

PERJURY PLIGHT

By Fred Silberberg

In the family law court system, the vast majority of issues are decided based on written documents that are supposed to be executed under penalty of perjury. The court is not given the opportunity to see a party testify live in order to assess the credibility of a witness, which is what nearly always happens in civil trials.

Instead, the practice of family law has become one of filing hundreds upon hundreds of written documents and leaving it up to the court to make decisions based on those documents and the argument of counsel. In the morass of paperwork that comes before the court, a fundamental element of our judicial system is given short-shrift. That element is the truth of the parties' testimony.

Our legal system is based on the premise that the court, whether by way of a judge or a jury, makes a decision premised on ascertaining the truth. In most areas of practice, there is a significant deterrent to lying because the offending witness may be caught, normally through the process of cross-examination.

In California family law, the amount of cross-examination that actually occurs has dwindled over time. Instead, the court goes through the documents presented, counsel argues the matter, and a decision is rendered. Our family court system has become one of trial for efficiency purposes; and the most efficient way to dispose of things is to have a research attorney review the pleadings and make a recommendation, then have the court rule on it.

Because live testimony has been abolished in virtually all proceedings except actual trials, the ability to lie or conceal the truth is ever-present. The cases are decided by the documents submitted. Each such document, whether it is a judicial counsel form or a declaration written by a party or counsel states

at its conclusion that the document has been executed under penalty of perjury. Each litigant attests to the fact that the information contained on the document is truthful.

However, there seems to be little reason to tell the truth when you can easily get away with a falsehood. The risk of being caught lying in the family law court system is rather slim. It is almost a certainty that one will not be cross-examined. There is little risk of embarrassment. In the cases where opposing counsel actually points out to the court that a party is lying, the court often just glosses over it. After reading hundreds of pages of testimony and reviewing court forms all day long, it seems to be human nature to just consider what you read, make the

call and move on.

Moreover, there is seemingly no risk of being prosecuted for perjury. The district attorney seems to be too busy to undertake such actions and family law judges seem to be too busy to refer cases to the district attorney, so the possibility of a resulting criminal conviction is virtually nil.

The irony in all of this is that the one segment of our court system that affects society on a daily basis is the family law courts, possibly even more so than the criminal courts. It is in the family law courts where issues that affect the basic unit of our society, the family, are decided daily. It is in our family law courts that decisions are made that affect children and their futures. And yet, it is in these very courts where we not only tolerate, but simply excuse lying.

The effect of lying in a family law proceeding can be dramatic; it can forever impact the future of parties who are totally innocent and rely on the court for protection. In a custody proceeding, for example, the effects of one party's lies can have significant consequences. An abuser who denies his conduct can get custody of children. The same goes for the alcoholic or drug-addicted parent, or the

parent who has severely impaired judgment. In these situations, where children are virtually helpless, corrective action can often only be taken after a tragedy. Sometimes that is too late.

Lying in family courts has economic repercussions, as well. A party that is ordered to pay support and lies about his or her income deprives the other party or the children of the appropriate amount of aid. A party that claims that expenses and needs are higher than they truly are in order to get more money undermines the paying party's ability to live his or her own life.

The form-driven system that is used in family law almost encourages people to lie. For example, the notorious Income and Expense Declaration — the primary document used to disclose information that affects support and fee orders — asks for a detailed itemization of monthly expenses for each party, but it does not ask for any substantiation.

As a result, one party often exaggerates what the expenses are in the hopes of getting more money from the other side. Often counsel will tell the supported spouse to raise the amounts in their individual categories of expenses so that their needs will appear higher.

Long ago, our appellate courts sanctioned the transition in family law from actual evidentiary hearings to the filing of papers. That change eliminated safeguards in the system that allowed the truth to be ascertained. As a result, the court and our criminal prosecution system now need to recognize the importance of enforcing consequences for lying under oath. The remedy is not complex. Signing a document under penalty of perjury should result in a penalty when the perjury actually occurs.

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