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1958

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American Judicature Society

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Recommended Citation

Marcus G. Raskin & Sanford N. Katz, Therapeutic Approach to Divorce Proceedings, 7 Clev.-Marshall L. Rev. 155 (1958)

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“Therapeutic Approach” to Divorce Proceedings*

Marcus G. Raskin**
and Sanford N. Katz**

The family court operates so that it may tend to conserve, not disserve, family life; that it may be constructive, not destructive; that it may be helpful, not harmful, to the individual partners and the children; that it may be preventive, not punitive of marriage and family failures. . . .

—Judge Paul W. Alexander¹

THE CONCEPT OF FAULT—the placing of blame on one party—has no place in the therapeutic approach to divorce cases. If we consider the concept of fault in a different sense, namely, misconduct contributing to the disruption of the marital relation, then the concept becomes workable.

The *marriage counselor's* primary function is not to determine which party's misconduct has caused the discord. The therapeutic approach is based on a relational misconduct. That is, it applies when both parties are responsible for the breakup. The aim of the therapeutic approach is not to “reward the innocent and punish the guilty.” The goal of the marriage counselor in the therapeutic approach is to help the parties work out their problems, the final outcome of reconciliation or divorce being dependent upon the best interests and the happiness of the parties. The marriage counselor is also a “Friend of the Court” who aids the judge by making available to him the information received in conferences with the parties. It is this information, coming from counselors trained in human relations, that provides

* This is part of a larger work, to be titled “Contemporary Problems in the Law of Divorce in the United States,” being written by the authors of this article. A second part is soon to be published in the *Canadian Bar Review*.

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¹ 26 Connecticut Bar J. (3) September, 1952.

the judge with "considerations and facts which are outside the case."²

The leading court utilizing the therapeutic approach is the Lucas County Court in Toledo, Ohio. There the marriage counselors are concerned with facts rather than fault.

The court over which Judge Paul Alexander presides was founded in 1924, when the state legislature created the Division of Domestic Relations in the Court of Common Pleas of Lucas County, Toledo, Ohio. This court had jurisdiction over divorce matters and juvenile cases, but it gained little recognition until Judge Alexander ascended the bench in 1927. Because of a public demand for progressive handling of family problems, Judge Alexander acquired a professional staff to assist him in the field of domestic relations. These trained people have since played an integral role in the Family Court Center in Toledo.

Judge Alexander's plan for a new method of handling divorce problems at an early stage has evoked a great deal of comment from various groups. Known as the "therapeutic approach," his plan is based on a particular philosophy: "Divorce is principally a family problem born of conflict rooted in the personalities of the spouse and expressed in their interpersonal relationships."³

The Family Court employs six marriage counselors who work full time at the center. The court is also staffed with psychiatric consultants who are available in the center two days a week. The professionally trained marriage counselor has several functions. He not only enters the scene when disaster occurs, but is given the duty of educating and advising people on choice of a mate *before marriage*. After marriage he diagnoses family problems, and helps partners to gain insight in order to prevent marriage failures. After separation he brings to bear all his knowledge and skill to help the spouses to rectify or modify the causa-

² In the marriage counseling system all the facts and considerations of a particular case are controlled. The information received by the Judge enables him to see the "whole case." And to the judge whose intuitions about particular parties or facts are wrong, the counselor's information, properly applied, provides a valuable guide for reaching a just result.

³ *Supra*, Connecticut Bar Journal, n. 1. Also see Alexander, *The Therapeutic Approach*, University of Chicago Law School Conference on Divorce, where Judge Alexander said, "The goal of the therapeutic approach is to make the divorce procedure helpful instead of harmful; to make it non-adversary."

tional factors and to mend their marriage.⁴ The marriage counselor talks with the parties, and consults with attorneys, relatives and the judge in order to safeguard the best interests of children in regard to custody, visitation and support. When it becomes apparent that a divorce is inevitable, the marriage counselor helps the wife to prepare for her status as a divorcee. As a by-product of his effort to help the parties readjust to their new status,⁵ the marriage counselor, not being concerned with fault, paves the way for friendly instead of hostile settlements of such issues as alimony, division of property, visitation of children and other matters which may come before the court.

