resolution with Their Clients*, 27 PACE L. REV. 677, 685–86 (2007) [hereinafter, Schepard, *Kramer*]; Weinstein, *supra* note 141, at 90–91.

<sup>154</sup> Elrod, *High Conflict*, *supra* note 148, at 501.

<sup>155</sup> See Firestone & Weinstein, *supra* note 148, at 204; Weinstein, *supra* note 141, at 122.

<sup>156</sup> See, e.g., Edwards, *Comments*, *supra* note 152, at 636 (describing adversarial tactics in an at-fault divorce proceeding).

<sup>157</sup> Weinstein, *supra* note 141, at 87–88.

<sup>158</sup> Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 131 (2002).

the contested courtroom hearing or trial.<sup>159</sup> The likelihood of increased hostility between the parties at every stage of the process as a result of this competition is obvious.<sup>160</sup>

Over the past four decades, psychologists and other researchers have developed a more sophisticated understanding of the impact that divorce and child custody litigation has on the children involved. At the beginning of this cycle, researchers held the perception that in virtually all cases, divorce had a significantly negative psychological impact on children.<sup>161</sup> However, over time, psychologists have come to conclude that not all children suffer long-term harm as a result of divorce.<sup>162</sup> Indeed, the pivotal factor in determining children's long-term adjustment to family dissolution relates to the amount of intra-family conflict to which the children are exposed.<sup>163</sup> This exposure can occur within the family home prior to the break-up of the family, or during the divorce/custody litigation, or post-litigation as the parents struggle to co-parent the child after the marriage has been dissolved.<sup>164</sup> In virtually all cases, increases in the amount of intra-family conflict result in increased negative outcomes for the children as they age.<sup>165</sup> Thus, adversary litigation events that increase the amount of conflict between parents during the litigation process, and then have a negative impact on the on-going, post-dissolution relationship of the parents, will logically result in adverse consequences to the children involved.

In recognition of these findings by both legal scholars and psychologists, courts have taken significant steps to modify traditional adversary processes in family law by moving from those procedures that engender conflict between the litigants to newer and emerging processes designed to decrease conflict between the litigants. Perhaps the most widespread and best known of such changes is the move toward mediation of family

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<sup>159</sup> See *infra* Part IV(B)(i).

<sup>160</sup> See Edwards, *Comments, supra* note 152, at 637.

<sup>161</sup> See Paul R. Amato, *Good Enough Marriages: Parental Discord, Divorce, and Children's Long-Term Well-Being*, 9 VA. J. SOC. POL'Y & L. 71, 72 (2001); Cassandra Brown, Comment, *Ameliorating the Effects of Divorce on Children*, 22 J. AM. ACAD. MATRIMONIAL LAW. 461, 461 (2009); SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 28.

<sup>162</sup> Amato, *supra* note 161, at 71–72; Elizabeth S. Scott, *Divorce, Children's Welfare, and the Culture Wars*, 9 VA. J. SOC. POL'Y & L. 95, 100 (2001).

<sup>163</sup> See, e.g., Brown, *supra* note 161, at 462; Elrod, *High Conflict, supra* note 148, at 497; John H. Grych, *Interparental Conflict as a Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs*, 43 FAM. CT. REV. 97, 98 (2005); Kelly, *supra* note 158, at 129–30; Murphy, *supra* note 6, at 894–95; SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 31; Scott, *supra* note 162, at 98–99; Singer, *supra* note 6, at 363.

<sup>164</sup> Brown, *supra* note 161, at 462.

<sup>165</sup> See Elrod, *High Conflict, supra* note 148, at 497.

law disputes, as discussed above.<sup>166</sup> Mediation is meant to encourage parties to resolve their differences rather than to engage in protracted courtroom battles.<sup>167</sup> Other examples of procedures developed in family court to reduce litigation conflict include: differentiated case management,<sup>168</sup> parenting plans,<sup>169</sup> parent education classes,<sup>170</sup> parenting coordinators,<sup>171</sup> neutral custody evaluations,<sup>172</sup> and collaborative law.<sup>173</sup> A detailed discussion of these procedures lies well beyond the scope of the present article. Though not each of these reforms has been adopted in every jurisdiction, the overall move toward the adoption of non-adversarial methods to help to resolve family law disputes has been widespread, national, and overwhelming in scope. And, as pointed out earlier, California has been a leader in the adoption of such methods in many respects.<sup>174</sup>

Certainly, the *Elkins* changes represent a 180-degree turn from this long-standing trend away from adversarial litigation methods in family law cases. As the Elkins Task Force pointed out, in many courts the presentation of live testimony had become the exception, rather than the rule, in contested family law proceedings, particularly in motion proceedings rather than trials.<sup>175</sup> Yet, as will be discussed in greater detail below, the presentation of live testimony through witnesses in court represents the most adversarial of all possible litigation activities.<sup>176</sup> The legislation also redefines the role of minor's counsel more along the lines of the traditional adversarial attorney, rather than the guardian ad litem-like role minor's

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<sup>166</sup> See *supra* notes 129–31 and accompanying text.

<sup>167</sup> See Elrod, *High Conflict*, *supra* note 148, at 527 & n.124; Schepard, *Kramer*, *supra* note 153, at 682 (discussing benefits of mediation in custody disputes); Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 FAM. L.Q. 659, 662 (2008).

<sup>168</sup> Elrod, *High Conflict*, *supra* note 148, at 521–22; Ver Steegh, *supra* note 167, at 668–69.

<sup>169</sup> Elrod, *High Conflict*, *supra* note 148, at 529–30.

<sup>170</sup> Grych, *supra* note 163, at 103; Shelley Kierstead, *Parent Education Programs in Family Courts: Balancing Autonomy and State Intervention*, 49 FAM. CT. REV. 140, 140 (2011); Susan L. Pollet & Melissa Lombreglia, *A Nationwide Survey of Mandatory Parent Education*, 46 FAM. CT. REV. 375, 375 (2008).

<sup>171</sup> See Brown, *supra* note 161, at 477–78; Elrod, *High Conflict*, *supra* note 148, at 533; Joi T. Montiel, *Why and How Alabama Courts Should Use Parenting Coordination in Divorce Cases*, 72 ALA. LAW. 300, 301 (2011); Ver Steegh, *supra* note 167, at 663–64.

<sup>172</sup> Mary Kay Kisthardt & Barbara Glesner Fines, *Making a Place at the Table: Reconceptualizing the Role of the Custody Evaluator in Child Custody Disputes*, 43 FAM. CT. REV. 229, 229–30 (2005); Ver Steegh, *supra* note 167, at 663.

<sup>173</sup> See Brown, *supra* note 161, at 479–80; Ver Steegh, *supra* note 167, at 667–68.

<sup>174</sup> SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 83–84 (comparing the dissolution process in New York with that of California); Schepard, *Evolving Judicial Role*, *supra* note 148, at 397–98.

<sup>175</sup> ELKINS FINAL REPORT, *supra* note 26, at 27.

<sup>176</sup> See *infra* Part IV(B)(i).

counsel had come to play in family law cases in California.<sup>177</sup> This too will have the effect of increasing the adversarial nature of custody litigation. Finally, the legislative changes making it more likely that children will testify or otherwise play an active role in family law litigation will also serve to further increase the adversarial quality of such proceedings.<sup>178</sup>

To be sure, the *Elkins* legislation does not represent a wholesale abandonment of collaborative procedures in California family law practice. After all, California was the first state to mandate mediation in child custody disputes,<sup>179</sup> and such mediation remains required under California law. However, some of the *Elkins* changes do suggest that California's commitment to non-adversary procedures is less steadfast than its first-to-mandate mediation status would appear to indicate. From early on, California counties have had the option to decide whether, in the event the parties are not able to reach an agreement as to the custody issues in their case, the mediator should make a recommendation to the court as to how the custody dispute should be resolved.<sup>180</sup> This practice has long been criticized by mediation scholars as violating some of the fundamental principles of mediation including confidentiality and neutrality.<sup>181</sup> Indeed, many would consider a "mediator's recommendation" to be an oxymoron.

While this author shares the criticisms of the manner in which mediation is conducted in "recommending" counties, those arguments have been fully aired elsewhere, and will not be repeated here.<sup>182</sup> The Elkins Task Force noted, but sidestepped the controversy surrounding mediator recommendations and made none of its own recommendations on the subject.<sup>183</sup> However, the Task Force did note that many family law litigants expressed frustration and surprise at the fact that what they presumed was a confidential process (mediation), was anything but, when they found their statements to the mediator quoted and provided directly to the judge in the case in the form of the

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<sup>177</sup> See *infra* Part IV(B)(ii).

<sup>178</sup> See *infra* Part IV(B)(iii).

<sup>179</sup> See Grillo, *supra* note 2, at 1552.

