Endnotes

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Moving Family Dispute Resolution from the Court System to the Community

Jane C. Murphy

Jana B. Singer

MOVING FAMILY DISPUTE RESOLUTION FROM THE COURT SYSTEM TO THE COMMUNITY

JANE C. MURPHY[*] AND JANA B. SINGER[**]

Over the past three decades, there has been a significant shift in the way the legal system approaches and resolves family disputes. Mediation, collaboration, and other non-adversarial processes have replaced a traditional, law-oriented adversarial regime.[1] Until recently, however, reformers have focused largely on the court system as the setting for innovations in family dispute resolution. But our research suggests that courts may not be the best places for families to resolve disputes, particularly disputes involving children. Moreover, attempting to turn family courts into multi-door dispute resolution centers may detract from their essential role as adjudicators of last resort and forums for the creation and enforcement of important social norms. In this Essay, and in our recent book, *Divorced From Reality: Rethinking Family Dispute Resolution*,[2] we suggest that family law reformers should rethink their continuing reliance on courts and consider moving some of the problem-solving processes and services that characterize today's family justice system out of the courts and into the community.

To a significant extent, families with access to legal and financial resources have already moved in this direction. If disputing families have money, they can choose when and how much the court will be involved in their break up and reorganization. Family lawyers now offer clients a range of options for resolving disputes relating to separation and divorce.[3] Given

[*] Jane C. Murphy is the Laurence M. Katz Professor of Law, University of Baltimore School of Law; B.A. 1975 Boston College; J.D. 1978, New York University School of Law.

[**] Jana B. Singer is Professor of Law, University of Maryland Francis King Carey School of Law; B.A. 1977 Dartmouth College; J.D. 1982, Yale University.

1. *See, e.g.*, DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS (Jay Folberg, Ann L. Milne & Peter Salem eds., 2004); Yishai Boyarin, *Court-Connected ADR—A Time of Crisis, A Time of Change*, 95 MARQ. L. REV. 993 (2012): PAULINE H. TESLER, COLLABORATIVE LAW (2d ed. 2008).

2. JANE C. MURPHY & JANA B. SINGER, DIVORCED FROM REALITY: RETHINKING FAMILY DISPUTE RESOLUTION (2015). This Essay draws on ideas presented at the Innovations in Family Dispute Resolution Symposium, held at the University of Maryland Francis King Carey School of Law on November 13, 2015. Portions of the Essay are also based on the authors' book and on Jane C. Murphy, *Stop Making Court a First Stop for Many Low Income Parents*, BALT. SUN (June 15, 2015), http://www.baltimoresun.com/news/opinion/oped/bs-ed-family-court-20150615-story.html.

3. *See, e.g.*, TESLER, *supra* note 1, at 3 (noting that "[f]amily lawyers have led the way in developing procedural alternatives to litigation"); JULIE MACFARLANE, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW (UBC Press, 2008) at x (noting that

these options, well-resourced parties increasingly choose out-of-court processes such as mediation, negotiation, and collaborative practice to resolve their conflicts without resorting to court involvement—thus reducing the acrimony and avoiding the loss of control and privacy that result from extended court proceedings. In the few cases where an agreement cannot be reached, one or both of the parents can use the court's resources—settlement judges, custody evaluators, or parenting coordinators—to resolve their conflicts within the court structure. It is not a perfect system but these families are, to a large extent, in control of the process.

The options for lower income families—particularly those who cannot afford lawyers—are considerably more limited. Regardless of their wishes, the court system is likely to be deeply involved in structuring and restructuring their families. Because low income parents, particularly African Americans, are more likely to be unmarried, they are subject to a system designed primarily to reduce the state's welfare costs, rather than to resolve disputes respectfully or to promote the interests of children.[4] Poor parents are often compelled to go to court to establish paternity and obtain child support orders.[5] These proceedings last only minutes and are more akin to debt-collection hearings than to processes designed to facilitate a viable post-separation parenting arrangement.[6] The focus is on how much will be paid and when. The only party represented by a lawyer is the state.[7]

In family court, poor families are undermined by a system that is supposed to strengthen families and protect children. In fact, for poor people, an encounter with the family court often leads to an encounter with the criminal justice system.[8] Low-income fathers are particularly vulnerable. More dead broke than deadbeats, these fathers are squeezed for financial support that they are often unable to pay, and their non-monetary

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"family law is an area in which voluntary participation in alternatives to litigation has grown exponentially, primarily in the form of family mediation or collaborative family lawyering").

4. Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 254 (2000) ("The history of child support law represents a literal joining of family law and welfare law. The original federal child support program was limited to families receiving [welfare] because, quite simply, the government wanted to recoup welfare costs through child support collections.").

