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Domestic Relations--Family Courts

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Notes

DOMESTIC RELATIONS—FAMILY COURTS

The Problem

The incidence of family breakdown in the United States is a phenomenon that draws forth proposal after proposal for reform in marriage and divorce laws.¹ Whether or not a high divorce rate indicates a rise in marriage instability is however, questionable. It may well be that the percentage of unstable marriages is the same as ever, but that more couples now choose to go to court for a decree. This would seem to be the natural result of the fact that divorce, in the last twenty years, has lost a great deal of its previous social stigma.² Simple population increase, too, will bring more divorce business before the existing courts without disturbing the percentage figures.

Although it is surely untrue that divorce is the proper solution for every ailing marriage, it is the contention of the writer that divorce has its legitimate place when applied to otherwise incurable marriage breakdowns. Admittedly, the present method of application leaves much to be desired, but the usual proposals for divorce-law reform are far too naive and superficial to operate as a remedy. At one time they may seek to make divorce almost impossible to obtain by restricting the legal grounds for divorce to an extreme. At other times they may seek to make it a matter of right by permitting divorce for "incompatibility" or even mutual consent.³

The effect of strict divorce law on marriages which should be dissolved is to force the parties to one of two evils—either suffer in silence or manufacture grounds.⁴ Extremely liberal grounds, however, result in routine granting of decrees without proper investigation of the marriages involved. If a husband and wife say that they are incompatible, their testimony cannot well be disputed because the word is too vague and all-encompassing to be subject to disproof. Mutual consent under the liberal view, of course, makes divorce easier to get than a driver's license; in effect, no grounds at all are required.

¹ Baber, *Marriage and the Family* 443 (1953); Johnstone, *The Place of the Legal System in Marital Discord Cases*, 81 *Ore. L. Rev.* 297 (1952).

² Baber, *supra* Note 1 at 443-44.

³ Johnstone, *supra* Note 1 at 311.

⁴ *Infra* Note 6.

Neither of these reforms is apt to have any real effect on the divorce rate or the situations of marital discord giving rise to divorce. In New York, where the only ground for absolute divorce is adultery, the courts have stretched the remedy of annulment to grandiose proportions in order to dissolve marriages that would be terminated by divorce in other states.⁵ Collusion, too, is common.⁶ The effect of establishing incompatibility as a ground for divorce, as has been done in New Mexico and Alaska,⁷ is merely to accomplish by legislative action what has been done for years by collusion between the parties. The fact is that courts today have very little influence on the question whether a divorce shall or shall not be granted. On the average, divorces are granted within ten minutes after the judge receives the case. Real contests are rare, and the courts seldom make adequate inquiries.⁸

One reason for this situation is that divorces are handled like tort or criminal actions—by the traditional adversary method of proceeding. The criterion for awarding the decree is the fault of one of the parties in committing an act in violation of the marriage contract. Certain grounds consisting of such violations are set out by statute. One party files an ordinary lawsuit, alleging the commission of such an act, and if the other party does not present a proper defense, the decree is usually granted. Theoretically, if the grounds are manufactured the suit will be dismissed, but if both parties desire the divorce the court will not be told of collusion. The adversary system presupposes two adverse parties with adverse interests. Most divorce suits involve parties who are adverse only to each other, but have a common interest in procuring a divorce as quickly as possible. The truth, in the usual case, does not emerge.

Thus, it seems that neither liberality nor strictness in *grounds* for divorce has much effect as “reform”. Liberalization does, however,

⁵ Baber, *supra* Note 1 at 519.

⁶ *Id.* at 478.

“It is an open secret that in certain states having very strict divorce laws collusion is a dreary commonplace . . . reporters get weary of the unimaginative sameness of the testimony, and even the judges, at first indignant, then disgusted, find themselves granting decree after decree in cases where they are . . . sure . . . that the most brazen collusion is being practiced. In New York, where adultery is the only ground for absolute divorce, the story of the plaintiff’s lawyer has so little variation that certain judges claim they can take it up at any point and complete it, knowing just where the “blonde in a night-gown” will appear. One New York judge has a leaflet specially prepared to expedite uncontested divorce suits. The referee admonishes the attorney to “use the book” when he inadvertently asks some usual but not entirely necessary question.”

