State Bar of Texas

Family Law Section

May 2, 2012

The Honorable Wallace Jefferson, Chief Justice
The Honorable Nathan Hecht, Justice
The Honorable Paul Green, Justice
The Honorable Wainwright, Justice
The Honorable Johnson, Justice
The Honorable David Medina, Justice
The Honorable Don Willett, Justice
The Honorable Eva Guzman, Justice
The Honorable Debra Lehrmann, Justice

201 West 14th Street, Suite 104
Austin, Texas 78701

RE: THE PRO SE LITIGATION PROJECT

Dear Justices:

On behalf of the four major Texas organizations of family lawyers, we want to provide our assessment of the current state of consideration of do-it-yourself divorce forms and related issues regarding pro se litigation.

We believe that an honest assessment of the paper and testimony we delivered to the Supreme Court Advisory Committee (SCAC) documenting no fewer than 80 substantial defects in the proposed forms and the numerous serious questions raised in the SCAC meetings on April 13th and 14th conclusively demonstrate that the process established for the forms project has failed. In addition, the State Bar and our organizations have suggested workable ideas in place of Supreme Court-endorsed forms.

We are grateful for the courtesies shown our representatives and others in attendance at the SCAC meeting by Chairman Chip Babcock. He conducted the SCAC meeting to produce a complete record (oral debate and testimony to be captured in a transcript, the two papers we submitted and those of others) that we think gave voice to many of the important issues embedded in pro se litigation.

However, we are in complete disagreement with Chairman Babcock's comments to the *Texas Lawyer* that there is a consensus on the SCAC in support of the forms and all they need is a little "tweak." On the contrary, the wide range of issues and the gross deficiencies in the Uniform Forms Task Force's product will be identifiable in the total record, which is to the great credit of the many SCAC members who identified their own concerns. We think the record shows that a substantial number of SCAC members, if not most, expressed serious concern about the forms and the Court's approach.

We believe that a minority of SCAC members seemed willing to accept the fact that the proposed forms deviate from the U.S. Constitution and applicable statutes, displace language enacted in statutes for language they considered more appropriate and effectively propose that the Court adopt via a form an explanation of a statutory term that is inconsistent with the statute and precedent. Conforming to the Constitution, laws enacted by the Legislature and the Court's precedents would not constitute "tweaking," as we understand that term.

Some people so strongly believe that forms are integral to addressing pro se litigation issues that they seem willing to accept the proposed kit as is, while minimizing, but not expressly denying, the documented defects. One SCAC member stated that there is no constitutional separation of powers problems with the forms, citing the Court's constitutional and statutory powers of administrative and procedural rulemaking. This assertion was made despite the fact that the forms deviate from the directives of the Legislature and no one, as of yet, has defined the legal effect that the instructions and the forms themselves are intended to have. The constitutional separation of powers is a concept we believe is fundamental to our form of government and the proposed forms would breach that separation, though the full extent to which it will have been breached cannot be measured because there are so many unanswered questions about them.

There seemed also to be testimony that divorces of some couples need to be rushed through the courts for fear that during any delay the women involved will have children by other men to whom they are not married, which would greatly complicate their legal situations. We categorically reject stereotyping of this sort.

What we have been saying about the drawing power of the Court's imprimatur on the forms was proved when one SCAC member stated a presumption that "Supreme Court-approved forms would be the most accurate" compared to any other source of forms. The proposed forms show

that such a presumption is wrong and in the sentiment expressed by that statement lies the danger: People will think their case is safe because the Court's name is on the documents. Do-it-yourself divorce is unwise, whether by use of a Supreme Court form or not.

Much of what we have said since last August about the Access to Justice Commission's (ATJ) pro se litigation project has been dismissed out of hand, flatly denied in the face of documentation, characterized as misinformation or, in one recent letter, termed "fantasy." Some have said we are just greedy lawyers protecting our incomes. Use of those tactics to approach these important issues should not stand, if the Court is to reach a result worthy of respect.