The counseling service was originally on a voluntary basis, with either the husband or wife making a request for such service. In 1951 however, a Citizens Committee on Divorce Procedure was formed in Cleveland. The Committee was composed of persons affiliated with religious, welfare, civic and lawyers organizations, along with a sub-committee of the chairmen of the domestic relations, common pleas and juvenile court committees of both the Cleveland Bar Association and the Cuyahoga County Bar Association. The sub-committee submitted plans to the Committee, one of which was to:

Submit a bill to the General Assembly of the State of Ohio to permit the creation of Departments of Domestic Relations in any common pleas court in the State. The Court to appoint such employees as it determines it needs for the purpose of investigating marital problems and making recommendations in custody, support, alimony and reconciliation matters.⁶

In 1951 an amendment to the Ohio General Code governing divorces made it mandatory for the court to initiate an investigation into every divorce application when there was a child under fourteen years of age in the family, and discretionary for the court to initiate such an investigation where there were no children under that age limit. The amendment reads:

⁴ Mudd, *The Social Worker's Function in Divorce Proceedings*, 18 *Law and Contemp. Prob.* 66 (1953). Miss Mudd states: "The purpose of marriage counselling is to help people find their way through the rough spots to a relationship which, hopefully, is constructive for both parents and their children." *Ibid.*, at 67.

⁵ Johnstone, *Divorce: The Place of the Legal System in Dealing With Marital-Discord Cases*, 31 *Oregon L. R.* 309 (1952).

⁶ Kovachy, *The Evolution of Ohio Divorce Laws: Their Development to Meet Present Day Needs*, 5 *West. Res. L. R.* 62 (1954).

Ohio R. C. § 3105.08 [G. C. § 8003-9] Investigation.

On the filing of a petition for divorce or for alimony, the court may and in cases in which there are children under fourteen years of age involved shall, cause an investigation to be made as to the character, family relations, past conduct, earning ability, and financial worth of the parties to the action. The report of such investigation shall be made available to either party or his counsel of record upon written request not less than five days before trial.

The court, on its own motion, may cite either party to the action from any point in the state to appear in court and testify as a witness.⁷

The narrow conception of the statute held by some writers⁸ is that the intent of the legislature was to make the amendment apply only to "families" with children under fourteen years, and that only in special cases was the amendment to apply to cases where there are no children of that age involved. Under this reading the statute deals primarily with custody. The more natural reading of the statute suggests that, at the very least, its *aim* is to have every petition for divorce investigated. Since this is an aim only, decision to make use of the method is in the discretion of the judge.⁹

In Judge Alexander's court the marriage counselor and the counseling program generally serve for more than mere conciliation. The court employs investigation reports and "therapeutic procedures." The investigation of a thousand divorce applications in the Toledo Court has pointed up a function of the divorce investigator:¹⁰

⁷ Comment by Director of Code Revision (1951):

"By virtue of the duties imposed by § 8003-9, a court having the inherent power to do those things necessary for the performance of its business may appoint one or more investigators, or appoint investigators from time to time to be paid however, only upon the allowance of the county commissioners as provided by § 2460; costs cannot be taxed and charged for the services of such investigator." 1951 OAG 913.

⁸ E. Dana Brooks (Director of Dept. of Domestic Relations, Cuyahoga County, Common Pleas Court, Cleveland), in referring to this amendment said, ". . . Since the investigation is only in those cases in which minor children under the age of fourteen are involved, unless the court specifically orders it in other cases, it seems to me that it is the intention of the Legislature, that the investigation is primarily aimed at the question of the custody and support of the said minor children." 25 Ohio Bar Association Report 581. (Emphasis added.)

⁹ This section is probably an example of what Llewellyn calls "giving teeth and not making them bite" in the same statutory section.

¹⁰ Report of the Toledo Family Court, 1955.

1. To provide the court and legal counsel with social information about the family which the attorney is not required to obtain and which the judge is unable to bring out in the brief time available for hearings.
2. To increase each client's awareness of all the influences contributing to his marriage failure, and of the consequences upon himself, a partner and children, of pursuing the conflict to a final severance of the matrimonial bond.
3. To help ready the client to consider reconciliation, and when ready, to encourage him and his mate to make another try at making a go of their marriage, for their own sake as well as the children's.
4. To try to bring the confused and over-emotional client to the point of asking for help with his problems and conflicts and then to begin the marriage counseling or refer him to a psychiatrist.

The marriage counseling process in the Toledo court begins with an in-take interview.¹¹ This is in the nature of a screening process, the purpose of which is to secure basic facts, define the problem, and determine future actions to be taken within the court. The person who conducts the interview writes up the facts and makes them available, for future reference, to any counselor or case worker who may handle the matter at a later time.