⁷ Johnstone, *supra* Note 1 at 312.

⁸ *Id.* at 298, 299.

have the attribute of honesty, in that it brings the grounds for divorce closer to the actual causes.

What is needed is not merely liberality or strictness in divorce laws, but the end of *fault* as the basis for family dissolution and the establishment of a method which will bring before the court a true picture of the family problem in each individual case. The emphasis should be placed on the question of whether divorce is the proper solution for a given case rather than on the question of whether one of the parties has slighted the other. The court, in the interest of the state, must take a more active part in bringing about the proper conclusion in divorce cases, on the theory that the state is a third party to the marriage contract and the society in general has a much deeper interest in divorce cases than in ordinary contract litigation. Otherwise, the adversary system leaves a gap in divorce litigation and the interest of the third party state is not adequately served. It is this gap that family courts are designed to fill.

What is a Family Court?

A family court differs from the ordinary court in three particulars: (1) It is integrated. This means that it has exclusive jurisdiction of all justiciable problems which arise in a given family out of the intra-familial relationship. (2) Whereas the ordinary court merely attempts to hear evidence and apply law, the family court operates on a therapeutic treatment principle, the controlling question being not "who is at fault here" but "what is best for this family?" (3) The court is provided with a specially-trained staff which acts in an advisory capacity to the judge. Ideally the staff would include the pediatrician, nurse, psychiatrist, clinical psychologist, psychometrist, psychiatric counsellor, social caseworker, marriage counselor, group worker and teacher.⁹

The function of the staff is to make a thorough investigation of the family problem presented and recommend to the judge its proper remedy. If deemed feasible, an effort at reconciliation may be made through professional guidance and counselling including psychological treatment. If divorce is thought to be the proper remedy, the effort is to prepare the parties for post-marriage family adjustment. The overall objective of the staff is to solve the family problem rather than merely to separate or refuse to separate its members.

For the same reasons that a specialized staff is required for family courts, it is also necessary that the presiding judge not be rotated. Considerable extra-legal knowledge is necessary for the family court

⁹ *Id.* at 320.

judge to utilize properly the work of his staff. It is also desirable that the presiding officer be a person having special interest in family problems. Many judges regard divorce, custody, alimony, and non-support as among the most vexing problems facing the judiciary, and do not enjoy working in domestic relations. This may derive from the fact that judges are usually lawyers first, and many lawyers feel that domestic relations litigation is less respectable than the balance of law practice. Here again, conflicts in philosophy may arise between succeeding judges dealing with the same family. For these reasons it is generally agreed that the family court judge needs to be something of a specialist and should not rotate.¹⁰

II

Advantage of Family Courts

One major advantage of the family court is that it appeals equally to conservatives and liberals on the question of divorce reform. It makes divorce neither harder nor easier to obtain. It insures that divorce will be granted only after a competent investigation of the family problem, but that it will be granted if a thorough analysis shows its desirability. In this sense the family court is a compromise which largely displaces objections to other types of reform.

Its unique attribute of centralized control of family matters is a large factor in making the family court attractive. "Often juvenile delinquency, nonsupport, divorce and other related problems will arise in a given family due to one basic cause, such as alcoholism or poverty. If one court with one inter-working staff can sift through these cases, it is more likely that a satisfactory solution of all these problems can be found, be it divorce or therapy, without duplication of effort within the legal system and a series of expensive lawsuits by the family members. Unification of effort in the legal system would be a boon to overworked courts, and the less expensive remedy available to individual families would in some degree offset the cost to society of maintaining a family court with its specialized staff. One writer has estimated that the family court would more than pay its own expenses through reduction of alcoholism, narcotic use, delinquency, mental disturbance and other expensive social problems."¹¹

Further, centralized control avoids conflicts of philosophy between judges in separate cases involving the same family problem. Very

¹⁰ Alexander, *What Is a Family Court, Anyway?*, 26 Conn. Bar. Jour., 256 (1952).

¹¹ Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 Vand. L. Rev., 637 (1956).

little can be done toward reconciliation in a divorce case if the husband is under indictment for nonsupport or desertion in a criminal court with a non-cooperative judge.