<sup>180</sup> See CAL. FAM. CODE § 3183 (West 2004).

<sup>181</sup> See, e.g., Edwards, *Comments, supra* note 152, at 649; Susan C. Kuhn, Comment, *Mandatory Mediation: California Civil Code Section 4107*, 33 EMORY L.J. 733, 776 (1984); Angel Lawrence, *Capitulate or Else: San Diego's Mandatory Mediation Process and Procedural Fairness*, 16 J. CONTEMP. LEGAL ISSUES 247, 251 (2007); see also Robert Rubinson, *Mapping the World: Facts and Meaning in Adjudication and Mediation*, 63 ME. L. REV. 61, 64 n.16 (2010) (illustrating the current debate over which style of mediation is best).

<sup>182</sup> See Kuhn, *supra* note 181, at 777.

<sup>183</sup> ELKINS FINAL REPORT, *supra* note 26, at 45.

mediator's recommendation.<sup>184</sup> As a result, the *Elkins* legislation did adopt a change in nomenclature, so that mediators in "recommending" counties will no longer be referred to as mediators, but rather will be referred to as "child custody recommending counselors."<sup>185</sup> This change further reflects the *Elkins* legislation's movement away from non-adversary procedures.

One family law scholar, at least at first glance, seems to support *Elkins'* move away from less adversarial processes in family law litigation. In an important article, Professor Jane Murphy argues that the adversary system needs to be revitalized in the case of family law.<sup>186</sup> Murphy is also referring to the "paradigm shift" discussed above in which the focus of family law dispute resolution has moved from the courtroom to settings such as the psychologist's office, the mediation conference room, etc. However, Murphy's critique is not about the different approaches within the adversarial system that might be used to adjudicate family law disputes, such as live testimony versus written declarations, what role minor's counsel should play, and child testimony versus other means of giving children a voice in custody disputes. Rather, her critique focuses on whether courts have the institutional competence to provide the extra-judicial processes of the therapeutic regime that has replaced the adversarial one,<sup>187</sup> and whether these processes adequately protect the due process rights of family law litigants, particularly poor ones.<sup>188</sup> The *Elkins* legislation does not, in fact, move away, in a fundamental fashion, from the types of extra-judicial process that concern Professor Murphy. Indeed, the *Elkins* legislation includes provisions for family centered case management, independent evaluation, and mediation of family law disputes. It will remain the case that the vast majority of California family law cases will settle before trial. Thus, Professor Murphy's critique does not provide support for the specific *Elkins* changes that are the focus of the present discussion.

#### B. Specific Criticisms of the *Elkins* Family Law Changes

This section of the article offers more particular criticisms of three specific legislative changes ushered in by the Elkins Report and its aftermath. The move to live testimony in family law motion hearings, the changes to the role of minor's counsel in

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<sup>184</sup> *Id.*

<sup>185</sup> FAM. § 3183(a).

<sup>186</sup> Murphy, *supra* note 6, at 891–92.

<sup>187</sup> *Id.* at 897.

<sup>188</sup> *Id.* at 910.

custody proceedings, and the increased reliance on child testimony in such proceedings will each be addressed.

i. The Presumption in Favor of Live Testimony in Motion Hearings

The increased reliance on live testimony in motion hearings in family law cases is the single most misguided aspect of the *Elkins* legislation. This change will do little if anything to increase the accuracy and reliability of judicial decision making in such proceedings. Yet the costs to litigants as a result of the increased adversarial nature that will be engendered by the increased use of live testimony will be significant. In an era of severe budgetary constraints for California courts, the increased use of live testimony will have a significant negative impact on both litigants and the court system itself in terms of increased delays and other costs in family law cases. Further, the primary purpose behind the increased use of live testimony, to increase fairness to self-represented litigants, will not be realized by the *Elkins* changes.

a. The Benefits of Live Testimony Do Not Outweigh the Costs of Increased Adversarialness

As discussed previously, the costs of increased conflict in family law litigation in terms of its negative impact on parties and their children are significant.<sup>189</sup> And no aspect of the family law litigation process engenders more conflict than the presentation of live testimony at a contested hearing. Indeed, the courtroom confrontation remains a staple of popular culture vehicles including film, television, and novels, precisely because of the drama and conflict engendered by such courtroom confrontations.<sup>190</sup> While such drama and conflict may be good for ratings, they are most certainly destructive for families that must continue to co-exist and work together after judgment is rendered.

Sticking with the popular culture theme for a moment, the 1979 Academy Award winning film *Kramer v. Kramer* was the first such vehicle to bring broad exposure to the brutality of the courtroom process for determining child custody disputes.<sup>191</sup> In

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<sup>189</sup> See *supra* Part IV(A)(iii).

<sup>190</sup> See generally Michael Asimow, *Popular Culture and the Adversary System*, 40 LOY. L.A. L. REV. 653, 655–56 (2007); James R. Elkins, *Popular Culture, Legal Films, and Legal Film Critics*, 40 LOY. L.A. L. REV. 745, 746 (2007); David Ray Papke, *Conventional Wisdom: The Courtroom Trial in American Popular Culture*, 82 MARQ. L. REV. 471, 472 (1999).

<sup>191</sup> Michael Asimow, *Divorce in the Movies: From the Hays Code to Kramer v. Kramer*, 24 LEGAL STUD. F. 221, 222 (2000).

the penultimate trial scene in the film, each of the parties' lawyers destroys the opposing party on cross-examination, pointing out that party's every possible failure, both as a parent and as a human being, in the most exaggerated terms, in order to sway the decision their way.<sup>192</sup> In the film, the father, played by Dustin Hoffman, leans over to his lawyer after the cross-examination of the mother, played by Meryl Streep, and asks the lawyer: "Did you have to be so hard on her?" The lawyer's response: "Do you want the kid or don't you?"<sup>193</sup>

As Hoffman's lawyer is cross-examining Streep, while the tears are streaming down the witness' face, the lawyer insists on an answer to his question whether she was a bad mother to her son.<sup>194</sup> Hoffman shakes his head and silently whispers the word "no" to his former wife, even while she admits on the stand to being a poor parent.<sup>195</sup> Of course, in a real courtroom proceeding, nothing along these lines would take place.<sup>196</sup> The father would at most sit by stoically as his lawyer rips the opposing party to shreds, and might in fact cheer internally given that the custody battle, at least for that moment, seems to be going his way. In any event, the damage to the parties' ability to cooperate in co-parenting the child in the future seems obvious.<sup>197</sup>

It is true that family law litigation has changed significantly since the time of *Kramer v. Kramer*.<sup>198</sup> However, it has done so via the proliferation of extra-judicial means of resolving family law disputes,<sup>199</sup> as has been discussed previously in this paper.<sup>200</sup> What happens inside the courtroom, when custody disputes cannot be resolved outside of it, in terms of live testimony, really

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<sup>192</sup> See David Ray Papke, *Peace Between the Sexes: Law and Gender in Kramer vs. Kramer*, 30 U.S.F. L. REV. 1199, 1204–05 (1996) (describing scenes from the movie) [hereinafter Papke, *Peace*]; Schepard, *Kramer*, *supra* note 153, at 681 (describing scenes from the movie).

<sup>193</sup> Schepard, *Kramer*, *supra* note 153, at 681. Other scholars have recognized the brutality of cross-examination, while at the same time recognizing its importance. See, e.g., MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 161 (1990); see generally Robert P. Lawry, *Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering*, 100 DICK. L. REV. 563 (1996) (exploring themes in cross-examination).

<sup>194</sup> Papke, *Peace*, *supra* note 192, at 1204–05.

<sup>195</sup> *Id.* at 1205.

<sup>196</sup> *Id.*

<sup>197</sup> To be fair, in the film, the mother ultimately relinquishes custody of the child to the father, even though she prevails in the courtroom proceeding. Schepard, *Kramer*, *supra* note 153, at 681. However, even at the end of the film, there is no indication that the wounds from the courtroom battle have healed, or that the father and mother will be able successfully to work together in parenting their child into the future.

<sup>198</sup> See, e.g., Schepard & Salem, *supra* note 8, at 516.

<sup>199</sup> *Id.*; see also SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 175.

<sup>200</sup> See Part IV(A)(iii).

has not changed all that much from the time of the film.<sup>201</sup> Again, the costs engendered by the contested courtroom custody hearing in terms of the parties' ability to work together in the future are significant.

