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I. INTRODUCTION

The 1976 and 1977 sessions of the General Assembly of Virginia established a legislative study commission to consider the establishment of a family court system in Virginia.[1] The study was conducted by the Family Court Subcommittee of the Virginia Advisory Legislative Council Committee to Study Services to Youthful Offenders, and its report was submitted to the Governor and to the General Assembly on January 6, 1978.[2] After a review of its findings the subcommittee recommended that:

> . . . a joint subcommittee of the Committee on Courts of Justice of the House of Delegates and the Senate of Virginia be appointed to consider the information gathered by the Subcommittee and to develop appropriate legislation which addresses the operational and legal problems which exist in the present division of responsibility between juvenile and circuit courts with regard to domestic relations matters.[3]

The recommended subcommittee was formed and two meetings were held, but no action was taken. The family court was quietly put to rest. The concept of a family court and its implications for Virginia are the subject of this article.

In the legal arena of family affairs, Virginia operates under a dual system in which the circuit courts have exclusive original jurisdictions over divorce,[4] annulment,[5] and adoptions,[6] and the juvenile and domestic relations district courts have exclusive original jurisdiction in juvenile delinquency and children in need of services

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1. Senate Joint Resolution No. 12 (1976) and Senate Joint Resolution No. 91 (1977).

2. VIRGINIA ADVISORY LEGISLATIVE COUNCIL ON SERVICES TO YOUTHFUL OFFENDERS, REP., S. DOC. No. 24 (1978) (hereinafter referred to as VALC REPORT).

3. *Id.* at 11.

4. VA. CODE ANN. § 20-96 (Cum. Supp. 1979).

5. *Id.*

6. VA. CODE ANN. § 63.1-221 (Cum. Supp. 1979).

cases.[7] There is overlapping jurisdiction in custody, support, and visitation matters.[8] A hybrid proceeding under section 20-79(c) of the Virginia Code allows the circuit courts, prior to the final decree of divorce, to transfer to the juvenile courts the enforcement of the circuit court orders relating to maintenance and support of the spouse and children, and the custody and care of the children. After the entry of the final decree, or prior thereto, on motion joined in by both parties, any other matters relating to maintenance and support of the spouse and children and the custody and care of the children may be transferred to the juvenile courts.[9] In cases where adults are charged with committing certain crimes against children, and in cases of certain crimes between members of a family, the juvenile courts have exclusive original jurisdiction, provided that the court's jurisdiction for felonies is limited to determining whether or not there is probable cause.[10]

A true family court would house all of these functions in a single court of general trial jurisdiction. For practical purposes in Virginia this could be accomplished by transferring jurisdiction in divorce, annulment, and adoption cases to the juvenile courts (family court). Several different systems of family courts have been suggested and these will be reviewed following a discussion of the advantages of a unified family court system for Virginia.

II. ADVANTAGES OF THE FAMILY COURT

A. *Avoidance of Multi-trials*

Opponents of the family court claim that the Virginia system works; that it is reasonably efficient and that there are no appreciable delays at either the circuit or juvenile court levels. Therefore, why tamper with a good thing?[11] This logic is superficial, however, because it only considers the mechanics of operating a court. If,

7. VA. CODE ANN. § 16.1-241 (Cum. Supp. 1979).

8. VA. CODE ANN. §§ 16.1-241, 16.1-244 (Cum. Supp. 1979) and § 31-15 (Repl. Vol. 1973) apply in custody cases. Poole v. Poole, 210 Va. 442, 171 S.E.2d 685 (1970) draws the jurisdictional line between the circuit and juvenile courts in such cases. Section 16.1-241, § 20-61 *et. seq.*, § 20-88.12 *et seq.*, and § 20-89 *et. seq.* apply in support matters.

9. VA. CODE ANN. § 20-79(c) (Cum. Supp. 1979).

10. VA. CODE ANN. § 16.1-241 (Cum. Supp. 1979).

11. VALC REPORT, *supra* note 2, at 26.

however, one looks to the social issues, change is more clearly mandated.

Nowhere is this more apparent than in divorce and custody cases. Contesting spouses are pitted in a battle royal to which there can be no victor. The harm to a child caught in a tug of war and power struggle between parents in a contested custody case can be irreparable. The child very likely suffers from guilt feelings for having "preferred" one parent over the other, and often learns to "play the game" by using the parents for favors.

A family court will not eliminate these problems, but it will at least put them under one roof and before a judge who, by choice, specializes in such cases. A family court should also have trained specialists to assist the parents and children in dealing with these problems.