The purpose of the divorce investigation¹² and procedure is to secure basic information for the court when hearing the divorce case, and to try to prevail upon clients to accept marriage counseling, either for reconciliation or for reducing the emotional stresses incidental to the litigation.

The recommendation of the counselor has four facets:

- (1) Alimony
- (2) Custody
- (3) Child Support
- (4) Visitation

He is instructed to make allowances for the wife in his report if there are young children. The court feels that only if the wife is employed and the children are left alone should the husband be relieved of the obligation to support the wife.

¹¹ The information regarding the marriage counseling process was received in several exchanges of correspondence with the Family Court Center.

¹² See the function of the divorce investigator, *supra*, n. 10.

In a case where the marriage is dead beyond all hope of revival, the marriage counselor nevertheless is *not* to consider that he has no duty to the parties. He is told that he must still bring to bear all of his case work skills and psychological experience, so that the husband and wife will emerge from the experience with some better understanding of themselves and their relations with others.¹³

In the breakup of a family unit the counselor is constantly informed of his duty to the children of the unit. The very minimum that he is required to do is to get all the facts necessary for sound recommendations that can be made to the court about:

- (1) Custody
- (2) Visitations
- (3) Support
- (4) Medical, Optical and other treatment
- (5) Alimony
- (6) Schooling
- (7) Religious training

The counselor's task is not completed with the making of these recommendations. He then must discuss these recommendations with the parties and "sell them on the merits of these recommendations. Even though a judge might be able to force the conclusions on the parties, the better method, for obvious reasons, is to convince the parties of the goodness of the recommended arrangement."

The Marriage Counselling Center distributes to its case workers certain standard procedures to follow in situations that in the past have occurred most frequently:

1. If the defendant is out of town or does not appear, the counselor is to remind his or her lawyer that the divorce can not be had until his client comes in for a "visit." If the plaintiff leaves town after filing for divorce, the counselor is to contact the plaintiff's attorney and ask him to produce the plaintiff for an interview.

2. The counselor is told the following about lawyers:

Remember that most of the good ones have had four years of college and three years of law school. They may not be too dumb. The not-so-good ones may have had little or no

¹³ Mudd, *The Social Worker's Function in Divorce Proceedings*, supra, n. 4. See Bridgman, *The Lawyer and the Marriage Counselor Pari Passu—Parties in More Effective Service to Ailing Marriages*, 4 *Kans. L. R.* 546 (1956).

college and got their degree at night school. They are apt to be touchy and defensive when approached by one who has had more education than they have had. And—don't forget! Some people think it is fashionable to express superiority to social workers. You will have to learn how to handle them and learn you must! Because he can throw a monkey wrench into the machinery and undo in a few minutes what you may have taken weeks to do. And sometimes—he can accomplish in a few minutes what you might take weeks to accomplish. He can be made your strongest ally—or your nemesis. He will be about what you make him. (off the record.) Lawyers have to eat and pay rent. They do not have a steady income as you do. They have to take in a lot of fees for rent and overhead before they start to eat. The county does not furnish their offices.¹⁴

3. Regarding confidential communications, the counselor is told never to prepare anything for the judge to see unless he is willing to have the judge show it to *any* interested party. The exception, of course, is all medical and doctor's reports because of privilege.*

4. One of the most interesting aspects is the method the counselor uses in order to ascertain what should be the alimony payment for the wife. The first distinction is made from the old common law doctrine of distinction between necessity and luxury. Naturally, certain items in particular cases might fall into a necessary class which fifty years ago might have been considered as luxuries. It is also true that what might be considered to be a luxury to one family is considered a necessity to another. The counselor is to consider all of the circumstances of each party: age, health, education, experience, employability, earning power, assets, liabilities, the "style to which they have been accustomed," earning power of children, health of children, and educatability of children. Clearly, there is no magical formula for fixing alimony.

Parallel to the affixing of alimony is property division. The counselor is told "only to try to get the parties into an equable [sic] frame of mind, so that a fair division of property might be possible."¹⁵ Liquidation of property, the Family Center feels, is

* [Editor's Note: Absence of attorney-client and priest-parishioner privilege in this Marriage Counseling Center list is noted, and may have been omitted by the authors.]

¹⁴ Report of The Family Court Center, 1955. [Editor's Note: The temptation to comment on this was resisted only with some effort.]