5. Stacy Brustin & Lisa Vollendorf Martin, *Paved with Good Intentions: Unintended Consequences of Federal Proposals to Integrate Child Support and Parenting Time*, 48 IND. L. REV. 803, 804 (2015).

6. *Id.* at 831–32.

7. Child support obligors, primarily fathers, are rarely represented by counsel in these state initiated proceedings. Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 357 (2005). Custodial parents are often not even considered parties in these proceedings. Brustin & Martin, *supra* note 5, at 817.

8. Naomi Cahn & June Carbone, *Walter Scott and The Child Support System*, CONCURRING OPINIONS (Apr. 24, 2015), http://concurringopinions.com/archives/2015/04/walter-scott-and-the-child-support-system.html.

contributions to their families are devalued or ignored.[9] And, when support obligations go unpaid, the parents are summoned to court again for enforcement proceedings in which they face a range of sanctions, including incarceration.

Then, having endured the humiliating and family-destabilizing experience of the paternity and child support docket, these parents are told that they must initiate another court action—often in a separate division of the court—to resolve a custody dispute or negotiate a parenting arrangement that allows both parents to remain involved in the child's life. In theory, the goal of these family court proceedings is to serve the best interests of the child. But most family courts are designed for divorcing couples with the resources to hire lawyers and other experts to help them navigate the often complex process of developing custody plans and visitation orders.[10] Ironically, it is precisely these well-resourced parents who are voting with their feet and largely bypassing the formal family court system.

Judges, legislators, and others are working hard to make the courts more responsive to the needs of poor families. The Civil Gideon movement continues to advocate for the right of all parties to have access to counsel when fundamental issues, such as access to children,[11] are at stake.[12] And new models of lawyering, such as unbundled legal services, have the potential to enhance access to legal representation in family court.[13] But these efforts have had mixed success, and support for publicly funded legal representation in civil cases is unlikely to become a government priority any time soon.

This is why we suggest that it may be time to think about shifting non-adversarial family dispute resolution away from the court system and into the community. What if we did not assume that access to justice necessarily meant access to courts?[14] Why not provide divorcing and

9. *See* Laurie S. Kohn, *Engaging Men as Fathers: The Courts, the Law, and Father-Absence in Low-Income Families*, 35 CARDOZO L. REV. 511 (2013).

10. MURPHY & SINGER, supra note 2, at 71–82.

11. Access to children encompasses legal proceedings still called child "custody" or "visitation" cases in many jurisdictions.

12. *See* John Nethercut, *"This Issue Will Not Go Away": Continuing to Seek the Right to Counsel in Civil Cases*, 38 CLEARINGHOUSE REV. 481 (2004); *cf.* Rebecca Aviel, *Why Civil* Gideon *Won't Fix Family Law*, 122 YALE L.J. 2106, 2110 (2013) (questioning the adequacy of Civil *Gideon* as a stand-alone reform for child custody cases, as it "accepts the primacy of a lawyer-centric adversary system as the preferred means for resolving family law disputes in the face of growing evidence that this framework does more harm than good for most domestic-relations litigants").

13. *See generally* FOREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE (2004).

14. See Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEO. J. ON POVERTY L. & POL'Y 473 (2015) (arguing that access to justice for poor people

separating families with affordable, community-based dispute resolution—as well as legal, mental health, and financial planning services—designed to make family transitions smoother, both for parents and for children? Why not extend the benefits of out-of-court dispute resolution to all families, rich and poor?

Moving non-adversarial family dispute resolution away from the courts and into the community offers a number of potential advantages. First, it reinforces the message that divorce and parental separation are not primarily legal events, but rather ongoing processes of family reorganization. Particularly where children are involved, a one-time judicial pronouncement is unlikely to accomplish this reorganization; rather, the transition is likely to require ongoing planning and collaboration by parents and other family members. Locating these planning efforts in the community, rather than the court system, helps to normalize this reorganization process—recharacterizing it as a life-cycle challenge, rather than a quasi-criminal event that requires the full machinery of the state. Shifting the resolution of parenting issues from the courts to the community may also reorient parents away from third-party adjudication and encourage them to take responsibility for resolving their current and future disputes.

Second, locating family dispute resolution services in the community should make it easier for individuals and families to access those services; this is especially important in a system in which a substantial majority of disputants are not represented by counsel.[15] Low income families, in particular, may be more likely to take advantage of community-based services, as they may be justifiably wary of interacting with state bureaucracies, particularly courts. Allowing families to access services without resort to court action may also encourage family members to take advantage of those services on a proactive or preventative basis, before positions harden and emotions escalate. Shifting services from courts to communities may also allow for better coordination of family dispute resolution with other community resources and programs, such as housing and child care assistance. Community-based centers may also provide a mechanism for coordinating the remedies and services available to families involved in multiple legal proceedings. Finally, reliance on community-based resources should allow more sensitivity to diverse cultural norms.