The family court would eliminate the yo-yo effect brought about by the trial de novo on appeal from a decision in the juvenile court.[12] When a divorce action is referred to the juvenile court under section 20-79(c), the questions of custody and support are relitigated with an appeal from the juvenile court back to the circuit court for a trial de novo. This can be a seemingly never-ending process. Continuing court appearances exacerbate the already hostile feelings between the parents and at the same time unconscionable stress is placed upon the child.[13]

12. GORDON, THE FAMILY COURT SYSTEM at 1 (National Council of Juvenile and Family Court Judges training publication). *See also,* Zehler & Bain, *The Appeal De Novo in Virginia's Juvenile Court: Time for a Change?,* 4 VA. B.A.J. 17 (Summer, 1978).

13. VALC REPORT, *supra* note 2, said at 10:

> The constant back and forth battle has proven to be detrimental to the children, costly to the litigants and frustrating to the attorneys and judges involved.
>
> These "yo-yo" cases also contribute to the tendency of juvenile courts and circuit courts to leave certain family problems unresolved, knowing that the case will soon be referred to another court and hoping that the other court will deal with the problem and offer solutions.

As a side note, the Virginia Beach Juvenile and Domestic Relations District Court, in conjunction with the Virginia Beach Department of Social Services, has set up a special counselling program for all juveniles six years or older who are involved in a custody or visitation dispute. At the time of the first court appearance when a guardian ad litem is appointed for the child, a special counsellor is also assigned to the child. The counsellor acts as a confidant and friend to assist the child through this difficult period. Communications between the child and the counsellor are confidential and the counsellor will not be summonsed to court. If counselling is necessary after the case is decided, such counselling is

The multi-jurisdictional issue has been addressed by the National Council of Juvenile Court Judges:

> Dispersal of family-connected matters among a number of courts has obvious weaknesses. Duplication is inevitable. A court with partial jurisdiction is less able to enlist the help of the family unit effectively. It is less able to enhance the stability of the family unit or to provide for its orderly separation where it cannot be preserved.[14]

B. *Emphasis on "The Family"*

The very name "family court" connotes the commitment of a state to the importance of the family unit. The Judeo-Christian ethic of the family permeates the fabric of our society and the recognition of this by the establishment of a family court in Virginia would be of great importance. The breakdown of the family unit is at the heart of many societal problems, not the least of which is juvenile delinquency. A family court, while again not solving these problems, would be in the best position to address them. A dual court system, with neither court fully able to deal effectively with the full gamut of family problems, is hardly desirable.

C. *Equal Status with the Court of Record*

Our democratic society, and perhaps even man's evolution from early hominids in good measure, is the result of the stable family unit. A society that owes so much to the family should not relegate its problems to any forum other than to the highest court of general trial jurisdiction. Unless the family court is given this dignity it will not be able to effectively compete for resources and personnel to carry out its mission.[15] It is often said that a court is no better than

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ordered. This program was initiated in early 1979. It is not yet possible to give an accurate estimate of the program's value at this writing but preliminary indications show that it has great potential.

14. *See* GORDON, *supra* note 12 at 1.

15. Without equal status, the family court may get secondary consideration with respect to direct needs, such as more personnel or more judges, and with respect to the legal and other services provided to the court . . . .

> Lower judicial status reduces the court's ability to obtain other resources as well. The legislature and the executive branch do not listen with the same respect to statements of need coming from an inferior member of the court hierarchy.

Gordon, *The Family Court: When Properly Defined, It is Both Desirable and Attainable,* 14

the judge sitting on its bench. The less attractive a judicial position, by way of salary and status, the less likely one is to find qualified individuals to accept the position. Capable family court judges are better assured when their court is on equal footing with the circuit courts.[16]

D. *Specialization and Utilization of Resources*

The concept of specialized judges, services, and facilities can only be accomplished in a unified family court system. Presently there are, no doubt, circuit court judges with neither the time nor training to handle family matters. A recent poll of the Virginia juvenile court judges[17] disclosed that approximately 95% of the circuit courts refer divorce cases to the juvenile courts under section 20-79(c), and some juvenile courts have been requested to prepare social histories in custody cases pending in the circuit courts. There is also a wide disparity in the procedures used in divorce cases. The poll disclosed that in urban courts, eight circuits used a commissioner system and five used depositions. None as a matter of routine conducted an *ore tenus* fact finding hearing. In the rural circuits, three used both commissioners and depositions while eight used depositions. Some allowed *ore tenus* hearings upon motion of a party. Although not scientific, the poll does illustrate the varied methods used in Virginia divorce cases. Whether it be the commissioner or deposition system, the ultimate arbiter in the case is too far removed from the parties.

The situation calls for a jurist trained in family matters who is in personal contact with the parties. Such a judge not only would resolve the legal issues presented but, more importantly, assure that the social problems of the parties and their children receive timely attention. This does not suggest an abandonment of sound legal principles and the adversary process, but merely a sophistication in our jurisprudence to meet more fully the needs of a family in crisis.