¹⁵ Ibid.

best dealt with by the lawyer, although the counselor is free to recommend his suggestions to the lawyer.

The counselors leave the bargaining aspects of alimony or property settlements to the lawyers, except in cases where alimony is needed to give children adequate personal supervision because the mother must remain at home. The counselor, in a situation where the mother has small children, is advised not to recommend a figure that will either force the mother to go to work too soon or to encourage her to continue her dependence on her husband beyond a desirable time limit. This suggestion is in line with Ohio Revised Code, § 2111.08 (Gen. Code, § 10507-8) which states that the mother is also required to work.

There has been no problem of the admissibility and competency of evidence of the marriage counselor in the Toledo Court. In a personal letter received from Judge Alexander,¹⁶ he writes the following:

You also inquire if there have been any problems of evidence, e.g., privileged communications. The answer is, none that I can recall. As you know, the original of 3105.08 became effective in 1938. The provision for mandatory investigations in cases with children under 14 became effective in 1951. From the moment the original became effective until the amendment went into effect this Court has had from one to three case workers, psychologists or lawyers full-time, whom we called 'Friend of the Court.' Their function was the same as the function of the marriage counselors under the amended law, now numbering five to seven.

Perhaps the reason we have had no objection on the score of incompetent evidence during so long a period is that we have always tried to avoid violation of the hearsay rule, the rule with reference to privileged communications, and other rules that would render evidence incompetent when it comes to making statements in the written records or imparting information to the Judge. Incidentally, the amount of information imparted to the Judge outside the record is so small as to be quite negligible, perhaps once in two or three years. This is not at all hard to do when the primary object of the investigation is considered: Not to advise the Judge how to decide a case (unless some specific issue has been referred by the Judge to a court worker for investigation and recommendation); but to enable the worker to help the litigants as much as possible. Of course help cannot be forced

¹⁶ Personal letter from Judge Paul W. Alexander, Family Court Center, Toledo, Ohio, March 13, 1957.

upon a reluctant client and we recognize perhaps more fully than most the folly of attempting anything like that. About all one can do is to expose the litigant to marriage counseling with perhaps a simple explanation and a very low-pressure sales talk. (Once in a while a client expresses appreciation of the 'sales talk.')

Another factor may be that the attorneys who practice in our court pretty well understand that when damaging evidence reaches the Court's eye or ear it is used not against the client for punitive purposes but as part of the whole picture in an effort to better understand him and help him. This is the philosophy carried over from the Juvenile end of our Court into the handling of Family cases.

Other disarming factors may be the free exchange of information between marriage counsel and legal counsel; the fact that the marriage counselor's report is always open to inspection; the fact that when a given case is for trial the marriage counselor is available for cross-examination; the fact that the marriage counselors are very highly trained in their profession and command the respect of the lawyers; that when called for cross-examination, they invariably justify their recommendation, if any, and impress the lawyers with their fairness and impartiality as well as their intelligence and thoroughness.

What effect has the mandatory counseling provision in the Ohio Code had on the divorce rate in Lucas County? Judge Alexander, in the letter previously quoted, stated:¹⁷

It seems to me that it would be impossible to give you reliable statistical information about the effect Section 3105.08 of the Revised Code has had on divorces a vinculo in this county. The number of divorces requested would affect the number of cases to which this section applies; changing population, increasing marriage rate, general increase or decrease in prosperity affect the number of applications for divorce. Reconciliations would be accomplished by the counselors in the course of the investigation, or could be influenced by other community resources before or after a petition for divorce is filed.

Often when a reconciliation takes place during the course of a mandatory divorce investigation, the counselor realizes he shares the honors with the psychiatrist, the minister and the attorney, and that the reconciliation might have taken place had there been no mandatory divorce investigation.

While it appears that Lucas County has long had a higher percentage of petitions withdrawn or dismissed than the

¹⁷ *Supra*, n. 16.

average for Ohio, or for some other states, no proof can be advanced that Section 3105.08 per se has been the cause.¹⁸

Judge Alexander says that he can not determine the effect of the mandatory counseling program yet. The system is still young, and perhaps it is too early to begin an accurate analysis of its effect. The main concern is that the therapeutic approach is a great advance in divorce procedure, since it recognizes that divorce is a human, emotional, and psychological problem. It is concerned with human relations and must be dealt with by experts in that field. Perhaps the best description of the approach is that it is concerned with helping instead of hurting; guidance instead of guilt.

¹⁸ Ibid.