Given the significant increase in conflict likely to follow from the increased reliance on live testimony family law hearings, one would have to believe that the benefits to result from such an increase are substantial, in order to make such a change. And sure enough, the Elkins Task Force displayed what I like to refer to as a "lawyer's faith" that the adversary process is the best available means for the resolution of disputes. Lawyers largely believe that the presentation of live testimony, through direct and cross-examination, is the best available means of discovering truth.<sup>202</sup> However, this belief truly is an article of faith, because there is virtually no empirical evidence that demonstrates that the use of live testimony, as opposed to other possible fact-finding methods, including the provision of written or other documentary submissions, provides for more accurate or reliable judicial decision making.<sup>203</sup>

This is particularly true in the area of family law, where all would agree that there is never one "correct" result of a child custody dispute, that courts could arrive at if they just employed better fact-finding and decision making procedures.<sup>204</sup> Instead, it is clear that there exist a range of possible acceptable outcomes of a custody dispute, and there is no process available that can demonstrate with certainty which of those outcomes will prove to be best in the future—given what I previously described as the "forward-looking" nature of custody determinations.<sup>205</sup> In a well-known article focusing on this indeterminacy in child custody decision-making, Professor Robert Mnookin only half-jokingly suggested that child custody determinations should be made by a coin toss, rather than by the adversary litigation methods currently employed.<sup>206</sup> Mnookin's point was that given that

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<sup>201</sup> See SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 83–84 (discussing the events of a divorce dispute in court).

<sup>202</sup> Asimow, *Popular Culture*, *supra* note 190, at 653; Edwards, *Comments*, *supra* note 152, at 635 ("Many attorneys pride themselves on their ability to use the adversarial process effectively to win their cases."); Weinstein, *supra* note 141, at 84–85 (discussing lawyers' stubborn allegiance to the adversary process).

<sup>203</sup> See, e.g., DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 32–40 (2007) (discussing the lack of empirical support for the adversarial system in achieving truth).

<sup>204</sup> See, e.g., Weinstein, *supra* note 141, at 111–12; cf. SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 25 ("[C]ourtroom combat between parents does not necessarily lead to wise or just judicial custody decision-making").

<sup>205</sup> See *supra* notes 150–63 and accompanying text.

<sup>206</sup> Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 289 (Summer 1975).

adversary litigation methods only marginally improve the odds of a “correct” determination of child custody disputes over the odds of a coin toss, the costs of such methods, including time and expense to the parties and the court system, increased conflict, etc., do not warrant the employment of such methods.<sup>207</sup>

Of course few of us would be willing to go so far as Mnookin suggests and leave child custody determinations to the toss of a coin.<sup>208</sup> Most of us believe that it is worth *trying* to improve on the odds of a coin toss in terms of getting better results in child custody disputes, though we know that arriving at a single, correct outcome in child custody proceedings is an unattainable goal. But where the costs of increased use of live testimony are well documented—in terms of time, expense, and intra-family conflict—and the benefits of increased use of live testimony are speculative and ephemeral at best, the *Elkins* legislation made the wrong choice in moving toward the increased use of live testimony. Families would be best served by quick and determinate custody decisions that would allow them to move rapidly toward working to make the new arrangement succeed, rather than drawing out the decision-making process and increasing the amount of conflict involved.

Another argument that may be made in favor of *Elkins*' move toward live testimony is that whether or not the increased use of live testimony improves the outcome of child custody disputes, parents have a due process right to present live testimony in judicial proceedings that implicate their fundamental right to determine the nature of the relationship they will have with their children.<sup>209</sup> However, the prioritizing of parental rights over the child's interest in minimizing conflict and having the best possible ongoing relationship with both parents, has been one of the main focuses of the critics of reliance on adversary litigation methods as the primary means of resolving family law disputes.<sup>210</sup> While parental rights are certainly an important concern, the state has *parens patriae* obligations to ensure the welfare of children that are equally weighty, and children have interests that must be considered as well.<sup>211</sup> As the California Supreme Court pointed out, parents' due process rights are adequately protected when they have a right to present live

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<sup>207</sup> *Id.* at 289–90.

<sup>208</sup> Mnookin acknowledges as much. *Id.* at 290–91.

<sup>209</sup> See *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

<sup>210</sup> See, e.g., Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 639–40 (2006); Firestone & Weinstein, *supra* note 148, at 203–04; Schepard, *Kramer*, *supra* note 153, at 687–88; Weinstein, *supra* note 141, at 88.

<sup>211</sup> *Troxel*, 530 U.S. at 86–88 (Stevens, J., dissenting).

testimony at a final trial in child custody proceedings.<sup>212</sup> Due process does not compel the presentation of live testimony at motion hearings, as the task force seemed to believe, and children's interests in positive family dynamics going forward outweigh whatever interests parents have in presenting live testimony at motion hearings.

b. Live Testimony Will Add to Delays in the Family Law Process and Raise Other Litigation Costs as Well

One of the Task Force's major goals was to reduce delay in family law proceedings. The Task Force rightly noted that delays can be particularly problematic in family law cases.<sup>213</sup> It is clear that hearings involving live testimony will generally take longer to conduct than prior hearings where live testimony was the exception rather than the rule. Given that dockets in family law departments in California are already overcrowded,<sup>214</sup> the new rules favoring live testimony will only exacerbate such crowding and delays.<sup>215</sup>

The Task Force's response to this concern was to call for greater devotion of resources to family law cases.<sup>216</sup> The Task Force pointed out that the family law department has traditionally received short shrift when it comes to budgetary allocations within the trial court system.<sup>217</sup> However, it is simply reckless to count on increased resources at a time when California and its courts face an unprecedented budgetary crisis.<sup>218</sup> At least one conspiracy theorist contends that the Task Force deliberately sought to "crash" the family court system, making the delivery of greater resources and other reforms unavoidable.<sup>219</sup> A more realistic view is that the Task Force engaged in a high stakes game of "chicken" with the Administrative Office of Courts and the Legislature over increased funding for the family law department. Given California's budgetary realities, this seems like a game the Task Force is certain to lose, although the real losers will be California family law litigants who will face even greater delays than is currently the case in having their cases adjudicated. Those litigants who can afford it are likely to turn increasingly to

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<sup>212</sup> *Elkins v. Superior Court*, 163 P.3d 160, 170 (Cal. 2007).

<sup>213</sup> ELKINS FINAL REPORT, *supra* note 26, at 39.

<sup>214</sup> *See, e.g.*, Edwards, *Comments*, *supra* note 152, at 644–45.

<sup>215</sup> Repa, *Reform or Wreckage*, *supra* note 137, at 44.

<sup>216</sup> ELKINS FINAL REPORT, *supra* note 26, at 75.

<sup>217</sup> *Id.*

<sup>218</sup> Repa, *Reform or Wreckage*, *supra* note 137, at 44.

<sup>219</sup> *Id.* at 43–44.

private dispute resolution mechanisms.<sup>220</sup> Those who cannot will be left to deal with the overburdened public system. The resulting “two-tiered” system for resolving family law disputes—private for those who can afford it and public for those who cannot—will be a particularly sad legacy of the *Elkins* changes.<sup>221</sup>

The Task Force was also of the view that the current practice of adjudicating motions primarily through written submissions increases the cost of family law litigation. It asserted that attorneys frequently spend a great deal of time drafting and re-drafting lengthy declarations,<sup>222</sup> driving up the fees charged to their clients. Such declarations often include hearsay and other inadmissible material, thus requiring opposing counsel to invest a great deal of time, again at great cost to the parties, drafting objections to inadmissible material.<sup>223</sup>

While these are serious concerns,<sup>224</sup> the Task Force’s assumption that a shift to full blown evidentiary hearings will mean less attorney time, and therefore less expense to litigants than prior practice, seems misguided. First of all, it is clear that the evidentiary hearings themselves will take longer than their predecessor hearings, as it will take a good deal of time for witnesses to testify to the evidence to be submitted. Moreover, given evidentiary objections and other delays that can pop up during evidentiary hearings, it seems like the increase in time will be substantial. Also, because many attorneys charge their clients *more* for time in court than time spent working outside of court, it may be that the shift to evidentiary hearings will result in an increase in attorney’s fees to litigants.

However, even if the Task Force is correct that it will take less time to present evidence through live testimony than it would take to present the same evidence in written form, a net cost savings to clients relies on the assumption that attorneys will spend virtually no time outside of court preparing for the evidentiary hearings. But anyone even remotely familiar with trial practice knows that good trial attorneys spend an extraordinary amount of time preparing their witness examinations, as well as preparing the witnesses themselves for direct and cross-examination. It is downright fanciful to think

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<sup>220</sup> *Id.* at 44.

<sup>221</sup> See Ver Steegh, *supra* note 167, at 659 (discussing two-tiered justice system that results from overburdened and under-funded family court systems).

<sup>222</sup> ELKINS FINAL REPORT, *supra* note 26, at 27.