The atmosphere of a family court is conducive to successful reconciliation. The parties come into court as partners, looking for help, rather than as opponents in a court battle. They tell their stories in conference and an investigation is conducted, without benefit of cross-examination and recrimination. The bitterness of a public accusatory trial is avoided, and experts are on hand to guide the proceedings in quiet channels.

It is better that child custody be determined by a trained judge in consultation with a staff of experts on child care and development than by the ordinary judge whose knowledge in matters extra-legal may be insufficient. Otherwise the welfare of the child is subject to the decision of one who is ill-informed, or is determined by common-law rules which may be wholly outdated by recently developed knowledge in fields other than law.

III

Problems of Family Courts

In actual practice, the efficacy of family courts is hampered by inadequate staffing and inadequate jurisdiction.¹² The staff required for highest efficiency is rather large and composed of highly trained personnel. Financial considerations lead inevitably to a whittling down of the staff. Just as an army with popguns could make only token resistance in the field, a family court with a skeleton staff can do too little in dealing with family breakdown. Authorities have determined that one caseworker can efficiently handle not more than forty cases simultaneously, but in a number of courts one worker is obliged to handle eighty, ninety or even one hundred cases.¹³ The information thus obtained is sketchy and superficial, causing ill-informed decisions. In such a situation, the money spent for a staff is largely wasted since the overburdened caseworker must do something on each case and therefore can rarely treat any case adequately.

To illustrate, in Oregon, two counties, Multnomah and Marion, have family courts. The Multnomah Court is fairly well staffed and placed in a model physical plant, but the Marion County Court has a total of one secretary and three probation officers for a staff, and its physical facilities have been termed "undesirable" and "inadequate".¹⁴ Such a court as the Marion County Court cannot justly be called a

¹² *Supra* Note 10 at 263.

¹³ Baber, *supra* Note 1 at 668.

¹⁴ Johnstone, *supra* Note 1 at 319, 320.

family court and its results are not a fair indication of the family court's utility. Because many skeleton courts like this are in operation throughout the country, it is almost impossible to get any clear statistical picture of family courts and their efficiency.

The second discrepancy between the ideal and the actual occurs in jurisdiction. It is imperative that a family court be integrated. Overlapping jurisdiction means trouble, usually caused either by conflicts of philosophy between family court judges and old-guard judges or by one court's operating on one family problem while another works on a different problem of that family, with neither knowing what the other is doing.¹⁵

In Ohio, where family courts exist in eight of the nine largest cities, the family court has either exclusive or concurrent jurisdiction of all family problems other than adoptions.¹⁶ In the matters where concurrent jurisdiction exists the family court exercises exclusive jurisdiction by tacit consent of the other tribunals.¹⁷ The Ohio situation is probably the best in the United States from the standpoint of jurisdiction due to the "gentleman's agreement" which gives the family courts almost exclusive jurisdiction in fact, although much jurisdiction is theoretically concurrent. In contrast to Ohio is the existing situation in Richmond, Virginia, where some family problems may be brought in any of five separate courts.¹⁸ Here coordination is supremely difficult if not impossible.

Situations falling somewhere between these two are common throughout the country, and also contribute to make statistics on family courts unreliable. The family is a treatment unit. Family courts have been set up to look after family welfare only to find themselves denied a certain amount of jurisdiction or sharing it with ordinary courts. Any appraisal of existing family courts must take into account the fact that no family court has yet been established with exclusive jurisdiction of family problems and a complete staff.¹⁹ The efficiency of existing courts is correspondingly diminished.

IV

Objections to Creation of Family Courts

An inevitable obstacle confronting family courts is the expense of maintaining the large specialized staff. It has been estimated that an

¹⁵ *Supra* Note 10 at 253-56.

¹⁶ *Id.* at 251.

¹⁷ *Ibid.*

¹⁸ Alexander, *The Family Court of the Future*, 36 J.A.J.S. 39 (1952).

¹⁹ Johnstone, *supra* Note 1 at 297, 322.

adequate family court staff would be more costly than the very best present day juvenile court staff.²⁰ However, there are compensations which should greatly diminish, if not completely over-ride, the expense objection.

