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Therapeutic Jurisprudence and Child Protection

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RESEARCH PAPER SERIES

Research Paper No. 34/2012

Therapeutic Jurisprudence and Child Protection

Shelley Kierstead

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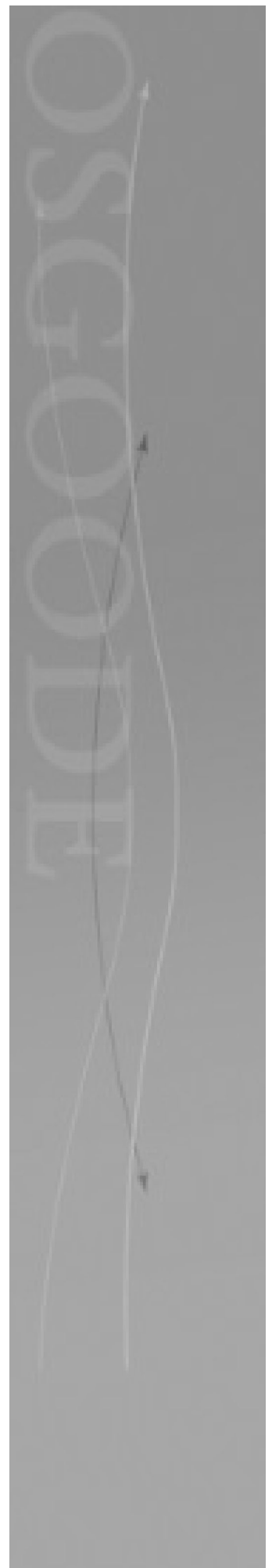
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Law & Political Economy



THERAPEUTIC JURISPRUDENCE AND CHILD PROTECTION

Shelley Kierstead*

I. INTRODUCTION

An intricate weave of public/private, legal/emotional, and inter-disciplinary elements make child protection law capable of attracting rich analyses from a therapeutic jurisprudence perspective.¹ This article aims to contribute in a small way to the extensive potential discussions in this area by considering some avenues that professionals working within the child welfare system can adopt to facilitate the emotional well-being of the parties involved while respecting the legal system values that apply to the regime.² Part II briefly introduces the child protection regime's intricate blend of elements. Part III advocates for preventive lawyering and therapeutic judging as vehicles for maximizing therapeutic outcomes for both parents and children involved in child protection matters. Part IV canvasses the complexity introduced by the variety of professionals involved in child protection cases, and their tendency to work from different conceptual bases and with different "vocabularies." It calls for a stronger understanding of the theoretical underpinnings of the array of professionals regularly involved in child protection matters, and better communication among these professionals so that they do not inadvertently end up working at cross purposes. The concluding part of the article offers preliminary suggestions for teachers and child protection professionals aimed at maximizing the therapeutic aspects of what is undoubtedly one of the most devastating areas of law to parents and their children.

II. CHILD PROTECTION: A COMPLEX BLEND OF RIGHTS AND INTERESTS

Child protection law clearly involves families. And yet, it does not give rise to the private type of dispute that involves parents negotiating child-related matters in a "typical" family law post-separation scenario.³ Rather, this area engages a significant public law element—one that involves state intervention aimed at

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1. Susan L. Brooks, *Therapeutic Jurisprudence and Preventive Law in Child Welfare Proceedings: A Family Systems Approach*, 5 PSYCHOL. PUB. POL'Y & L. 951, 951 (1999) ("Child welfare law provides a rich context for exploring the application of therapeutic jurisprudence (TJ) and preventive law principles."). Brooks went on to outline the importance of family systems theory, with its focus on mutual interaction and shared responsibility of family members, to effective child welfare practice.

2. Therapeutic jurisprudence is an approach to legal analysis and legal action that seeks to maximize well-being (often emotional) for those involved in the law, without sacrificing other legal system values. See DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991) (for a number of early key works on the concept of Therapeutic Jurisprudence).

3. Sometimes, however, parties involved in child protection proceedings can be simultaneously going through the separation process.

protecting children from parental behavior that harms them or places them at risk of harm.⁴ As part of his in-depth look at judicial determinations of custody disputes, Robert Mnookin described the most important distinction between the child protection function and private custody resolution function as lying in their relationship to the distribution of power between the family and the state:

Legal standards for private dispute settlement guide judicial resolution of a private controversy. In this instance, authoritative resolution does not in itself expand the state's role with regard to child-rearing. Legal standards for the child-protection function, on the other hand, act both to define *when government may intrude into the family and to control child-rearing through coercion*. Defining the appropriate scope of the child-protection function is therefore necessarily related to profound questions of political and moral philosophy concerning the proper relationship of children to their family, and the family to the state.⁵

The level of state intervention in family functioning represented by child protection proceedings heightens the concern for ensuring due process for the parties whose interests are at stake.⁶ The distinct nature of child protection matters necessarily embodies a tension between family autonomy and the protection of

4. See Child and Family Services Act, R.S.O. 1990, c. C.11, s. 37(2) (Can.) [hereinafter CFSA] (for the list of descriptors of a "child in need of protection").

5. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 265 (1975) (emphasis added).

6. The Supreme Court of Canada dealt with the concern for due process in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 (Can.), a case dealing with an indigent mother's right to publicly funded counsel in a child protection matter where she was at risk of losing custody of her children for a prolonged period.

[80] In proceedings as serious and complex as these, an unrepresented parent will ordinarily need to possess superior intelligence or education, communication skills, composure, and familiarity with the legal system in order to effectively present his or her case. There is no evidence in *Athey J.*'s decision or the record to suggest that the appellant possessed such capacities.

[81] In light of these factors, I find that the appellant needed to be represented by counsel for there to have been a fair determination of the children's best interests. Without the benefit of counsel, the appellant would not have been able to participate effectively at the hearing, creating an unacceptable risk of error in determining the children's best interests and thereby threatening to violate both the appellant's and her children's right to security of the person.

In a later case dealing with the validity of warrantless apprehensions, the Supreme Court of Canada stated:

[T]he removal of a child from parental care by way of apprehension may give rise to great emotional and psychological distress for parents and constitutes a serious intrusion into the family sphere. Since s. 21(1) of the [Manitoba *Child and Family Services*] Act provides for the apprehension of a child from parental care, it contemplates an infringement of the right to security of the person which can only be carried out in accordance with the principles of fundamental justice.

Winnipeg Child & Family Servs. v. K.L.B., 2000 S.C.C. 48, [2000] 2 S.C.R. 519, para. 87 (Can.).

children. Due process considerations, then, should apply to both the adults and the children who are at the very center of child protection cases. There is a growing body of literature focused on the latter issue, often with a specific focus on children's participation in legal matters affecting them.⁷ This article does not engage with that body of literature, but rather is focused primarily on therapeutic jurisprudence concepts as they relate to parents. Of course, it is impossible to separate the concern for children's well-being that is embedded within this analysis.⁸

The complex blend of rights and interests involved in child protection matters invites consideration of an equally intricate set of legal and therapeutic elements. A number of authors have argued for greater use of interest-based dispute resolution in matters involving personal relationships, family dynamics, and children's interests.⁹ There is widespread agreement that the family litigation process often serves to exacerbate stress and conflict among family members.¹⁰ Given that child protection matters involve the support and nurturing of ongoing family relationships, similar caveats about the anxieties associated with the litigation process certainly come into play. And yet, to the extent that child protection matters pit parents against the state in a contest about who will be entitled to parent the child(ren) at issue,¹¹ significant due process rights arise. These cases also give rise to an interesting power dynamic, particularly in light of statistics that suggest a significant number of child protection cases involve parents of low socio-economic status¹² and correspondingly little access to resources. While informal processes

7. For one recent analysis, see Rachel Birnbaum & Nicholas Bala, *Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio*, 24 INT'L J.L. POL'Y & FAM. 300 (2010).

8. The CFSA, *supra* note 4, makes it clear that the promotion of children's best interests, protection, and well-being is the paramount objective of the legislation. See *infra* note 19 and accompanying text.

9. See Marsha B. Freeman, *Love Means Always Having to Say You're Sorry: Applying the Realities of Therapeutic Jurisprudence to Family Law*, 17 UCLA WOMEN'S L.J. 215 (2008) and Susan Daicoff, *Collaborative Law: A New Tool for the Lawyer's Toolkit*, U. FLA. J.L. & PUB. POL'Y 113 (2009).

10. See M.K. Pruett & T.D. Jackson, *Perspectives on the Divorce Process: Parental Perceptions of the Legal System and its Impact on Family Relations*, 29 J. AM. ACAD. PSYCHIATRY 18 (2001) (for an account of divorce clients' perceptions of the stress associated with litigation).

11. In *New Brunswick v. G.(J.)*, *supra* note 6, the Supreme Court of Canada recognized the significance of the presumption that parents will be entitled to raise their children. At para. 61, the Court stated:

I have little doubt that state removal of a child from parental custody pursuant to the state's *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent. The parental interest in raising and caring for a child is, . . . "an individual interest of fundamental importance in our society". Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere.

In the United States context, parents' right to care and custody of their children has been recognized under the Due Process Clause of the Fourteenth Amendment, see Marsha B. Freeman, *Lions Among Us: How Our Child Protective Agencies Harm the Children and Destroy the Families They Aim to Help*, 8 J.L. & FAM. STUD. 39, 53 (2006); see also Susan E. Lawrence, *Substantive Due Process and Parental Rights: From Meyer v. Nebraska to Troxel v. Granville*, 8 J.L. & FAM. STUD. 71 (2006).