<sup>223</sup> *Id.*

<sup>224</sup> California did address these concerns to a certain extent by modifying its statewide court rules in family law cases to limit the length of declarations in most instances to ten pages. See CAL. R. CT. 5.118(f) (as amended effective July 1, 2011).

that the shift to live testimony will save attorney time in contrast to current practice when preparation time and hearing time are taken into account. Yet even if the Task Force is correct, a conclusion that clients will save money in attorney's fees under the new regime requires a further assumption that attorneys will stop spending time drafting, filing, and objecting to evidentiary declarations once the opportunity to present live testimony at hearings is available. But this too seems like an unfounded assumption. Attorneys will continue to submit evidentiary declarations at hearings, in addition to live testimony, at continued high costs to clients for a variety of reasons.

First, the *Elkins* decision and section 2009 of the California Civil Procedure Code make clear that evidentiary declarations are still admissible at motion hearings despite the *Elkins* legislation.<sup>225</sup> So attorneys will have to make strategic decisions about which evidence they wish to present through live testimony, and which evidence through declaration. Further, section 217 of the California Family Code and Rule 5.119 of the California Rules of Court still give judges a great deal of discretion as to how live testimony is admitted, and what live testimony to admit. There is a great deal of uncertainty among family law practitioners regarding exactly how the move to live testimony will play out in practice.<sup>226</sup> Thus, at least until practice under the *Elkins* legislation sorts itself out, it is likely that cautious attorneys will err on the side of presenting evidence in both formats, rather than risk that the evidence will not be admitted if one format is relied on to the exclusion of the other. Indeed, many family law attorneys who are not experienced in the presentation of live evidence will likely submit evidentiary declarations to cover in the event that they fail to introduce successfully certain evidence through live testimony. Additionally, given the scheduling challenges that are going to be imposed by the *Elkins* legislation,<sup>227</sup> cautious attorneys will also present evidentiary declarations to cover for the fact that they may not be able to secure enough hearing time to present all of the evidence they wish to present through live testimony. Thus, the end result is likely to be a combination of live and written testimony at family law hearings, ultimately increasing the amount of attorney time involved in preparing for and conducting

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<sup>225</sup> CAL. CIV. PROC. CODE § 2009 (West 2007).

<sup>226</sup> Repa, *Reform or Wreckage*, *supra* note 137, at 44 ("Many family law practitioners say the recommendations could actually wreak havoc with the panel's stated goals."); *see also* CAL. FAM. CODE § 217 (West 2011); CAL. R. CT. 5.119 (as amended effective July 1, 2011).

<sup>227</sup> *See supra* notes 214–15 and accompanying text.

such hearings, resulting in an increase in the cost of litigation to clients rather than the decrease anticipated by the Task Force.

c. The Issue of Self-Represented Litigants

In recent decades, there has been a virtual explosion in the number of self-represented litigants appearing in our courts.<sup>228</sup> This development has perhaps been most prevalent in the family law branch of our court system.<sup>229</sup> The strains that this development has placed upon judges, court personnel, and court systems as a whole are palpable.<sup>230</sup> Perhaps more importantly, the litigants who represent themselves often find their experiences in the judicial system to be extremely frustrating,<sup>231</sup> and there is little doubt that self-represented litigants often obtain significantly poorer outcomes through their judicial proceedings than would have been the case had they been represented by competent counsel.<sup>232</sup>

Despite these facts, there is little reason to believe that the flood of self-represented litigants is likely to abate in the foreseeable future. For this reason, judges, court administrators, and lawyers have responded with a variety of innovations in order to address the problems created by the increase in self-representation.<sup>233</sup> There is little doubt that both the California Supreme Court in *Elkins*, and the Task Force that followed it, were trying to address both the specific barriers imposed on Jeffrey Elkins in trying to represent himself effectively in his individual case, as well as the barriers imposed on self-represented litigants more generally in family court. However,

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<sup>228</sup> See, e.g., Feitz, *supra* note 31, at 194; Stephen Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 440 (2009); Drew A. Swank, Comment, *The Pro Se Phenomenon*, 19 B.Y.U. J. PUB. L. 373, 376 (2005) [hereinafter Swank, *Pro Se*].

<sup>229</sup> See, e.g., Berenson, *Family Law*, *supra* note 31, at 110; Goldschmidt, *supra* note 31, at 36.

<sup>230</sup> See, e.g., Berenson, *Family Law*, *supra* note 31, at 112 (“The burgeoning number of self-represented litigants, particularly in the family law area, has placed great demands on the limited time resources available to court staff.”); Feitz, *supra* note 31, at 195; Landsman, *supra* note 228, at 449; Swank, *Pro Se*, *supra* note 228, at 384.

<sup>231</sup> See Goldschmidt, *supra* note 31, at 37.

<sup>232</sup> See Engler, *supra* note 33, at 1988.

<sup>233</sup> Among these innovations are simplified court forms that laypersons can fill out, in place of traditional pleadings. Berenson, *Family Law*, *supra* note 31, at 123; Margaret B. Flaherty, Note, *How Courts Help You Help Yourself: The Internet and the Pro Se Divorce Litigant*, 40 FAM. CT. REV. 91, 93 (2002). Educational programs to assist self-represented litigants in filling out these forms and in representing themselves in court have been provided by court personnel and a variety of legal services providers. See Berenson, *Family Law*, *supra* note 31, at 127; Feitz, *supra* note 31, at 204; Landsman, *supra* note 228, at 455–56. Such forms, along with assistance in filling them out, can be made available online, to make them even more accessible to self-represented litigants. Flaherty, *supra*, at 91.

there are serious questions whether the means chosen by the Task Force and the subsequent legislation were the best possible ways to achieve this goal.

The Task Force and the Legislature rejected an approach that provided detailed rules regarding the steps that need to be taken prior to their hearings in order for self-represented litigants to have their evidence considered by the court.<sup>234</sup> Instead, they favored an approach that defers most of that work to the hearings themselves, in terms of decisions regarding the admissibility of different types of live testimony at the hearing. But there is no reason to believe that self-represented litigants will do a better job of navigating the rules of evidence and other procedural requirements during the course of their hearings than they did in relation to the pre-trial filings required by prior rules. Thus, the Task Force and the Legislature seem to rely on the ability of trial judges to play an active role in assisting self-represented litigants to present their cases during hearings, whereas judges are not able to play such a role with regard to filings that must be provided prior to hearings.

It is true that a number of academics have similarly focused on the role of trial judges as a critical component in assisting self-represented litigants to present their cases more effectively.<sup>235</sup> However, many judges themselves express deep discomfort with a role that would have them be more active in assisting one or more of the parties to a dispute in presenting their cases. At heart, many judges see such a role as violating the fundamental tenet of judging—neutrality.<sup>236</sup> Indeed, particularly where one of the parties is represented by counsel and one is not, assisting the self-represented party might even be seen as punishing the represented party for their decision to retain an attorney. Further, many judges feel extremely uncomfortable offering assistance to a litigant when the judge actually knows very little about the details of, and facts and circumstances surrounding, the litigant's case. Add in caseload pressures, frequent rotations in and out of different trial court departments, and often little experience with family law, and the primary reliance on trial

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<sup>234</sup> See *supra* notes 65–71 and accompanying text.

<sup>235</sup> See, e.g., Baldacci, *supra* note 33, at 688; Engler, *supra* note 33, at 2028; Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 368 (2008); Goldschmidt, *supra* note 31, at 48.

<sup>236</sup> See, e.g., Hon. Robert Bacharach & Lyn Entzeroth, *Judicial Advocacy in Pro Se Litigation: A Return to Neutrality*, 42 IND. L. REV. 19, 42–43 (2009); Hon. Gerald W. Harcastle, *Adversarialism and the Family Court: A Family Court Judge's Perspective*, 9 U.C. DAVIS J. JUV. L. & POL'Y 57, 120–21 (2005); see also Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1583 (2005).

judges to help self-represented litigants effectively to present their cases seems misguided.<sup>237</sup>

Ultimately, it may be necessary for courts to play a more active role in assisting self-represented litigants to present their cases. However, it seems that the burden of dealing with the self-representation crisis should continue to be shared by judges with other court personnel, bar associations, legal services providers, and other public and private resources. Certainly counties like Contra Costa could have and should have done a better job of drafting their pre-hearing rules and procedures to be more accessible to lay persons such as Jeffrey Elkins, and also could have done more to provide assistance, both inside and outside of the courthouse, to self-represented litigants in complying with those rules and procedures. But it is simply too much to ask trial judges alone to make up for those failures.

ii. Modifying the Role of Minor's Counsel in Custody Cases

In theory, two distinct approaches are available to provide children with a “voice” in child custody proceedings. The first approach involves appointing a GAL to represent the child's interest in the litigation.<sup>238</sup> The GAL is charged with advancing the “best interests” of the child in the case.<sup>239</sup> While the GAL may be a lawyer, a non-lawyer may also be appointed.<sup>240</sup> The court may utilize any one of a number of approaches to receiving the GAL's input into the decision making process. For example, the GAL may testify as a witness during the custody proceedings, but more commonly, the GAL presents a written report to the court.<sup>241</sup>

Aside from appointing a GAL, a court may also appoint an attorney to represent the child in custody proceedings. In such instances, there is a divergence of roles that can be played by the child's attorney. First, to the extent the child is old enough and mature enough to have formulated an expressed preference regarding the outcome of the case, the attorney may work to

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<sup>237</sup> Repa, *Reform or Wreckage*, *supra* note 137, at 30.