In jurisdictions where juvenile courts already exist, the cost of establishing a family court is not great. The juvenile court staff, if it is adequate, comprises the bulk of the family court staff. A widening of jurisdiction plus the addition of a few staff members is all that is needed. As noted before, there are other savings to be effected by the family court which cut down on the cost of its maintenance. Reduction of expensive social problems and unification of effort in the legal system and in individual families must be considered. Of course such savings are directly affected by the adequacy of the court in terms of staffing and jurisdiction.

Whether the family court is a money-saving device is at least debatable. But whether it is expensive or not, the need overbalances the cost. The American Bar Association, in unanimously approving family courts in the United States, has said that "the cost of our present divorce system *in terms of human tragedy* has become too high to be tolerated any longer."²¹

Perhaps the most potent objection to the family court is that it permits the state to interfere too much with the individual. Family court procedures will necessarily involve deep investigation into the family unit, both through social workers and through psychological probing. These methods may be necessary to ferret out the true causes of family discord and the resulting divorce, delinquency, or other problem. Rehabilitation when possible is the aim of family courts, and this may sometimes require psychiatric treatment of personality factors causing disharmony. It has been pointed out that there is danger here of interfering with basic rights of personal freedom.²²

When parties voluntarily choose to undergo treatment, no constitutional objections can be raised. Probably the greatest number of divorce cases will be in this category, since very few couples actually want a divorce. Most of those who apply are doing so only as a last resort. They are sick, troubled people, disillusioned and in need of help. Many parties file divorce suits either in temporary anger or in the mistaken hope of bringing the other party "to his senses", and follow through with the action because of personal pride.²³ A chance to stop and submit to arbitration is usually welcomed. This conclusion

²⁰ Id. at 322.

²¹ 78 Reports of the American Bar Association 305 (1948).

²² *Supra* Note 11 at 637-40.

²³ Jour. Bar. Assn. D. C. 5 (Jan. 1954).

is borne out by the experience of the Conciliation Court in Los Angeles.²⁴

May parties who are unwilling to submit to family court methods be forced to undergo extensive examination of their private affairs and possible psychiatric treatment involving personality change as a condition precedent to a divorce? Indeed this is a difficult question, and if answered in the negative will destroy much of the value of family courts. However, it is the opinion of the writer that parties can be compelled to go through family court without any violation of fundamental rights. Primarily, this is a question of degree. A rule of reason is indicated. In a society such as ours, no legal right is perfect and absolute. Although a man's right to be inviolate in his person is one of the most closely protected rights known to the law, circumstances have and will occasionally warrant a measured invasion, for the good of the state and the whole people. Interests must always be balanced in deciding such legal questions, and it is inevitable that in this process a situation will now and then emerge requiring some abrogation of personal freedom.

Examples of such situations are readily found in the cases on constitutional law. Incarceration for criminal conduct or insanity, and quarantine of persons having contagious diseases are well-known and accepted invasions of liberty. Compulsory vaccination²⁵ and even compulsory sterilization of mental incompetents²⁶ have been allowed where the good of the whole society was in jeopardy.

In the present question it is necessary to balance the interest of the state in family stability and the interest of other family members in the preservation of their home against the interest of a recalcitrant individual in the freedom of his person. It is obvious that freedom of the person must yield to a certain reasonable extent. The degree to which this freedom must give way is a matter to be determined in each individual case. Only the broader limits can be seen in specula-

²⁴ The Conciliation Court resembles a true family court only in approach. It is not staffed to provide such help as a family court would give, and it takes divorce cases only by consent of the parties. More than a thousand couples per year appeared before this court in 1954 and 1955, and conciliations were effected in 43% of these cases, without benefit of a trained staff. The voluntary appearance of so many couples in a court of conciliation shows that the constitutional objection applies only to a limited class. See, *Burke, An Instrument of Peace: The Conciliation Court in Los Angeles*, 42 A.B.A.J. 621 (1956). Also relevant is the experience of the Family Part of the New York County Supreme Court, created September 1, 1955. This tribunal operates with only one social worker on an outside referral basis. Cases are taken on a consensual basis. A recent report states, "There have been some refusals, but in the main consents have been given." 12 N.Y.C. Bar Assn. Record 100 (1957).

²⁵ *Rottschaefer, Constitutional Law* 730 (1939).