12. NATIONAL CLEARINGHOUSE ON FAMILY VIOLENCE, CANADIAN INCIDENCE STUDY OF REPORTED CHILD ABUSE AND NEGLECT—2008 MAJOR FINDINGS 55–56 (2010) (this report released by Canada's Public Health Agency reported that thirty-three percent of substantiated child protection investigations involved children whose families received Employment Insurance, social assistance, and other benefits as their primary source of

undoubtedly hold potential to provide parties with a more direct “voice” in the resolution process,¹³ the transparency of a court proceeding¹⁴ may help to ensure that due process concerns are addressed, particularly in cases where parents are at a very real risk of permanently losing the right to parent their children (and, of course, children are at a very real risk of permanently losing the right to be parented by their current parents).

There is some debate about the extent to which due process safeguards are impacted by child protection mediation¹⁵ and other informal dispute resolution processes.¹⁶ Certainly, both mediation and family group conferencing have been widely recognized as “help[ing] professionals [to] engage families and children, increase the focus on family and community strengths, promote collaboration instead of adversarial relationships, and help children leave the foster care system and find permanency in a timely manner.”¹⁷

The discussions about the range of possible dispute resolution mechanisms reflect the mixed objectives of most child welfare statutes—promoting best interests of the child and supporting the integrity of the family unit. For example, the *Child and Family Services Act*¹⁸ of Ontario provides as follows:

income. Ten percent of families relied on part-time work, multiple jobs, or seasonal employment. Two percent of families reported no reliable source of income, and eleven percent of families in substantiated cases were also living in public housing.).

13. Gregory Firestone, *Empowering Parents in Child Protection Mediation: Challenges and Opportunities*, 47 FAM. CT. REV. 98 (2009) (arguing for the need to empower parents to be active participants in child protection mediation so that issues of concern can be dealt with in a timely way); see also Marilou Giovannucci & Karen Largent, *A Guide to Effective Child Protection Mediation: Lessons from 25 Years of Practice*, 47 FAM. CT. REV. 38 (2009).

14. Trevor C. W. Farrow, *Privatizing our Public Civil Justice System*, 9 NEWS & VIEWS ON CIVIL JUSTICE REFORM 16 (2006) (articulating the importance of transparency within the civil justice system).

15. Marvin M. Bernstein, *Child Protection Mediation: Its Time Has Arrived*, 16 CAN. FAM. L.Q. 73 (1998) (arguing the view that mediation can increase parental bargaining power without sacrificing the parents’ due process rights, while taking the position that the determination of whether a child is in need of protection cannot be mediated).

16. Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 909 (2010). While recognizing that in some cases, mediation (and other informal processes) can empower parties:

Perhaps an even more troubling example of risks posed by mediation in the face of disabling power imbalance is family conferencing in child welfare cases. . . . [T]he attorneys’ role in family conferencing is as ill-defined and limited as in divorce and custody mediations. And these cases are often marked by intimate partner violence and parties with limited education and resources. All these circumstances create risks that a parent, most often the mother, will “suppress her point of view in order to achieve agreement,” and not benefit from available statutory or constitutional protections.

17. Kelly Browe Olson, *Family Group Conferencing and Child Protection Mediation: Essential Tools for Prioritizing Family Engagement in Child Welfare Cases*, 47 FAM. CT. REV. 53, 53 (2009); see also Susan M. Chandler & Marilou Giovannucci, *Family Group Conferences: Transforming Traditional Child Welfare Policy and Practice*, 42 FAM. CT. REV. 216 (2004); Paul Adams & Susan M. Chandler, *Responsive Regulation in Child Welfare: Systemic Challenges to Mainstreaming the Family Group Conference*, 31 J. SOC. & SOC. WELFARE 93 (2004); and Jeanette Elizabeth Schmid & Shoshana Pollack, *Developing Shared Knowledge: Group Family Conferencing as a Means of Negotiating Power in the Child Welfare System*, 21:3 PRACTICE 175 (2009).

18. CFSA, *supra* note 4.

Paramount purpose

(1) The paramount purpose of this Act is to promote the best interests, protection and well being of children.

Other purposes

(2) The additional purposes of this Act, so long as they are consistent with the best interests, protection and well being of children, are:

1. To recognize that while parents may need help in caring for their children, that help should give support to the autonomy and integrity of the family unit and, wherever possible, be provided on the basis of mutual consent.
2. To recognize that the least disruptive course of action that is available and is appropriate in a particular case to help a child should be considered.

This combination of elements provides serious challenges for those involved in child protection work—including legislators, lawyers, social workers, mediators, and judges. This article places the spotlight primarily on the work of lawyers and judges in facing these challenges. And, while accepting that non-court processes have inherent therapeutic value for many families, the current work suggests that even in cases where the court process is used in whole or in part to resolve a matter,¹⁹ there is potential to maximize therapeutic possibilities throughout the process. The responsibility for maximizing this potential lies squarely with the professionals who administer the system.