<sup>238</sup> See Elrod, *Client-Directed Lawyers*, *supra* note 36, at 907–08 (“[Guardian ad litem] advocate for the best interests of the child by conducting an investigation, writing reports or otherwise making recommendations with some required to inform the court if the child's wishes differ . . . .”); Dana E. Prescott, *The Guardian Ad Litem in Custody and Conflict Cases: Investigator, Champion, and Referee?*, 22 U. ARK. LITTLE ROCK L. REV. 529, 537–39 (2000).

<sup>239</sup> SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 142.

<sup>240</sup> *Id.* at 143.

<sup>241</sup> See Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 FAM. L.Q. 105, 115–16 (2003) [hereinafter Elrod, *Raising the Bar*].

advance the expressed preference of the child.<sup>242</sup> Indeed, this is consistent with the traditional understanding of the role of an attorney—to advocate for the lawful objectives of the client.<sup>243</sup> On the other hand, if the child is either too young or too immature to express a preference as to the outcome of the proceedings, or is unwilling to do so, the attorney may represent the child on a “best interests” or “substituted judgment” basis.<sup>244</sup>

In practice, jurisdictions are all over the map in terms of the variations and combinations among these alternatives that are actually employed. For example, some states provide for the appointment of an attorney for the child, but define the attorney’s role similarly to that of a GAL as described above.<sup>245</sup> Other states provide for hybrid attorney/GAL roles, or other variations on the above-described alternatives.<sup>246</sup> Further, some jurisdictions call for attorneys to represent children involved in custody proceedings on a best interests basis even if the child is mature enough to express a preference as to the outcome of the proceedings.<sup>247</sup> In such instances, the attorney might advocate for an outcome that is at odds with the expressed preference of the child if the attorney believes that the child’s preference is not the outcome that would be in the child’s best interests.<sup>248</sup>

Additionally, appointing a GAL and an attorney are not mutually exclusive options. A court may be able to appoint both in the same case.<sup>249</sup> In such circumstances, the most common approach is for the attorney to act as lawyer for the GAL, who stands in the place of the child client in terms of directing the lawyer’s activities. However, it would be possible in some circumstances for the attorney to advocate for the child’s expressed wishes, and for the GAL to advocate for what the GAL believes to be in the child’s best interests—where the GAL

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<sup>242</sup> See Elrod, *Client-Directed Lawyers*, *supra* note 36, at 911; SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 142.

<sup>243</sup> See, e.g., David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 470–71 (1990).

<sup>244</sup> See Elrod, *Client-Directed Lawyers*, *supra* note 36, at 910–11.

<sup>245</sup> See Atwood, *Best Interests*, *supra* note 44, at 391 (“[M]ost states in the United States continue to permit children’s lawyers to engage in best interests representation.”); Barbara Ann Atwood, *The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L.Q. 63, 75 (2008) [hereinafter Atwood, *Bridging the Divide*] (“[M]any states routinely appoint lawyers as guardians ad litem without careful delineation of the distinctions between the two roles.”); Elrod, *Client-Directed Lawyers*, *supra* note 36, at 908.

<sup>246</sup> See Atwood, *Best Interests*, *supra* note 44, at 391–92; Elrod, *Client-Directed Lawyers*, *supra* note 36, at 908–09.

<sup>247</sup> See *supra* notes 37–42 (discussing California law and the role of the lawyer).

<sup>248</sup> See, e.g., SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 144 (discussing *Carballeira v. Shumway*, 710 N.Y.S.2d 149 (N.Y. App. Div. 2000)).

<sup>249</sup> Atwood, *Best Interests*, *supra* note 44, at 391–92.

believes that the child's expressed preferences are contrary to their best interests. However, in family court, there are generally no public resources to pay for either GALs or attorneys for children in custody cases.<sup>250</sup> Given, as discussed above, that most parties do not even hire attorneys to represent themselves in custody proceedings, it seems unlikely that most parties will have the resources to pay for either an attorney for the child, or a GAL, let alone both, in the context of custody proceedings. Thus, child representation, in whatever form, is the exception, rather than the rule in custody proceedings.

In California, prior to the *Elkins* legislation, the statutory scheme for child representation in family court should perhaps be described as a combination between the roles of GAL and best interests attorney. Formally, California law did not provide for the appointment of a GAL in family court.<sup>251</sup> However, sections 3150 and 3151 of the California Family Code do allow a court to appoint counsel to represent the child in custody proceedings if the court determines that doing so would be in the child's best interests.<sup>252</sup> Further, under section 3151, the child's attorney is to represent the best interests of the child.<sup>253</sup> And, under the prior version of section 3151, the court could require the child's attorney to submit a written "statement of issues and contentions setting forth the facts that bear on the best interests of the child."<sup>254</sup> Such a statement was virtually indistinguishable from the report traditionally prepared by a GAL for the court.

There has been a tremendous amount of discussion in recent years among legal scholars and advocates for children regarding the appropriate role for attorneys representing children in child custody proceedings.<sup>255</sup> Though the discussion has often been

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<sup>250</sup> SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 147. By contrast, most states provide funding to pay for representation for children in juvenile court proceedings. See *supra* note 34.

<sup>251</sup> *In re Marriage of Lloyd*, 64 Cal. Rptr. 2d 37, 39–40 (Cal. Ct. App. 1997).

<sup>252</sup> CAL. FAM. CODE § 3150(a) (West 2004).

<sup>253</sup> FAM. § 3151(a) (West 2011).

<sup>254</sup> FAM. § 3151(b) (West 1998), amended by Stats. 2010 ch. 352 § 15 (AB 939) (effective Jan. 1, 2011); Pellman, *A Child-Centered Response*, *supra* note 41, at 116.

<sup>255</sup> Two conferences, attended by many of the nation's leading children's law scholars and advocates, taking place a decade apart, published recommendations regarding the appropriate role for lawyers to play in representing children. See generally *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996); *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592 (2006). Further, a number of professional organizations have promulgated standards offered to guide attorneys in the representation of children. For example, in 2003 the American Bar Association promulgated its *Standards of Practice for Lawyers Representing Children in Custody Cases*, reprinted in 37 FAM. L.Q. 131 (2003). In 2006, the Uniform Law Commission (ULC) (formerly known as the National Conference of Commissioners on Uniform State Law) offered its Uniform Representation

heated, it seems that a broad consensus has emerged from this debate regarding a couple of points. The first is that lawyers should act like lawyers in custody proceedings, and not like GALs.<sup>256</sup> Thus, lawyers should be limited to presenting information to the court in the manner that lawyers have traditionally presented information to the court—through admissible evidence and proper legal argument. Therefore, lawyers should be prohibited from offering personal opinions regarding the outcome of custody proceedings, from testifying as witnesses in custody proceedings, and offering reports to the court, like GALs traditionally offered, containing hearsay and other inadmissible evidence.<sup>257</sup>

The second point of consensus to emerge from this debate is, at least in circumstances where the child is mature enough to express a preference regarding the outcome of the proceedings, that best interests representation is inappropriate, and that the attorney for the child should adhere to the traditionally accepted role for counsel of advocating for the lawful preferences of their client.<sup>258</sup> Two separate justifications have been advanced for this second point. First, it is contended that best interests representation is incompatible with the basic ethical requirements of attorney representation, because the agent/lawyer is freed from following the directives of the principal/client.<sup>259</sup> The other justification is that, to the extent best interests representation allows the child's attorney to advocate for an outcome that is contradictory to the expressed preferences of the child, the child is essentially deprived of having a voice relating to the outcome of the proceedings that are supposed to be primarily about the child to begin with.<sup>260</sup> Many would contend that children have a right of some type, to have their preferences heard and considered in proceedings that will

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of Children in Abuse, Neglect, and Custody Proceedings Act. UNIFORM REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT (2007). However, a contentious debate caused the ULC to withdraw the Act from consideration by the ABA House of Delegates. See Atwood, *Bridging the Divide*, *supra* note 245, at 72–73; Martin Guggenheim, *The AAML's Revised Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 22 J. AM. ACAD. MATRIMONIAL LAW. 251, 269–75 (2009) [hereinafter Guggenheim, *AAML*]. And, in 2009, the American Academy of Matrimonial Lawyers promulgated its Standards for Attorneys and GALs in custody proceedings. Am. Acad. of Matrimonial Lawyers, *Representing Children: Standards for Attorneys for Children in Custody or Visitation Proceedings with Commentary*, 22 J. AM. ACAD. MATRIMONIAL LAW. 227 (2009). For an overview of each of these proposals, see Atwood, *Best Interests*, *supra* note 44, at 387–89.