With a specially trained judge, there logically follows the develop-

J. OF FAM. LAW 1, 12-13 (1975). *See also*, Arthur, *A Family Court—Why Not*, 51 MINN. L. REV. 223, 230-31 (1966).

16. Gordon, *supra* note 15.

17. This poll was conducted by the author of his colleagues during a recent meeting of the Virginia Council of Juvenile Judges.

ment of resources and personnel to meet the directives of the court. Some localities have these resources, but they are uncoordinated because of a morass of social programs with no apparent beginning or end. Specialization can lead to better utilization of resources in the delivery of social services. Furthermore, all of the court's resources will be utilized more efficiently since the juvenile courts could be eliminated.

E. *Other Reasons*

Judge Gordon, in his family court handbook, makes the point that a unified family court system leads to consistency within the system, particularly in the areas of procedure, sentencing, and implementation of court orders.[18] In this fashion every litigant is assured some degree of reasonable consistency. Absolute equivalency should not, however, be the goal of any family court system.

In addition, the family court with its informality, intake unit, and trained staff, offers more immediate access to families with emergencies which cannot wait for the filing of formal pleadings or the next docket call.

Finally, there are instances where both lawyer and litigant run afoul of jurisdictional problems. This occurs in cases that have been referred under section 20-79(c) when enforcement of property rights under the final decree is at issue. The juvenile court does not, under the referral statute, have the jurisdiction to resolve such conflicts.

III. Alternative Systems

The VALC Report makes note of a recommendation of the Virginia Council of Juvenile Court Judges that Virginia adopt a modified family court.[19] Under this system the present juvenile courts (family courts) would assume jurisdiction in divorce, annulment, separate maintenance, and adoption cases with appeals on the record to the Virginia Supreme Court.[20] The court's present jurisdiction and appeals from the court in all other matters would remain the same except that appeals on custody, support, and termination

18. Gordon, *supra* note 12, at 4.
19. VALC Report, *supra* note 2, at 11.
20. *Id.*

of parental rights would be directly to the Supreme Court.[21] This system would have the advantages of a unified family court with the added advantage of an appeal de novo horizontally to the circuit court. While many cases handled by the family court would not involve momentous legal issues, these cases are important to the litigants, and an inexpensive appeal to the circuit court, with the right to a jury trial, guarantees an appropriate review.

Another alternative is the full family court with all appeals directly to the Virginia Supreme Court. This, however, has the disadvantage of relative inaccessibility to the average family court litigant. On balance, therefore, a modified system seems more suited to Virginia. The pitfalls of multi-trials would be avoided by the appeal to the Supreme Court in divorce annulment, adoption, custody, support, and termination of parental rights cases, but at the same time, an inexpensive appeal in other matters would be allowed to the circuit court.

The VALC Report also discusses the possibility of forming "Family Law Divisions" within each circuit.[22] This would require very little restructuring and have the advantage of easy implementation. This would no doubt be an improvement due to the specialization of the judge and staff, but it would not, however, meet the objectives of the full family court, and Virginia would continue to have a dual system.

IV. The Realities in Virginia

The arguments against a family court in Virginia encompass "expense, further fragmentation of Virginia's judicial structure, increased demand on facilities and staff; excessive case loads for one court; and a severing of the relationship between the judge and the juvenile because of the formality of a court of record."[23]

The concern of increased expense is paramount and must be addressed. The answers to a questionnaire prepared by the Family Court Subcommittee and submitted to all courts throughout the state, indicate that the establishment of a family court will likely

21. *Id.*
22. *Id.*
23. *Id.* at 8.

entail additional expense for judges' salaries, personnel, and physical space.[24] If the premise of greater efficiency in the operation of a unified family court system is valid, then in the long run one should expect no increase in the courts' operating budget. The initial implementation however, at least in some jurisdictions, will cause added expense. This can be minimized by a gradual phasing of the system. For example, when a circuit court judgeship becomes available in a multi-judge circuit, the vacancy could be used to appoint a family court judge. At the same time, the juvenile court would become the family court and the juvenile judges in that court elevated to the court of record level. The reduction of one judge in a multi-judge circuit would not be burdensome if that court is being relieved of its divorce, annulment, and adoption cases.[25] In this hypothetical case no additional judges would be required. A reshuffling of personnel and utilization of existing space might very well make the transfer relatively inexpensive. These costs would eventually be offset by the increased efficiency of the new operation.

The solution is not so apparent when reviewing the situation in the rural circuits and districts. Cost is a major factor in those areas, but there is no way of determining what these costs will be until there is a financial analysis of the expense of changing Virginia to a family court system. Such a study could be conducted or supervised by the office of the Executive Secretary of the Supreme Court of Virginia.

The argument of fragmentation is without merit! A family court would not fragment, it would consolidate. An existing juvenile court would become the family court and at the same time be vested with jurisdiction to handle matters now tried in the circuit courts.