For every statement we have made since last August, we have provided ample documentation in writing and will continue to do so on request. For every defect in the proposed forms, we have cited page and line number. Experts have put their names on the line, and those of their organizations, establishing the credibility of the reports of these problems. Judges who overwhelmingly handle family law cases have stated that this project is misguided. The full Board of the State Bar of Texas and *Solutions 2012*, a task force appointed by Bar President Bob Black, are on record discrediting the forms approach to pro se issues.

For those who cling to trust in forms, we have suggested the use of existing sources that are better than the Court will be able to develop, much less maintain year after year.

The Family Law Section already expends a great deal of resources developing, updating and perfecting the Family Law Practice Manual, which is made available free to every Texas county. We know what it takes to do this. The Court cannot match these resources, absent a significant addition of revenue. While, ATJ Executive Director Trish McAllister suggested in an *Austin American Statesman* article that the proposed forms would be sold, we doubt the authority exists to do so.

While ATJ recognizes that the Family Law Practice Manual provides legally accurate tools, some complain that the Manual is too complicated and is not written in plain language. The Manual incorporates the state and federal constitutions and statutes passed by the Legislature, uses the language of the statutes and cases and follows the precedents established by the Supreme Court and the Courts of Appeal, whether in the nature of common law jurisprudence or statutory or

constitutional interpretation. Unlike the proposed forms, the Manual allows tailoring for individual justice in every case.

Legal aid organizations maintain simpler forms that representatives of ATJ have said are also legally accurate. In fact, the Access to Justice Foundation has recently provided hundreds of thousands of dollars in grants to legal aid organizations to develop forms. These forms are available online.

Both *Solutions 2012* and our organizations have suggested alternatives to forms that we believe can and should be the basis of the response to pro se litigation issues. We think solutions imposed from the Court have, and are destined to, fail and that only the State Bar and its related organizations can effectively address these issues. ATJ has not pursued some approaches that seem obvious to us and that is disappointing.

For example, a recent meeting with Texas legal aid organizations demonstrated a startling fact. Through no fault of their own, a substantial percentage of their funds is consumed in an eligibility system that results in those dollars being essentially wasted. One organization estimated that last year it sent letters to 30,000 people for whom the eligibility process was completed, an overwhelming number denying them legal services. More than half of those met financial eligibility but could not be served because they did not have priority cases or the organization did not have the resources to serve them. This inefficiency is common to most, if not all, the legal aid organizations—again, through no fault of their own.

Rather than provide them with forms and send them on their way, the first priority should be to make those wasted dollars work for those who have already been determined to be financially eligible. Our proposal would move those people identified as financially eligible into a system determined to provide legal services at free or reduced cost, depending on the nature of their cases.

While proponents of forms say there will never be enough lawyers to serve people, their proposed solution—forms—provides not one single lawyer to people who need one. This approach will require more lawyers at greater expense to straighten out many people's lives if they rely on the forms. If ATJ has reached its limit in its efforts to provide legal services to low-income Texans, the answer is not to abdicate the effort.

We have been accused of hyperbole when we say that the effect of the Access to Justice Commission's proposals for pro se litigation would be to dramatically change the practice of law.

If a Supreme Court administrative order endorses forms and instructions that ignore constitutions and statutes, when words in a statute are effectively changed by that court order and when precedent is overshadowed by court-ordered forms, the system of law as we have known it will, in fact, have been changed. We have documented the fact that these deviations from our system of law are clearly present in the forms presented to the Court, even after nine months of work by the Task Force.

No person can honestly conclude otherwise and no one is in a better position than the Members of the State Bar of Texas, who are the repository of expertise in this area, to draw that conclusion and document it, as we have. Workable solutions have been placed on the table.

Thank you for your consideration.

Sincerely,

Tom Ausley
Chair, Family Law Section
State Bar of Texas

Brian Webb
President
Texas Family Law Foundation

Diana S. Friedman
President, Texas Academy
of Family Law Specialists

Jimmy Vaught
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