<sup>256</sup> See, e.g., Elrod, *Raising the Bar*, *supra* note 241, at 115–19.

<sup>257</sup> *Id.*

<sup>258</sup> See Atwood, *Bridging the Divide*, *supra* note 245, at 90–91.

<sup>259</sup> *Id.* at 92.

<sup>260</sup> *Id.*

have such a dramatic effect on the child's life,<sup>261</sup> and that best interests representation deprives the child of that voice.

The consensus disappears, to a certain extent, for children who either cannot, or will not express a preference regarding the outcome of the proceedings, whether due to age, incapacity, or another reason. In such circumstances, some scholars and child advocates would allow for best interests representation.<sup>262</sup> On the other hand, others would argue that child representation should be forgone entirely in such circumstances.<sup>263</sup>

On review, it is clear that the *Elkins* legislation is halfway consistent with the scholarly consensus described above. First, the change to section 3151 that prevents judges from requiring children's lawyers to submit a statement of issues and contentions is consistent with the view that lawyers should act as lawyers in custody proceedings, and should be prohibited from acting as GALs traditionally have.<sup>264</sup> On the other hand, the *Elkins* legislation also maintains best interests representation as the role to be played by children's lawyers in custody proceedings.<sup>265</sup> While it is true that the revised section 3151 requires children's lawyers to present the child's wishes to the court if the child so requests (the former statute gave the child's lawyer discretion whether or not to present the child's wishes to the court),<sup>266</sup> it still allows the lawyer to argue against the child's expressed preference if the lawyer believes that doing so is in the child's best interests.

The result of the *Elkins* legislation is a somewhat incoherent role for children's attorneys in California custody proceedings. On the one hand, lawyers will be confined to their traditional roles of presenting admissible evidence and argument in support of their positions in court. On the other hand, they will continue to be required to pursue the best interests of their child clients, despite the arguments that best interests representation is incompatible with the traditional role of an attorney as an advocate for the lawful pursuits of their client. Further though, lawyers for children will be required to present the child's

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<sup>261</sup> See *infra* notes 282–83 and accompanying text.

<sup>262</sup> See Atwood, *Best Interests*, *supra* note 44, at 423 (“If lawyers should take on a broader ‘moral’ view of their responsibilities vis-à-vis their clients with full capacity, a lawyer for a child who cannot direct counsel surely acts within his or her professional role when pursuing that client’s interests.”).

<sup>263</sup> Guggenheim, *AAML*, *supra* note 255, at 278 (explaining that restricting a child’s lawyer’s role to enforcing substantive rights can significantly restrict the lawyer’s prerogatives).

<sup>264</sup> See *supra* notes 251–54 and accompanying text.

<sup>265</sup> See *supra* notes 36–42 and accompanying text.

<sup>266</sup> See *supra* note 127 and accompanying text.

preference to the court, even where the lawyer believes that preference to be incompatible with the very best interests of the child that the lawyer has been charged with pursuing.

This author somewhat reluctantly agrees with the *Elkins* legislation's decision to confine children's attorneys to the presentation of admissible evidence and argument at trial, rather than presenting a statement of issues and contentions, testifying as a witness, or stating a personal opinion regarding the outcome of the proceedings. The policies behind the well-entrenched "advocate-witness rule,"<sup>267</sup> support the notion that GAL-like functions are incompatible with the role of an attorney representing a client in contested litigation.<sup>268</sup> However, while it is appropriate that lawyers be required to act as lawyers at all times, forcing lawyers into a more traditional role as adversary advocates is also likely to further increase the "adversarialness" of child custody proceedings, a result that was decried in previous parts of this paper.

Additionally, it does seem that something important is lost in depriving the court of the potentially important source of relatively neutral information that can come from child attorneys' statements of issues and contentions.<sup>269</sup> Alas, as has been pointed out previously, too often parents enmeshed in hotly contested custody disputes lose sight of their children's best interests.<sup>270</sup> In such circumstances, the court really is in a position to benefit from a relatively neutral, yet thorough examination of the issues and evidence in the case. California law does provide for input from a wide variety of such non-party sources in custody litigation including custody evaluators, psychologists, and parenting coordinators. However, as

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<sup>267</sup> MODEL RULES OF PROF'L CONDUCT R. 3.7 (2007). Rule 3.7 provides:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;  
(2) the testimony relates to the nature and value of legal services rendered in the case; or  
(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

<sup>268</sup> The essential conflict is between the lawyer's obligation as an advocate to advance the interests of their client with the lawyer's obligation as a witness to be completely candid with the court, even if the resulting testimony will be adverse to the client's objectives. See, e.g., Douglas R. Richmond, *Lawyers as Witnesses*, 36 N.M. L. REV. 47, 48-49 (2006).

<sup>269</sup> Pellman, *A Child-Centered Response*, *supra* note 41, at 116-17.

<sup>270</sup> See *supra* notes 152-65 and accompanying text.

mentioned above, the economic realities of private party custody litigation are such that the availability of such independent evaluations is likely to be strictly limited in most cases.<sup>271</sup>

Indeed, the value of a statement of issues and contentions is consistent with the availability of evaluative mediation in California custody cases. While this paper was critical of evaluative mediation earlier,<sup>272</sup> that criticism was based upon: (1) the incompatibility of the mediator's role as a facilitator of agreements and the role of recommending counselor, and (2) the limitations on the mediator's ability to engage in reliable fact-finding in support of her recommendations. Relating to the latter, because the mediator has no authority to engage in fact-finding, other than through the unsworn statements of the parties during a single, short mediation session, the factual findings relied on by mediators in making their recommendations are particularly suspect. By contrast, children's attorneys writing statements of issues and contentions had a much greater opportunity, and indeed an obligation, to interview witnesses, review documents, and engage in a wide variety of other fact finding activities that made the basis for their recommendations much more reliable than those relied on by mediators in making their recommendations.<sup>273</sup>

Still, the incompatibility of the child attorney's role with that of a GAL makes clear to me that the change away from statements of issues and contentions is proper. Yet, in order to make up for what was lost in making that change, the *Elkins* legislation should have simultaneously created the authority on the part of the family court to appoint a non-lawyer GAL in instances where it would be beneficial to do so. That way, the court would still have the benefits of a statement of issues and contentions, without bringing about the conflicts inherent in having the child's attorney prepare such a report. As outlined above, resource limitations will probably make it unlikely that in many cases courts will appoint both a GAL and an attorney for the child, but the *Elkins* legislation should have established the possibility to do so, where such a result would serve the best interests of the child, and resources will allow for it.

Establishing the ability to appoint a GAL in limited circumstances would also have allowed the *Elkins* legislation to abandon best interests representation, and bring California law into line with the emerging consensus among legal scholars and

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<sup>271</sup> See *supra* notes 249–50 and accompanying text.

<sup>272</sup> See *supra* notes 179–85 and accompanying text.

<sup>273</sup> See CAL. FAM. CODE § 3151(a) (West 2006).

children's advocates that such representation is inappropriate.<sup>274</sup> I have more confidence in attorneys' ability to engage in best interests representation in a professionally appropriate manner than most of the critics of best interests representation.<sup>275</sup> Indeed, there is evidence that attorneys who represent children in practice actually engage in something of a hybrid between best interests and child's preference representation regardless of the label placed on their appointment.<sup>276</sup> Nonetheless, the availability of a GAL where appropriate would allow California to move from best interests representation to child preference, thus rendering the child's attorney's role to be more in line with the move away from statements of issues and contentions and toward traditional attorney advocacy. In cases where the child is too young or is unwilling to express a preference to direct her lawyer's performance, the court could appoint a non-lawyer GAL, either with or without a lawyer to represent the child/GAL. Similarly, the court could also appoint a GAL for an older child if there was reason to believe that the child's preference being advocated by the child's attorney was potentially adverse to the child's best interests. Thus, the *Elkins* legislation should have provided for GALs in family law cases and abandoned best interests attorney representation in favor of child preference advocacy where the child is mature enough to state a reasoned preference.

### iii. Increased Use of Child Testimony in Custody Cases

Though not part of the *Elkins* legislation itself, AB 1050 was enacted around the same time as the *Elkins* legislation, and clearly furthers the Elkins Commission's objective of giving children a greater "voice" in child custody proceedings. Prior to its amendment via AB 1050, section 3042 of the California Family Code, did provide that "[i]f a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an order granting or modifying custody."<sup>277</sup> The statute also granted the court considerable latitude to determine the manner in which the child's preference would be ascertained, so as to best protect the interests of the child.<sup>278</sup>

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<sup>274</sup> See *supra* notes 255–57 and accompanying text.