III. PREVENTIVE AND CLIENT-CENTERED LAWYERING AND JUDGING

For legal advocates working with child protection matters, concepts such as preventive lawyering,²⁰ which looks at ways to prevent legal risks from becoming legal problems, and client-centered lawyering, are particularly relevant. The latter approach

has its source in a perspective that legal problems typically raise both legal and non-legal concerns for clients, that collaboration between

19. *Id.* at s. 51.1. The CFSA allows for a combination of processes to occur after formal protection proceedings have been commenced:

At any time during a proceeding under this Part, the court may, in the best interests of the child and with the consent of the parties, adjourn the proceeding to permit the parties to attempt through a prescribed method of alternative dispute resolution to resolve any dispute between them with respect to any matter that is relevant to the proceeding.

20. See Susan Daicoff, *Making Law Therapeutic for Lawyers: Therapeutic Jurisprudence, Preventive Law, and the Psychology of Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 811 (1999); see also Susan Daicoff, *Reclaiming Meaning in the Practice of Law: The Comprehensive Law Movement*, 19 TOURO L. REV. 825 (2004) (for a discussion of preventive law as a vector of the comprehensive law movement).

attorneys and clients is likely to enhance the effectiveness of problem solving, and that clients ordinarily are in the best position to make important decisions.²¹

One of the justifications for client-centered lawyering rests with the proposition that the extent to which solutions generated within the lawyer-client relationship are viewed as successful by clients is directly related to how well they respond to the client's concern about non-legal consequences.²² A hallmark of client-centeredness is the ability to understand and respond to clients' feelings without being required to play the role of psychologist or social worker.²³

Laypersons are, understandably, not familiar with the various professionals and professional roles involved in the child protection regime. Failure to understand matters such as the purpose and mechanics of supervised access visits, parental capacity assessments, and judicial case conferences, can create significant uncertainty for parents.²⁴ This uncertainty can lead to anxiety, fear, and depression.²⁵ Therefore, it is important to clarify process details to clients. Further, to the extent that the documents prepared for a case can be clear and unambiguous, and can reflect the client's voice (for example, through the affidavits that support his or her position), clients may feel some sense of control regarding the information package that is being created with and for them.²⁶ In an era where public (legal aid) funding is limited, and where many child protection cases involve clients who rely on public funding, taking the time to explain procedural details may seem to be an unnecessary luxury. But it is an essential step toward working with truly informed clients who are proactively engaged in their own matters.

A key aspect of successful client engagement in the child protection process involves careful listening. It is obvious that lawyers must listen to clients' stories to get an immediate sense of the appropriate next "step" in the process.²⁷ From a therapeutic jurisprudence perspective, there is, I suggest, both a more nuanced aspect of listening to clients, and a requirement flowing from this "listening"

21. DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE & PAUL R. TREMBLAY, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 3 (2d ed. 2004) [hereinafter *LAWYERS AS COUNSELORS*].

22. *Id.* at 5.

23. *Id.* at 11.

24. AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* (1997) (examining the disconnect created between lawyers and clients when the latter were not fully informed about the divorce process).

25. James P. Felstiner, *Child Welfare Hearings from an Unfamiliar Perspective*, in *CANADIAN CHILD WELFARE LAW: CHILDREN, FAMILIES AND THE STATE* 306–09 (Nicholas Bala, Joseph P. Hornick & Robin Vogl eds., 1991).

26. See SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 122 (1984) (This type of "client information control" is referred to within social cognition literature); Sumner J. Sydeman, Michele Cascardi, Norman G. Poythress & Lee M. Ritterband, *Procedural Justice in the Context of Civil Commitment: A Critique of Tyler's Analysis*, 3 *PSYCHOL. PUB. POL'Y & L.* 207, 211 (1997); see generally Michele Cascardi, Norman G. Poythress & Alicia Hall, *Procedural Justice in the Context of Civil Commitment—An Analogue Study* 18 *BEHAV. SCI. & L.* 731 (2000) (on the topic of procedural justice theory and social cognition).

27. THERESA ROE LUND & JENNIFER L. RENNE, *CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS* (2009) (for checklists that aim to assist with the assessment of appropriate steps to take), available at <http://www.dcf.state.fl.us/initiatives/protectingchildren/CPTAB/docs/mtgs/20120117/ABACHildSafetyManualfinaldraft.pdf>.

exercise. The more nuanced aspect of listening involves listening not only to facilitate an assessment of where the facts fit within the legal “theory of the case”²⁸ being developed, but also to gain an in-depth understanding of what motivates the client.

Understanding client motivations can not only help lawyers to refer clients to more appropriate support services; it can also allow them to inform clients about which motivations are likely to add support to their position and which are likely to be either neutral or detrimental to their position. Where clients seem focused on motivations that are not likely to be helpful to their child, for example, it will be a key part of the lawyer’s role to encourage them to adopt a more child-centered focus.