There will be an increased demand on the staff and facilities of the juvenile court, but at the same time there will be less demand on the staff and facilities of the circuit court because it would no longer handle family oriented cases. The costs of added social serv-

24. *Id.* at 2, App. A.

25. In response to a questionnaire sent to all members of the judiciary and all bar associations in Virginia by the Subcommittee on the Family Court of the VALC Committee to Study Services to Youthful Offenders, circuit judges reported that most had less than 50 adoptions and less than 50 custody cases in their caseload at the time of the questionnaire. But the majority were handling between 500 and 1,000 divorces. VALC REPORT, *supra* note 2, at 9.

ices would partially be offset by the increased efficiency of the family court.

The fear of increased case loads is unfounded because the family court system would not increase the number of family-type cases. It merely would put them in one court.

The claim that the formality of a court of record will sever the relationship between the judge and juvenile has, for many purposes, already happened to both the juvenile judge and family court judge in this post-*Gault*[26] era. The juvenile is afforded procedural due process under federal and Virginia case law which has been codified and expanded by the juvenile code revision of 1977.[27] It is doubtful that the metamorphosis of a juvenile court judge to a court of record family court judge will change the mettle of the individual. A successful family court judge is measured by the level of his compassion and understanding of the problems and needs of others. The fact that the judge sits in a court of record need not create an unbridgeable gap of formality between the family and the court. To the contrary, it is proper to envision the family court in great measure being conducted along the lines of the traditional informality associated with the juvenile courts in Virginia.

In the background, though not mentioned in the Report, is the concern that upon establishment of a family court, some of the circuit court clerks would suffer a loss of fees with the attending effect on the operating budgets of such clerks. This is no small matter, but there are many in the Commonwealth with the political acumen to resolve this problem. It has been suggested that the operation of the family court be within the office of the clerk of the circuit court or that this be a matter of local option.

26. *In re* Gault, 387 U.S. 1 (1967). In that case the Supreme Court ruled that when a juvenile is before a court and may face the prospect of being committed to an institution for delinquency, many of the safeguards of the Due Process Clause of the fourteenth amendment must be provided, including the rights of adequate notice of the charges against him, the rights of confrontation and cross examination of the witnesses against him, the privilege against self incrimination, and to be informed of his right to counsel.

27. VA. CODE ANN. § 16.1-226 to § 16.1-330 (Cum. Supp. 1979). *See,* Hopper & Slayton, *The Revision of Virginia's Juvenile Court Law,* 13 U. RICH. L. REV. 847 (1979).

V. PROPOSAL

The time may not be ripe for a quantum leap into a family court system, but one small step in that direction would be propitious. Legislation should be introduced to eliminate the trial de novo in appeals from the juvenile courts to the circuit courts in all matters involving custody and visitation. The yo-yo effect would be reduced with no great financial burden to the state.[28] In addition, a study of the costs of implementing a family court system should be conducted, with a possible emphasis on a gradual phasing in of the system to correspond with normal judicial turnover. The study would also consider abolishing the use of divorce commissioners and the resolution of divorce actions by depositions, and substituting the trial of all such cases *ore tenus* before the family court. The study might also consider that the financial savings to the litigants could be reflected in higher filing fees to cover the costs of additional judges and personnel.

Finally, the General Assembly should be mindful that Virginia is in the minority in not providing a unified family court[29] and that such groups as the Institute of Judicial Administration of the American Bar Association,[30] the U.S. Department of Health Education and Welfare,[31] the National Council of Juvenile and Family Court Judges,[32] and the Virginia Council of Juvenile Court Judges[33] all

28. Zehler & Bain, *The Appeal De Novo in Virginia's Juvenile Court: Time for a Change?*, 4 VA. B.A.J. 17, 21 (Summer 1978).

29. For a state by state analysis of juvenile courts framework, see DINEEN, JUVENILE COURT ORGANIZATION AND STATUS OFFENSES: A STATUTORY PROFILE, The National Center for Juvenile Justice 6-24 (1974).

30. INSTITUTE OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT, Standards Relating to Court Organization and Administration, Tentative Draft, § 1.1, at 5 (1977).

31. UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, MODEL ACTS FOR FAMILY COURTS AND STATE-LOCAL CHILDREN'S PROGRAMS, § 3 (1975).

32. The National Council of Juvenile and Family Court Judges, in its annual meeting in 1977, held in St. Louis, Mo., passed a resolution endorsing the establishment in each state of a single, separate court, on the level of the highest trial court, with jurisdiction over all family-related problems. This information was provided by the National Center for Juvenile Justice.

33. The Virginia Council of Juvenile Court Judges endorsed the establishment of a family court during a meeting of the Judicial Conference of District Courts held in Roanoke, Va., October 26, 1977.

advocate a family court system. It may not always be wise for Virginia to follow the majority or special interest groups, but in this case the logic is persuasive.

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