<sup>275</sup> Accord Atwood, *Best Interests*, *supra* note 44, at 412–13.

<sup>276</sup> See, e.g., Leary v. Leary, 627 A.2d 30, 36–42 (Md. Ct. Spec. App. 1993) (child's attorney properly balanced child advocacy and reporting roles in custody litigation).

<sup>277</sup> FAM. § 3042(a) (amended 2010).

<sup>278</sup> FAM. § 3042(b).

As amended, section 3042 mandates: “If the child is 14 years of age or older and wishes to address the court regarding custody or visitation, the child *shall* be permitted to do so, unless the court determines that doing so is not in the child’s best interests.”<sup>279</sup>

If the court determines that allowing the child to address the court with regard to her preference is not in the child’s best interests, the court must state its reasons for that finding on the record.<sup>280</sup> The revised statute goes on to make clear that nothing in the above-quoted provision shall be construed to prevent a child who is less than fourteen years of age from addressing the court with regard to custody or visitation.<sup>281</sup>

There is nearly universal agreement that the views of children who are mature enough to have an opinion regarding the custody arrangements that will affect them at a minimum should be considered in determining those custody arrangements.<sup>282</sup> Indeed, the widely-ratified United Nations Convention on the Rights of the Child recognizes a right of participation on the part of children in legal proceedings affecting their interests.<sup>283</sup> After all, it is the child who must live with decisions that are made regarding where the child will reside, which parent the child will spend the bulk of her time with, where the child will go to school, etc. However, consensus is much more elusive when it comes to questions of the weight that should be placed on the child’s preference regarding custody arrangements, as well as the manner in which the child’s input into the custody proceedings should be obtained.

There is also widespread agreement, at least among psychologists, if not among lawyers and children’s rights advocates, that placing children “in the middle” of custody disputes between their parents may subject the children to significant psychological harm.<sup>284</sup> Placing significant weight on

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<sup>279</sup> FAM. § 3042(c) (West 2011) (emphasis added).

<sup>280</sup> FAM. § 3042(c).

<sup>281</sup> FAM. § 3042(d).

<sup>282</sup> See Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573, 575 (2008); Elrod, *Client-Directed Lawyers*, *supra* note 36, at 870; Cynthia Starnes, *Swords in the Hands of Babes: Rethinking Custody Interviews After Troxel*, 2003 WIS. L. REV. 115, 123 (2003).

<sup>283</sup> Appell, *supra* note 282, at 575 & nn.3–4 (noting that the United States is one of only two countries that have failed to ratify the treaty).

<sup>284</sup> See, e.g., EMERY, MARRIAGE, DIVORCE, *supra* note 48, at 20; Robert E. Emery, *Children’s Voices: Listening—and Deciding—is an Adult Responsibility*, 45 ARIZ. L. REV. 621, 623 (2003) [hereinafter Emery, *Children’s Voices*]; Richard A. Warshak, *Payoffs and Pitfalls of Listening to Children*, 52 FAM. REL. 373, 374–76 (2003); Firestone & Weinstein, *supra* note 148, at 206–07; Weinstein, *supra* note 141, at 126.

the child's preference places the child at risk of being manipulated or pressured, intentionally or unintentionally, by one or both of the parents.<sup>285</sup> A variety of tactics may be employed by a parent to corrupt a child's view of the other parent.<sup>286</sup> The damage that may result to the child's relationship with the other parent may be difficult to undo.<sup>287</sup> Further, a child's preference as to custody may be influenced by fear of a parent, in the event the child chooses to reside with the other parent, or excessive concern for the welfare of a parent who may feel abandonment if the child chooses to live with the other parent.<sup>288</sup> And, of course, children are susceptible to being "bribed" by a parent in the form of gifts, excessively lenient household rules, etc.<sup>289</sup> Even absent any form of undue influence being exerted on the child, the mere fact of having to choose between two parents that the child loves places an enormous burden on the child, that most would wish to avoid.<sup>290</sup>

Two factors seem likely to exacerbate the potential harm caused to children through involvement in their parents' custody disputes. The first relates to the weight to be accorded to the child's preference. The second relates to the manner in which the child's preference will be ascertained and presented to the court for consideration. As to the first, it stands to reason that the more weight that will be placed upon a child's preference in deciding custody proceedings, the more pressure the child will feel in stating their preference, and the more susceptible the child will be to manipulation and other tactics that may cause long-term detriment to the child.

As to the second, there are a number of possible ways that a child's preference may be introduced for consideration by the court in reaching a decision with regard to a custody dispute. For example, the child's preference could be solicited by minor's counsel, a GAL, a mediator/recommending counselor, a custody evaluator, or by the judge herself *in camera*. Alternatively, the child's preference may be elicited through testimony in open court, with the child subject to cross-examination by the parties' attorneys, and perhaps by minor's counsel as well. Common sense suggests that the more private and non-coercive means used to elicit the child's preference, the less pressure these

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<sup>285</sup> Warshak, *supra* note 284, at 375.

<sup>286</sup> *Id.*; see, e.g., Kathleen Nemecheck, Note, *Child Preference in Custody Decisions: Where We Have Been, Where We Are Now, Where We Should Go*, 83 IOWA L. REV. 437, 462 (1998).

<sup>287</sup> Warshak, *supra* note 284, at 375.

<sup>288</sup> *Id.*

<sup>289</sup> Nemecheck, *supra* note 286, at 462.

<sup>290</sup> Starnes, *supra* note 282, at 124.

procedures are likely to place on the child, and the less damage that is likely to be incurred. On the other hand, the more public and coercive the means used to elicit the child's preference, the more harmful such proceedings are likely to be to the child's long-term psychological interests. Indeed, the legal literature is replete with accounts of the damage caused to adult witnesses, often ones with little stake in the outcome of the proceedings, caused by rigorous cross-examination.<sup>291</sup> One can only imagine the harm to a child of being rigorously cross-examined, potentially by three separate lawyers, in a proceeding that is going to determine the future course of the child's life.

It is thus possible to imagine a continuum of possibilities for incorporating a child's voice into a custody dispute. On the most advantageous side, concerned parents would delicately and privately seek information relating to the child's preference with regard to a custody determination. Such an information gathering process might not even directly raise the issue of custody with the child, but rather would seek out the child's views indirectly, through questions that would not directly threaten or place the child in the middle of the custody dispute.<sup>292</sup> The parents would then privately reach agreement as to a custody arrangement that would give consideration to the child's preferences, along with other factors relating to the child's best interests.<sup>293</sup>

On the other hand, we can also imagine a scenario where parents involved in high-conflict litigation might solicit the child's input through interviews with each parent's retained counsel, and place implicit or explicit pressure on the child to express a preference in favor of that parent. The child's preference will then be presented to the court through live testimony, subject to rigorous cross-examination by the non-favored parent's attorney.

Naturally, one would conclude that the first scenario is preferable in terms of incorporating the child's voice into custody disputes. As stated by Professor Andrew Schepard:

Even the most vigorous advocates of considering a child's preference in a custody dispute do not suggest that the child should be sworn as a witness and cross-examined by his or her parents' lawyers in front of

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<sup>291</sup> See *supra* note 193 and accompanying text.

<sup>292</sup> See, e.g., Emery, *Children's Voices*, *supra* note 284, at 622–26 (describing a case study and an example to illustrate ways to communicate with children to lessen their burden).

<sup>293</sup> *Id.* at 626.

his or her parents. They recognize that a courtroom confrontation of this sort could irreparably poison the parent-child relationship.<sup>294</sup>

However, I fear that the changes to section 3042 of the California Family Code move us precisely in that direction. It is true that even as amended, section 3042 does not require a child to express a preference as to custody, nor does it require any preference to be presented through child testimony. However, the legislative changes significantly increase the likelihood of both occurrences.

The former section 3042 was broad enough to allow for a child's preference to be considered in custody proceedings, and for that preference to be expressed through child testimony where appropriate. However, the new section 3042 clearly increases the likelihood that the child will be drawn into the middle of custody litigation by expressing a preference on the record. Now, the court cannot deny the right of a child fourteen years of age or older to state a preference in the case, unless the court makes written findings as to why it would not be in the best interests of the child to do so—a significant deterrent to trial judges who are often loathe to take the time and effort to make such written findings. Further, the clear legislative intent behind the changes was to increase the consideration of child preference in custody proceedings, otherwise there would have been no point in amending the statute to begin with. Judges are likely to get the message of the point behind the statutory change in applying their authority regarding the consideration of child preference in custody litigation. Further, subsection (e) of the amended statute requires the court to provide alternative means of soliciting input from the child as to the child's preference should the court preclude calling the child as a witness.<sup>295</sup> This provision seems to set up live testimony as the default mechanism for receiving input from the child, with all other means offered as second alternatives. It is almost certain to have the effect of causing more children to testify in their parents' custody cases.<sup>296</sup>

Drawing children further into the middle of their parents' custody disputes seems particularly problematic in light of the other previously discussed changes from the *Elkins* legislation that are likely to increase the adversarial nature of custody litigation. Increasing the acrimony of custody battles, and then placing children squarely in the middle of them, runs precisely counter to the findings of a generation of scholars who have

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<sup>294</sup> SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 140–41.