While lawyers’ work is critical to the positive progression of a child protection case, judges can also play a critical role in fostering therapeutically positive outcomes in these matters. With the growing prevalence of judicial case management within child protection regimes, such opportunities abound. First, the judge who manages proceedings up to the (unlikely) point of trial²⁹ has several opportunities to hear, encourage, and collaborate with parents. The facilitative scope of the judicial role in case-managed proceedings may provide a positive balance of (both parent and child) interest-based proceedings and protection of due process. One judge has commented:

In recent years, I have found that a judge-mediated case conference can be an effective alternative to traditional approaches for deciding child protection cases. . . . Because a judge is not a mediator . . . the judge still has a responsibility to intervene if the “resolution” does not respect the law protecting children.³⁰

Judges’ verbal messages to clients during meetings can have a significant impact. It has been argued that judicial suggestions are often perceived as judicial requirements.³¹ Assuming the validity of this assertion, it is not difficult to see how encouragement by a judge to continue with a parenting course or anger management program may be highly motivational to parties. Listening to their concerns, achievements, and set-backs with a lens focused on moving toward the desired goal (generally of family reunification) can provide part of a critical network of support that parents in vulnerable circumstances may desperately need.

28. Alfred A. Mamo, *Getting a Family Case to Trial*, 25 CAN. FAM. L.Q. 17, 17 (2006). The theory of the case is the lawyer’s decision about how “legal principles can be used to interpret for the Court your client’s story.”

29. CANADA DEP’T OF JUSTICE, CANADA’S SYSTEM OF JUSTICE, available at <http://www.justice.gc.ca/eng/dept-min/pub/just/08.html> (last visited Mar. 2, 2012).

30. Thomas Gove, *Reflections on Child Protection—Looking for the Best Available Outcomes*, in CANADIAN CHILD WELFARE LAW: CHILDREN, FAMILIES AND THE STATE 430 (Nicholas Bala, Michael K. Zapf, R. James Williams, Robin Vogl & Joseph P. Hornick eds., 2d ed. 2004).

31. See Andrew Schepard & Stephen W. Schlissel, *Planning for P.E.A.C.E.: The Development of Court-Connected Education Programs for Divorcing and Separating Families*, 23 HOFSTRA L. REV. 845 (1994) (noting that a judicial *suggestion* that parents attend a parent education program was often perceived as a judicial *mandate* to attend).

Such supportive judicial approaches have been found to assist parties within the context of drug courts. As Michael S. King has noted, an exploratory study found that defendants in drug courts who received the most supportive comments from judges were more likely to complete treatment programs than defendants who received fewer supportive comments.³²

Judges' words have potential impact from another important perspective. Unfortunately, despite the best efforts of parties and professionals involved in a child protection matter, there may be a decision at the end of the process that a child must be removed permanently from his or her parents' care. When this is the outcome, its rationale will be delivered in the form of a written judgment. The wording of the judgment has the potential for a great deal of therapeutic impact—for both parents and, I argue, children.

Others have written about the therapeutic implications of judgment writing, albeit in different contexts. Bruce Winick and Amy D. Ronner, for example, discussed the anti-therapeutic effects of the Per Curiam Affirmance (PCA), where an appeal court accepts the ruling of a lower court without discussing how it reached its conclusion.³³ Drawing upon studies that establish the psychological benefit to litigants of feeling “heard” within the legal process,³⁴ the authors argued that a recital of the facts, and a concise listing of the arguments made, along with a brief indication of the reason for the dismissal,³⁵ would provide this sense of voice to unsuccessful appellants.

Nathalie Des Rosiers has also examined written judgments from a therapeutic jurisprudence perspective. She analyzed two different judgments rendered by the Supreme Court of Canada (SCC) in difficult constitutional cases involving questions relating to the Province of Quebec's potential secession from Canada.³⁶ Des Rosiers argued that as opposed to rendering a decision framed in right-wrong terminology, when dealing with minority-majority conflicts, the court should “becom[e] more process-oriented listeners, translators, educators and, if possible, facilitators.”³⁷ She compared the SCC's decisions in *Quebec Veto Reference*³⁸ and

32. Michael S. King, *Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice*, 32 MELB. U. L. REV. 1096, 1120 (2008). King refers to the studies in Scott R. Senjo & Leslie A. Leip, *Testing and Developing Theory in Drug Court: A Four-Part Logit Model to Predict Program Completion*, 12 CRIM. JUST. POL'Y REV. 66 (2001) and Scott R. Senjo & Leslie A. Leip, *Testing Therapeutic Jurisprudence Theory: An Empirical Assessment of the Drug Court Process*, 3(1) W. CRIMINOLOGY REV. (2001), available at <http://wcr.sonoma.edu/v3n1/senjo.html> (last visited Mar. 2, 2012).

33. Amy D. Ronner & Bruce J. Winick, *Silencing the Appellant's Voice: The Antitherapeutic Per Curiam Affirmance*, 24 SEATTLE U. L. REV. 499 (2000).

34. See LAWYERS AS COUNSELORS, *supra* note 21.

35. Ronner & Winick, *supra* note 33, at 506. The wording, suggests the authors, could be as brief as the following: “While we understand the contentions made by the appellant and that he or she feels that the decision below was erroneous, under our law we must defer to the discretion of the trial judge in matters such as these, and therefore, for the reasons set forth in the appellee's brief, we must affirm.”

36. Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*, 37 CT. REV. 54 (2000).

37. *Id.* at 54.

38. Reference Re Amendment to the Canadian Constitution, [1982] 2 S.C.R. 793 (Can.).

*Re Secession of Quebec*³⁹ to illustrate how it adopted a more therapeutic “process-oriented listener” approach to drafting its decision in the latter case.⁴⁰

Des Rosiers first analyzed the language and structure of the *Quebec Veto Reference* and argued that the SCC failed to adopt a therapeutic perspective because it did not acknowledge the uncertainty and complexity of the issue before it, did not acknowledge Quebec’s voice, and did not frame the debate in a helpful way.⁴¹ She contrasted that case with the more recent decision in *Re Secession of Quebec* where the SCC explicitly recognized the complexity of the issues at stake, and used a tone sympathetic to Quebec’s sensitivities.⁴² The author argued that by adopting this therapeutic approach, the SCC was able to effectively help participants come to grips with the frailties of their position.⁴³

Applying a similar approach to the child protection context has the potential to yield therapeutic benefits. A negative judgment in a child protection matter can, for example, acknowledge parents’ strengths and positive motivations. Inclusion of this information has the potential of providing the parent with the comfort that their efforts, and usually their love for the child, were recognized, even though the frailties of their position have lead to them ultimately being found unable to continue caring for their child. The following concluding paragraphs from a judgment⁴⁴ rendered by an Ontario court in a recent case where Crown Wardship⁴⁵ with no entitlement to access being granted to the children’s mother illustrate the kind of therapeutic approach advocated for within this work:

Conclusion

161 An order will go that:

- (a) [R.S.] be made a Crown ward without access for the purpose of adoption.
- (b) That the mother will have no access to [A.S.] for the purpose of adoption.

162 **I recognize that this will be a very difficult outcome for the mother. She demonstrated her love for the children and did the very best she could.** It appears that she will likely have an open adoption arrangement for [A.S.]. The mother is a good candidate for an open

39. Reference *Re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.).

40. Des Rosiers, *supra* note 36, at 58–62.

41. *Id.* at 60.

42. *Id.* at 61.

43. *Id.* at 62.

44. Catholic Children’s Aid Society of Toronto v. S.(S.), [2010] O.J. No. 5893 (Can.).

45. Pursuant to s. 57 of Ontario’s CFSA, *supra* note 4, a court has a number of options for disposition once a child has been found to be in need of protection. The most extreme option is Crown Wardship, which transfers the custody of the child completely to the State.

adoption arrangement for [R.S.] as well. The mother has demonstrated that she is willing to work co-operatively with the children's caregivers and is unlikely to undermine any future placement.

- 163 This order does not preclude the society, in its capacity as custodial parent of Crown wards, from permitting the mother to visit the children prior to an adoption. The society will have full control over any contact that the mother has with them. . . .
- 164 It is also important for the mother to know that this decision does not preclude her from caring for any children whom she may have in the future. **The long lapse of time since the children came into care, the special needs of the children and the fact that she is just recently making gains with her considerable issues has necessitated this result. The mother has a lot of positive qualities, as outlined in this decision.** She is strongly encouraged to continue her treatment with Dr. Werry and participate in any after-care treatment recommended by Beacon House. It would be helpful for her to address her use of drugs in her therapy and to obtain domestic violence counselling. She will need to establish that she can sustain stability in her life and in her relationships. I sincerely wish her the best in her efforts to meet these challenges.⁴⁶

This judgment reflects judicial insight into the trauma the decision is likely to cause the mother in this case. It aims to help her to understand why the outcome was reached, and it encourages her to continue with her efforts to improve her situation. The judge attempts to give the mother hope for future parenting roles, and provides advice about the route she might most profitably follow to make such future possibilities successful.

Note that in this case, the judge suggests that the mother may be a good candidate for an open adoption arrangement⁴⁷ with respect to both children. Such

46. *Catholic Children's Aid Society*, O.J. No. 593 at paras. 161–64 (emphasis added) (internal citations omitted).

47. Section 145.1 of the *CFSA*, *supra* note 4, describes the circumstances under which a court may grant an openness order:

- (1) If a child who is a Crown ward is the subject of a plan for adoption, and no access order is in effect under Part III, the society having care and custody of the child may apply to the court for an openness order in respect of the child at any time before an order for adoption of the child is made under section 146.
-
- (3) The court may make an openness order under this section in respect of a child if the court is satisfied that,

an arrangement would provide the children with opportunities to have contact with their mother. However, in many cases, an order for Crown Wardship will completely sever the child's relationship with his or her former guardians.⁴⁸ Where this result occurs, children will be left in a similar position to that of adoptees who were legally disconnected from their biological parents as a result of a voluntary relinquishment of parental rights. Due to the traditional assumption that an adoption order should achieve the discontinuance of one family formation and the formation of a new family unit,⁴⁹ adopted children's ability to discover details

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- (a) the openness order is in the best interests of the child;
 - (b) the openness order will permit the continuation of a relationship with a person that is beneficial and meaningful to the child; and
 - (c) the following entities and persons have consented to the order:
 - (i) the society,
 - (ii) the person who will be permitted to communicate with or have a relationship with the child if the order is made,
 - (iii) the person with whom the society has placed or plans to place the child for adoption, and
 - (iv) the child if he or she is 12 years of age or older.