²⁶ *Supra* Note 25 at 731.

tion. When children are present in a marriage sought to be dissolved, it would seem that a strong public policy would call for substantial interference with the parent's right to immunity. On the other hand, it is doubtful that such strong methods as brain surgery could ever be allowed.

Probably the fear of deep personality transformation is not too well founded. Failures to adjust in marriage often arise from fairly trivial beginnings. Sometimes all that is needed is an objective view of the problem presented by an impartial third party. Minor counsel and guidance may be sufficient. The family court seeks merely to iron out difficulties, not to turn out a succession of wooden men, equally balanced and having identical personalities.

Another objection is that the family court removes domestic relations from the province of the legislature and turns over to judicial discretion a matter which has so far been dependent on clear-cut rules of law. It is contended that a government of laws is superior to a government of men. However true this premise may be in the abstract, it has been a miserable failure when applied to divorce. These very "clear cut rules of law" have resulted in a degree of collusion and underhanded practices so outrageous as to render divorce a public joke and the judge and his laws mere bystanders to the whole affair.²⁷ This is not the first instance in which it has been deemed wise to give a judge, board, or commission needed authority to control a flexible situation. Decisions such as this must be made in light of history and fact, not in terms of pure abstraction. A government of laws is generally better, but this rule finds its exception in family cases.

Finally, it is argued that the family court arrives too late on the scene of marital discord. When a couple have gone so far as to actually file suit for divorce, can anything constructive be done? Although it is unquestionably harder to cure a festered wound than a fresh cut, this does not mean that the job is hopeless. Again, reference is made to the suggestion that most people don't want to be divorced at all, but

²⁷ See Baber, *supra* Note 1 at 522-23 which states:

"Our divorce laws are a mess, they are rotten, they have totally failed to accomplish their disclosed objective (quoting a report of the A.B.A. Special Committee on Divorce and Marriage Laws). . . .

"Divorce procedure has become so routine that it might be called a legal farce. . . .

"There is little majesty in the law when confusion, evasion, judicial indifference, and stark dishonesty reign supreme."

Also see Reginald H. Smith, as quoted in 34 A.B.A.J. 196 (1948):

". . . the press and periodicals treat the divorce laws, including the decisions of the Supreme Court of the United States, with outspoken contempt, . . ."

are merely seeking a solution. To them, an alternative less drastic than divorce is welcome. The records of the Los Angeles Conciliation Court and the New York Family Part noted before bear out this conclusion. The family court may be the ideal, rather than the worst place for counseling, since the parties are usually at the end of their ropes, under emotional strain, and encountering their first opportunity for capable outside help. The family court provides a friendly atmosphere rather than the bitterness of an open court battle, which would have an adverse effect on conciliation efforts. Then, too, the family court's work is not entirely conciliation of divorce cases. In addition to the numerous family problems outside of divorce, the court performs a valuable function in counseling parties to prepare them for separation and divorce.

Conclusion

The family court, properly staffed and given adequate jurisdiction, should merit legislative attention as the only available remedy for a major national problem. State legislatures should seriously consider the adaptability of the family court in particular jurisdictions.

Divorce itself is not the problem. It is sometimes the most sensible solution to a bad marriage. Children are often more harmed by living in an air of constant conflict than by a separation of the parents. The malady of domestic relations is that its law is intrinsically poor and badly administered. The method used to determine who should have a divorce or custody of children is antiquated, bearing more resemblance to trial by ordeal than to modern legal theory. Further, even if the laws were perfect, the facts in actual cases are easily hidden from the courts. The adversary system fails here.

The integrated family court, with access to all family problems, is the best answer yet provided. It is the logical outgrowth of the juvenile court, and exists for the same reasons. A family court system would rid the legal world of the stigma it now bears as a rather inept and fumbling organization so far as divorce goes. Divorce laws simply do not work. They are drawn to fit an adversary scheme, which too often does not exist, and they cannot successfully be applied. Lawmakers have tried to draft divorce laws to fit the traditional system for want of a better frame.

The family court may or may not be an expensive remedy. A conclusion on this point would be pure speculation. But expensive or not, it appears to be the only workable solution for an urgent problem. Cost may be measured in money or in human happiness; if measured in the latter, a saving is inevitable.

Jesse S. Hogg