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50 Years in Family Law The More Things Change, the More They Stay the Same

PETER M. WALZER

Certified Family Law Specialist, State Bar of California

Fellow, American Academy of Matrimonial Lawyers and International Academy of Matrimonial Lawyers

Peter M. Walzer is an attorney at Walzer Melcher LLP.

You know you are getting up there in age when an editor asks you to write “the history of family law.” I took this to mean that she wanted to know what has changed over my years of practice and what has remained the same. I decided to go back 50 years to the inception of “no-fault divorce.” Although I was still in high school, at the time my father was a family lawyer and on the governor’s Commission on the Family, which endorsed codification of existing case law, “no-fault divorce,” and many other changes which led to modern family law as we know it today. I started practicing law in 1982 when fault practice was in the distant past. At the time, computers with floppy disk drives were making their way into the practice of law and Dissomaster was still a few years away.

Back then, we did not use “private judges” to resolve disputes — either for mediation or judging. A judicial officer did not think about leaving the bench to do another job. They looked forward to playing golf or playing bridge. Collaborative law was unheard of, and mediation was in its infancy. My colleagues tried mightily to settle cases, but it was through letters, four-way meetings with parties and counsel, or with the help of a judicial officer in chambers. The clients did not have the option to hire a mediator straight out of the gate. There was no family law mediation program in the courthouse. We used the conciliation court to settle custody disputes.

In the Central District of the Los Angeles Superior Court, lawyers gathered in Department 2 for case assignments. We sat in the jury box on the right side of the courtroom and waited for our case to be called. Cases were sent out for a hearing or trial by the supervising family law judge. My memory is fuzzy, but it seemed easier then to get a hearing, but then again, there were no “long-cause courtrooms” back then. There have always been litigants representing themselves, but they now seem to make up a greater

percentage of litigants. The self-help center at the court is “new.” I would say the court is much more accessible to the public than ever before. No doubt, the pressures of this influx of self-represented litigants is straining the system — but the courts have always been strained.

I practiced in the pre-*Elkins* days — and pre-Family Code Section 217 days (requiring the court to receive relevant live testimony) — when judicial officers “Reflerized” declarations submitted in support of Orders to Show Cause. They accepted declarations as evidence subject to motions to strike and cross-examination. Motions were for procedural matters such as jurisdictional disputes and handled on declarations only. Many of the judicial officers in the county were commissioners dedicated exclusively to family law (Commissioners Denner, Black, Sandoz, Endman, Kline, Schneider and others). They were “specialists” in the sense that they were assigned to family law indefinitely, and they developed knowledge and experience.

In *Elkins v. Superior Court*, 41 Cal. 4th 1337 (2007), the California Supreme Court recommended the creation of a task force 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.” After the *Elkins* Task Force made recommendations in 2010, various statutes and court rules enacted as a result changed the course of family law — not all for the better. Family Code 217 mandated the right to live testimony in family law hearings unless there is a showing of good cause. California Rule of Court 5.250 changed the way we handle children who testify in family court proceedings. The guidelines for the use of minor’s counsel were reformed. The distinctions between Motions and Orders to Show Cause were eliminated. Ironically, *Elkins* may have made it more difficult to obtain a hearing in a family law cases because of the overburdened courts. The goal of due process for all litigants remains elusive.

There have always been laws against domestic violence, but the statutory penalties in my early years of practice were not as robust. Stronger laws and penalties lead to greater protection for victims. The downside — and there always are pros and cons to any legislation — is that false allegations of domestic violence can be used to gain strategic advantage in litigation. Addressing founded and unfounded domestic violence claims consumes significant resources. Domestic violence always was a factor in custody issues, but there was no Family Code Section 3044 presumption against joint custody and no Family Code Section 4320(i) (domestic violence factor in spousal support). I expect the definition of domestic violence to continue expanding in the next decade to include emotional abuse, making the burdens on courts greater and the resolution of these matters even more difficult.

Fiduciary duty legislation was enacted in 1992 (Family Code Sections 721 and 1101). The body of case law is still undeveloped. While it is not uncommon now to see the allegations pled, it is still difficult to obtain a finding that there was an actual breach of fiduciary duty and to determine what the damages are. Over time, lawyers will learn to plead these claims properly, and courts will learn to address the claims decisively.

The statutes requiring mandatory disclosure were enacted in 1993 (Family Code Section 2100 et seq.). Before mandatory disclosure, there was a sense among certain clients that they could gain an edge by hiding assets. Now, it is incumbent upon the all parties to disclose their assets and for lawyers to demand that

disclosure. A significant part of our practice has become preparing proper disclosures to protect against post-judgment litigation.