The *CFSA* further provides for the possibility of an Openness Agreement being entered into between adoptive parents and biological parents:

153.6 (1) For the purposes of facilitating communication or maintaining relationships, an openness agreement may be made by an adoptive parent of a child or by a person with whom a society or licensee has placed or plans to place a child for adoption and any of the following persons:

1. A birth parent, birth relative or birth sibling of the child.

...

- (2) An openness agreement may be made at any time before or after an adoption order is made.

48. *CFSA*, *supra* note 4, at s. 59. In fact, in Ontario, there is a presumption that there will be no access where Crown Wardship is ordered:

- (2) Where the court makes an order that a child be made a ward of the Crown, any order for access made under this Part with respect to the child is terminated.
- (2.1) A court shall not make or vary an access order . . . with respect to a Crown ward unless the court is satisfied that,
 - (a) the relationship between the person and the child is beneficial and meaningful to the child; and
 - (b) the ordered access will not impair the child's future opportunities for adoption.

For a discussion of these provisions, see Elizabeth McCarty, *Crown Wardship and Access: The Impact of the Amendments to the Child and Family Services Act in Ontario*, 27 *CAN. FAM. L.Q.* 129 (2008).

49. Section 158 (2) of the *CFSA*, *supra* note 4, declares the following:

For all purposes of law, as of the date of the making of an adoption order,

- (a) the adopted child becomes the child of the adoptive parent and the adoptive parent becomes the parent of the adopted child; and
- (b) the adopted child ceases to be the child of the person who was his or her parent before the adoption order was made and that person ceases to be the parent of the adopted child, except where the person is the spouse of the adoptive parent.

about their biological roots, and to get a clear sense of why they were not maintained within the original birth family, has been curtailed.⁵⁰ Even where certain information does become available to adoptees, the fact that they were made a Crown Ward and adopted afterward is unlikely to give them a full sense of the struggle their parent(s) faced or the emotional bonds that existed between parent(s) and child. Studies continue to show that discovering information associated with their biological parents is extremely significant to the emotional well-being of many adoptees.⁵¹ Having access to judicial reasoning that demonstrates the parent's strengths, weaknesses, and desires may assist the child to understand and accept the adoption that followed the decision.

The judicial exercise of "therapeutic" judgment writing can be strongly supported by lawyers. Both written and oral communications with judges should be aimed at ensuring the client's perspective is heard, articulating clearly and with detail the positive attitudes and activities that the client has adopted, and working to ensure that the client has the best opportunities available to access supportive programs, understand his or her child's needs, and work toward developing the capacity to meet those needs to the greatest extent possible.

IV. THE COMPLEXITIES INTRODUCED BY THE INTERDISCIPLINARITY OF CHILD PROTECTION MATTERS

Lawyers and judges are, of course, not the only professionals involved in child protection matters. It has been noted that "[a]ttorneys, counselors, social workers and others are recognizing that clients may present issues that transcend the scope and purpose of a single profession."⁵² In virtually all child protection cases, social workers play a key role, and in at least some matters, psychologists, psychiatrists, and physicians are also intricately involved. While all of these professionals are committed to assisting the children at the center of the cases and their parents, differences in perspective and terminology can actually hinder the progression of the matter.

For example, as noted earlier, a lawyer will develop a theory of the case based on the desired outcome for the client. This theory of the case may lead the lawyer to look for evidence that supports the theory, and to downplay contrary evidence. A doctor, on the other hand, tends to rule out possibilities as more evidence becomes available. The doctor's ability to find that the available evidence is consistent with one or more alternative conclusions may be frustrating to the lawyer who is

50. In Ontario, a number of legislative amendments to the Child and Family Services Act, have been enacted and repealed in an attempt to achieve the appropriate balance between the privacy traditionally associated with adoption and adoption records, and the desire of adoptees to access information about their parents. The current framework for disclosure of information contained within adoption records is set out in *Adoption Information Disclosure* O. Reg. 464/07 (Can.).

51. See Ulrich Muller & Barbara Perry, *Adopted Persons' Search for Contact with Their Birth Parents*, 4:3 ADOPTION Q. (2001) (for a review of a number of empirical studies about adoptees' search for information about their birth families).

52. Jeffrey R. Baker, *Necessary Third Parties: Multidisciplinary Collaboration and Inadequate Professional Privileges in Domestic Violence Practice*, 21 COLUM. J. GENDER & L. 283, 283 (2011).

seeking to validate evidence that is consistent with his or her “theory.” Likewise, the lawyer’s insistence on a definitive diagnosis may be frustrating to the doctor.