<sup>295</sup> CAL. FAM. CODE § 3042(e) (West 2011).

<sup>296</sup> See Pellman, *A Child-Centered Response*, *supra* note 41, at 113–14.

studied the harms to children that result from their involvement in such proceedings.

## V. RECOMMENDATIONS

The legislative changes that are the focus of this article are misguided because they run directly counter to the salutary, decades-long trend in family law away from reliance on traditional, adversary litigation as the primary means of resolving family law disputes. Adversary litigation has been shown, in many instances, to be costly and damaging to the relationships of the parties involved in family law cases, and particularly harmful to children who are dragged into the vortex of their parents' disputes, and then subject to the continuing effects of the strain placed upon the parents' ability to cooperate in raising the children into the future. Yet the increased use of live testimony in family law motion hearings, the redefinition of the role of minor's counsel in custody cases to more closely resemble that of adversarial advocates, and the increased reliance on child testimony in custody cases will all have the effect of moving California back in the direction of adversarialism in family law litigation.

The goals of the California Supreme Court in the *Elkins* decision, and the corresponding task force, could have been achieved through other measures that would not have had the negative consequence of increased adversarialism. Here are some recommendations.

### A. Eliminate Evaluative Mediation in Custody Cases

There is virtually universal agreement that except in rare cases involving domestic violence or other gross disparities in capacity between spouses, negotiated agreements in family law cases benefit both the parties to the dispute, the court system as a whole, and the children who are the subject of the dispute.<sup>297</sup> Parties are more likely to be satisfied with agreements that they play a central role in creating than orders generated by a judge who is less knowledgeable about the circumstances of the parties than they are themselves. Negotiated settlements also free up court time to address cases that are resistant to settlement. Thus, steps that will result in more settlements of family law disputes are generally viewed as being positive.

Eliminating evaluative mediation will result in more settlements in family law cases. As pointed out above, requiring

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<sup>297</sup> See, e.g., Schepard, *Kramer*, *supra* note 153, at 682.

neutrals to play the conflicting roles of mediator and evaluator reduces their effectiveness in the former role, thus decreasing the likelihood of mediated agreements.<sup>298</sup> Also, parties must approach mediation in an adversarial stance, prepared to communicate all information that might help them obtain a favorable recommendation from the counselor, thus greatly increasing their likelihood of success before the court should the mediation session fail to produce an agreement. Yet such an adversarial stance is inimical to the kind of cooperative stance that is most likely to result in a successful outcome in mediation.

#### B. Live Testimony Should Remain Limited in Family Law Motion Hearings

For reasons stated above, the increased use of live testimony in family law motion hearings is unlikely to achieve better results in such proceedings, will increase adversarialness in family law litigation with its corresponding costs, and will further contribute to backlogs and delays in the family law department at this time of unprecedented budget pressures in California.<sup>299</sup> Moreover, the change will not achieve the *Elkins* reforms' primary goal of making the courts more accessible to self-represented litigants, because such litigants are no more likely to successfully present their cases through live testimony than they would through written submissions.

Rather than placing the entire burden for solving the challenges presented by the explosion of self-representation in family court on trial judges who will preside over evidentiary hearings, the burden of addressing these challenges should be shared equally by the bench, the bar, and court administrators. The Judicial Council, counties, courts, and other drafters of procedural rules must do a better job of drafting court rules in a manner that will be comprehensible to self-represented litigants, and will serve as effective guides in helping litigants present their issues to the court in a manner that will assist the court in reaching a proper result, whether those presentations will take place in oral or written form. New, revised, and simplified court forms can play a role in assisting litigants in these tasks. Such rules and forms should be made widely available to litigants via the internet, and other technologies for those who do not have easy internet access.

More assistance must also be provided to self-represented litigants in preparing their cases, both inside and outside the

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<sup>298</sup> See *supra* notes 179–85 and accompanying text.

<sup>299</sup> See *supra* Part IV(B)(i).

courthouse. In addition to free assistance through court based and other pro bono programs, the private bar should continue to consider means for providing limited legal assistance to self-represented litigants in preparing their cases to present to the court. Though there has been an increase in the provision of such “unbundled” legal services,<sup>300</sup> more can be done. Though it is true that many self-represented litigants are too poor to afford to pay for any legal services whatsoever, it is clear that many self-represented litigants have the means to pay for at least some legal services,<sup>301</sup> but choose not to do so, either because they don’t want to invite the additional adversarialness engendered by traditional, full-blown adversary legal representation, or because they don’t see the value added in paying for legal services.<sup>302</sup> However, providing limited assistance in preparing cases for court might mutually serve both the courts’ and litigants’ interests in effective presentation of cases, and attorneys’ interests in obtaining business from segments of the population who have traditionally declined to employ their services. Paralegal and other non-attorney assistance may also be appropriate in helping self-represented litigants to prepare their cases to be presented effectively in court, to the extent that appropriate regulation and quality assurance can be provided for such services.<sup>303</sup>

Together, these steps should avoid the need for live testimony in many motion hearings. And, retaining the right to present any and all necessary testimony should the family law dispute require a full trial on the merits, will address the due process concerns raised by the California Supreme Court in *Elkins*.

### C. Adopt Traditional Attorney Representation for Children in Custody Cases Along with Explicit Recognition of a GAL Role

The *Elkins* legislation offers an incoherent role for children’s counsel by recasting the role of counsel as a traditional adversary advocate in all respects except the most fundamental one, advancing the lawful objectives of the client. California should have gone all the way toward allowing “lawyers to be lawyers” in custody disputes by eliminating best interests representation. On the other hand, California should expressly recognize a role of

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<sup>300</sup> See, e.g., Feitz, *supra* note 31, at 202.

<sup>301</sup> See, e.g., SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 40.

<sup>302</sup> See, e.g., Swank, *supra* note 236, at 1573–74.

<sup>303</sup> See, e.g., Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 885–86 (2009) (discussing steps that could be taken to allay “concerns about unqualified or unethical lay assistance”).

GAL in custody disputes. While it will be the rare case where both minor's counsel and a GAL will be employed, authorization to appoint a GAL will preserve the opportunity to have an adult present the best interests of the child, when the child herself is either unable, or unwilling to do so, or there is a serious risk that the expressed preference of an older child presents a serious risk of harm to the child. Additionally, the ability of a court to appoint a GAL will make up for the elimination of "statements of issues and contentions" from the current legislation and present the opportunity to provide courts with a thoroughly researched, yet relatively objective presentation of the important facts relating to the custody determination, in a manner that neither the parties' attorneys, nor the court itself, would otherwise be able to provide.

#### D. Child Testimony Should Be a Last, Not a First Resort in Custody Litigation

Few would dispute that on the witness stand, testifying in one's parents' custody case is one of the last places a child would want to be. Legislation that makes it more likely, rather than less likely that children will be placed in exactly that position is misguided. While it will certainly be appropriate, indeed even necessary in some cases, to have a child testify in custody proceedings, the goal should be to limit those instances, rather than to increase them. Pre-existing California law was adequate to give judges, parents, lawyers, other professionals, and the children themselves, the flexibility to make sure that children have an opportunity to be heard regarding custody decisions that will have an enormous impact upon their lives, and to determine the appropriate manner in which the child's views will be presented. What is needed is for the involved persons to exercise that discretion appropriately, rather than to place a thumb on the scale in favor of child testimony.

#### CONCLUSION

Only time will tell if the latest set of family law reforms in California will catch on in the rest of the country as has happened so many times in the past. However, it is this author's hope that they do not. The recent steps back in the direction of increased adversarialism in family law litigation mark a mistaken reversal of course by a state that led the path away from such adversarialism over the past few decades. Does anyone really want to return to the days when custody disputes

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were a legal “battle to the death,”<sup>304</sup> with little concern for the casualties created along the way? Hopefully, other states will answer this question “no,” and decline to follow California’s lead in family law this time around.

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<sup>304</sup> SCHEPARD, CHILDREN, COURTS, *supra* note 6, at 12 (discussing the film *Kramer v. Kramer* and the manner in which custody cases were determined around the time (1979) the film was released).