The adoption of laws promulgated by the Uniform Law Commission has been a success story over my career. California enacted the Uniform Child Custody Jurisdiction Act in 1983. The Uniform Child Custody Jurisdiction and Enforcement Act was enacted in 1996. The United States joined the Hague Convention on Child Abduction in 1988, and many countries followed, making recovery of stolen children possible in many cases. The Uniform Interstate Family Support Act was drafted in 1992 and adopted by all the states. This uniform act built on the Revised Uniform Reciprocal Enforcement of Support Act and the Uniform Reciprocal Enforcement of Support Act has aided in the enforcement of child and spousal support orders. The uniform acts and treaties have made enforcing custody and support orders comparatively more efficient and reliable.

The Uniform Premarital Agreement Act was enacted in California effective Jan. 1, 1986. In 2000, the Supreme Court cases of *Marriage of Bonds*, 24 Cal. 4th 1 (2000), and *Marriage of Pendleton & Fireman*, 24 Cal. 4th 39 (2000), spurred the Legislature to make significant changes to California's version of the act. On the one hand, the Legislature liberalized the law to allow limitations on spousal support. On the other hand, the Legislature created a new set of rules to protect self-represented couples from entering into agreements they would later regret. The code requires the unrepresented party to be "fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement, and was proficient in the language in which the explanation of the party's rights was conducted and in which the agreement was written." The unique treatment of self-represented litigants portends a two-tier system. It creates one set of rules for the self-represented litigants and another for those represented by counsel.

Same-sex partners have been granted the same rights as opposite sex partners since I began practicing. In 2001, the Legislature enacted the Domestic Partnership Act. In 2003, California recognized out-of-state legal unions between same-sex partners. In 2015, the U.S. Supreme Court in *Obergefell v. Hodges* ruled that the fundamental right to marry is guaranteed to same-sex couples.

The Tax Cuts and Jobs Act of 2017 eliminated the tax deductibility of spousal support. The ability to deduct attorney fees that were incurred for the purpose of generating income was also eliminated. Over the years, we were able to draft agreements that used the tax laws to create favorable settlements for both parties by shifting income to a party in a lower tax bracket or had deductible mortgage interest that would offset the tax impact of spousal support. We were able to incentivize clients to pay their attorney's fees and support by making them deductible. That flexibility is gone.

The laws surrounding surrogacy are relatively new and are still evolving. The first baby was conceived through surrogacy in 1978. The first compensated surrogacy agreement was in 1980. The Baby M. Case decided by the New Jersey Supreme Court in 1988 held that the surrogacy agreement in that case violated public policy. Since then, the laws around the country are catching up with the technology. California statutes governing surrogacy were enacted in 2015 and 2017. I expect that in the 21st century the law will continue to develop and the use of artificial reproductive technology will spread.

The population of California was 25 million when I began practicing in 1982. It is now hovering around 40 million. There have been many other changes during my career — more women in the profession, more litigants, more people cohabiting, more marriages, and more divorces. We now have pet custody laws to give our judicial officers more work to do. Despite these changes, people still break up. They need custody and support orders. They need fees to resolve their disputes. They need orders of protection. The courts are still overburdened. As long as people do not get along, there will be work for us to do.

FIFTY YEAR FAMILY LAW TIMELINE

1970 -- The Family Law Act of 1969-- No Fault Divorce

1978 -- First baby conceived by surrogacy

1980 -- Congress enacts the Parental Kidnapping Prevention Act (PKPA)

1983 -- Uniform Child Custody Jurisdiction Act enacted in all states

1986 -- Uniform Premarital Agreement Act adopted in California

1988 -- Baby M. case was decided by the New Jersey Supreme Court in 1988 where it was held that the surrogacy agreement violated public policy

1988 -- United States joins the Hague Convention of Child Abduction

1992 -- Family Code §§721 and 1101 (Fiduciary duty legislation)

1992 -- UIFSA adopted. Revised in 1996 and 2001. (formerly URESA and RURESAs)

1993 -- Domestic Violence Prevention Act

1993 -- Family Code §§2100 et. seq. (mandatory disclosure)

1999 -- UCCJEA adopted in CA (not adopted by MA & Puerto Rico)

2000 -- Cal. Supreme Court rulings in *Marriage of Bonds & Pendleton & Fireman*

2001 -- Domestic Partnership Act

2002 -- Family Code §1615(c) added allows limitation on spousal support in prenups. Family Code §1615 amended to include protections for self-represented parties.

2003 -- California recognizes out-of-state legal unions between same-sex partners

2007 -- *Elkins v. Super. Ct. (2007) 41 Cal.4th 1337*,

2010 -- Family Code §§217, 2450, 2451, 3042, 3151 & CRC 5.83, 5.93, 5.242, 5.250, 5.380, 5381- live testimony/minor counsel/children's voices/case management

2015 - *Obergefell v. Hodges* held that the fundamental right to marry is guaranteed to same-sex couples

2017 -- Tax Jobs and Cuts Act eliminates tax deductibility of spousal support

2020 - Family Code §1615 amended to require seven days between presentation of the final agreement and the execution of the agreement

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