Social workers adopt yet another approach. Often the first point of contact with families, they gauge the severity of the situation, consider the required intervention for the family through their own particular cultural/socio-economic screens, and often (depending on the structure of the child protection regime in a particular jurisdiction) must find ways to balance their role of assisting the family with that of potentially being required to gather evidence in relation to protection proceedings. Lawyers’ questioning may be difficult for social workers. One author has commented: “While their work is obviously essential to the system, the movement of family problems to the legal arena places them in a world that is both foreign and uncomfortable. For the most part, social workers have been poorly trained to enter this ‘legal’ world.”⁵³

Different approaches to defining⁵⁴ and solving problems can create delays as each professional struggles to understand and respond to the approach of the other. The differences can also foster distrust among professionals. Surely this is not a therapeutic outcome. Delays will, in most cases, translate directly into children being separated from their parents for longer periods of time. It is important for professionals to communicate in order to better understand each other’s language and objectives.⁵⁵

Concern about communication among professionals exists in another more narrow, yet significant area. In tragic circumstances where a child dies under suspicious circumstances, there will often be resulting parallel criminal and child protection investigations.⁵⁶ In such cases, post-mortem examinations may provide information about the cause of death that can be relevant to both the criminal and potential child protection proceedings. And yet, because the proceedings are separate, the sharing of relevant information has not traditionally been assured. A 2008 inquiry into pediatric forensic pathology in the Province of Ontario was told that “children’s aid societies sometimes have had to litigate against the police to obtain information from ongoing criminal investigations in order to carry out the appropriate child protection investigations.”⁵⁷ One of the inquiry’s recommendations was that the Province of Ontario should develop more

53. Mary Kay Kisthardt, *Working in the Best Interest of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 RUTGERS L. REC. 1, 45 (2006); see also Robert G. Madden & Raymie H. Wayne, *Social Work and the Law: A Therapeutic Jurisprudence Perspective*, 48:3 SOC. WORK 338 (2003) (for another account of the potential collaborative work that could fruitfully be undertaken by social workers and lawyers).

54. Kisthardt, *supra* note 53 (noting that while social work discourse focuses on “helping”, lawyers focus on “rights” and whereas social work language stresses interdependence, lawyers’ language is focused on individualism and vindicating individual positions).

55. See Paul Johnson & Katharine Cahn, *Improving Child Welfare Practice Through Improvements in Attorney-Social Worker Relationships*, 54 U. PITT. L. REV. 229 (1992) (for a discussion of one interdisciplinary program providing cross-disciplinary training between lawyers and social workers).

56. Freeman, *supra* note 11, at 41 (describing a situation where police and child welfare systems interacted in the case of a family losing a baby to sudden infant death syndrome).

57. STEVEN T. GOUDGE, REPORT OF THE INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY IN ONTARIO 575 (2008) (referring to information provided by Professor Nicholas Bala).

comprehensive province-wide standards on sharing information arising out of investigations of child deaths by police and children's aid societies.⁵⁸ Reflecting the concern raised earlier in this article about uncertainty in relation to various particular professional roles, one of the elements of the recommended provincial standards was that they should "articulate the roles to be played by coroners, forensic pathologists, and Crown counsel in the sharing of information in investigations"⁵⁹ Presumably, information-sharing standards decrease delays for all involved, and allow all of the professionals engaged with the family at issue to work in a more fully informed manner. This, in turn, leads to clients being more informed about the matters at stake, and, correspondingly, to play a greater role in responding to the concerns raised. It is hoped that province-wide standards will be expanded as recommended by the inquiry report.

CONCLUSION

The complexity of child protection matters, and the interaction of individuals involved in this area, call out for continuing efforts to ensure that legal rights and other human needs are balanced in a manner that most effectively supports families who are dealing with state intervention into their child-rearing functions. This balancing includes having lawyers employ preventive lawyering techniques, having judges work with clients to motivate, educate, and guide them, and when the outcome of court cases is negative, provide families with feedback that will assist them to move on in the healthiest manner possible. It also involves having all professionals involved in child protection matters strive to understand each other's language and perspective. Each of these initiatives requires hard work. Law schools and other professional schools need to better educate their students about the inter-disciplinarity of this line of work. Lawyers with more experience need to mentor child protection lawyers with less experience. Judicial education needs to focus on therapeutic approaches. Joint continuing education initiatives among child protection professionals need to occur. While positive moves have taken place, there is still much work to be done. Few would argue against the proposition that emotionally and physically healthy children are essential to a thriving society. Supporting healthy families for these children is equally essential. Complex problems often require multi-faceted, sensitive responses. We must begin to develop these responses within law school and other program curricula. Finally, we must evaluate the effectiveness of initiatives at each juncture of the process so that we have a sense of their therapeutic impact.

58. *Id.* at 576–77.

59. *Id.* at 577.