Disaggregating some family services from the court system should also allow the court system to focus on what it does best and what it alone can do: authoritatively resolve high-conflict cases, protect vulnerable family

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requires more than access to courts, and must include attention to the ways in which the current judicial system reinforces subordination and expands state power).

15. Randall T. Shepard, *The Self-Represented Litigant: Implications for the Bench and Bar*, 48 FAM. CT. REV. 607, 611 (2010) (noting that "[s]ome reports estimate that 80 to 90 percent of family law cases involve at least one self-represented litigant").

members, and articulate norms for novel legal problems. Critics have warned that asking courts to act as problem-solvers of first resort for most families in transition may compromise courts' ability to perform these critical back-stop functions.[16] Judges have voiced similar concerns, suggesting that the time and energy required to provide an even playing field for large numbers of pro se litigants may deplete resources that would be better spent on other, more traditional judicial tasks.[17] Moving non-adjudicative dispute resolution processes and services away from the court system into the community may ameliorate these concerns and enable courts to more effectively carry out their core justice functions.

Several promising models for such community-based programs currently exist. In Australia, a network of government-supported Family Relationship Centres ("FRCs") provide an array of family education and dispute resolution services previously available through the court system.[18] Unlike the United States' court-centric approach, the Australian reforms "locat[e] responsibility for the design and implementation of mediation and education services for divorcing and separating families in a national community based system of service providers, rather than the court system."[19] Consistent with this community orientation, the FRCs are not located in or near courthouses, but rather in highly visible shopping centers and malls, and they are operated not by the government, but by community-based organizations, experienced in counseling and mediation.[20] Moreover, although the FRCs operate under national guidelines, individual Centres have considerable autonomy to tailor their services and approaches to the particular needs and characteristics of the communities they serve. These design characteristics reinforce the message that "[s]eparating and divorcing families, with all of their impacts on the parent and child mental health, the workplace, the court system and the future of the society are the communities' responsibility, not the legal system's alone."[21]

Closer to home, the Resource Center for Separating and Divorcing Families ("RCSDF"), an interdisciplinary collaboration between the Institute for the Advancement of the American Legal System and the University of Denver, offered comprehensive and affordable dispute

16. *See generally* Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, 40 FAM. CT. REV. 435 (2002).

17. Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge's Perspective*, 9 U.C. DAVIS J. JUV. L. & POL'Y 57, 119–22 (2005).

18. For a detailed description of these Family Relationship Centres, see MURPHY & SINGER, *supra* note 2, at 110–17.

19. Andrew Schepard & Robert E. Emery, Editorial Notes*: The Australian Family Relationship Centres and the Future of Services for Separating and Divorcing Families*, 51 FAM. CT. REV. 179, 180 (2013).

20. *Id.* at 181. The organizations compete for funding and operational authority through a rigorous, renewable application process based on criteria established by the government. *Id.*

21. *Id.* at 180–81.

resolution, counseling, and educational and financial planning services for transitioning parents and children.[22] Available dispute resolution services included mediation, early neutral evaluation, and legal education; RCSDF also offered both individual and group counseling, as well as parenting plan assistance.[23] Services were provided on a sliding fee scale by graduate students working side by side with licensed attorneys, psychologists, and social workers. Recently, RCSDF transitioned from a university pilot project to a community-based center with a similar mission and focus.[24]

These and similar community-based processes will not replace family courts; formal judicial proceedings are necessary when parents refuse to support their children or exploit or harm vulnerable family members. But it is time to stop making the courts the mandatory first stop for families undergoing divorce or parental separation, and to allow everyone to benefit from forward-looking processes that provide what families in transition most need—support, healing, and peaceful resolution of disputes.

22. The model for RCSDF was developed by the *Honoring Families Initiative* of the Institute for the Advancement of the American Legal System; the goal of the *Honoring Families Initiative* is to offer new models of service delivery and facilitate dialogue on how courts and communities can better meet the needs of families and children affected by divorce and separation. *See* Rebecca Love Kourlis et al., *IAALS' Honoring Families Initiative: Courts and Communities Helping Families in Transition Arising from Separation or Divorce*, 51 FAM. CT. REV. 351, 352–53 (2013).

23. *See id.* at 362–65; G. M. Filisko, *Model Program Brings Holistic Solutions to Divorce*, A.B.A. J. (Feb. 1, 2015), http://www.abajournal.com/magazine/article/model_program_brings_holistic_solutions_to_divorce.

24. *See* Tony Flesor, *Center for Out-of-Court Divorce Takes Holistic Approach*, LAW WEEK COLO. (Jan. 4, 2016), http://www.lawweekonline.com/2016/01/center-for-out-of-court-divorce-takes-holistic-approach/. For a detailed description of the Center, see www.centerforoutofcourtdivorce.org.