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CHILDREN OF DIVORCE IN MINNESOTA:
BETWEEN THE MILLSTONES

Edward F. Waite*

THE PROBLEM

This study concerns itself with one of the most important, needy, and until recently neglected socio-legal fields,—protection of children in divorce cases. It need not be argued here that, generally speaking, the divorce or voluntary separation of parents is likely to imperil the welfare of their young children. There are instances where children are better off when rid of an unfit father or mother or both. These call attention to the fact that the real cause of the sorry plight of children of divorce is often a bad family environment long preceding the breaking up of the home. But even in such cases relief from emotional or moral evils is usually accompanied with new problems of support, training and education.

Nature provides the child with two parents, each normally performing functions which the other cannot take on so well if at all; and the two joining in much that can be better done together. When from any cause the total duties of parenthood fall upon a single parent the child loses something valuable; but his disadvantage is plainly greater when there is divorce1 than when the loss occurs through death or necessary absence, because of the psychological disturbance incident to an atmosphere of domestic discord. Damage is likely to have been done before the case comes into court; and divorce and its aftermath often continue and sometimes increase the ill effect of previous disharmony. The child in every divorce case has therefore ipso facto a status of disadvantage which challenges the judge, and opens to him the duty to reduce it so far as possible.

This presumption of disadvantage finds ample confirmation in the experience of judges, lawyers, clergymen, psychiatrists, and social workers. Everybody knows that practically all children who come into the juvenile courts as “dependent” or “neglected” are without two parents who are on the job. This is true of a large proportion of the “delinquents”—approximately one-third; and

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1. Unless otherwise indicated, the term “divorce” is used herein to include separate maintenance and annulment of marriage.
while it cannot be assumed that in all these cases lack of normal home environment is the prime cause of delinquency, nevertheless it is doubtless one factor. The calamity which has befallen these children has included all varieties and combinations of the negative evils of economic and emotional loss due to the mere absence of one of the two parents essential to a normal home, and the positive evils of conscious insecurity, divided filial allegiance, the shocks and embarrassments of recognized parental discord, and the ruinous mental conflicts which develop when hostile parents compete for the child's affection.

Official duty and public concern for these unfortunates have been slow to furnish adequate protection. Long ago English Chancery developed the theory that, representing the Crown as parens patriae, it was charged with supervision of the interests of those not competent to care for themselves, including minor children; but centuries passed before this principle was applied to minors when property interests were not at stake. In the United States the socialized attitude of the courts made more rapid progress and may be said to have reached the modern stage in 1899, when the first juvenile court was established in Chicago. This court emphasized the chancery principle of guardianship of children and extended it to law-breakers under sixteen years of age, dealing with them as erring or "delinquent" children who were objects of the law's protective and constructive solicitude, rather than criminal victims of retributive justice. The idea spread and in addition to the rapid establishment of juvenile courts throughout the land there were soon instituted a few "courts of domestic relations," having varying jurisdiction within the implications of that term. As early as 1914 one of these in Ohio (Hamilton Co., including the city of Cincinnati) was given divorce jurisdiction, and this was repeated in two other counties in 1918 and 1919.

In 1917 a committee of the National Probation Association, of which Judge Hoffman of the Cincinnati Court of Domestic Relations was chairman, recommended the general establishment of "family courts" with jurisdiction as follows: "(a) Cases of desertion and non-support; (b) Paternity cases, . . .; (c) All matters arising under acts pertaining to . . . courts, however designated in the several states, having within their jurisdiction the care and treatment of delinquent and dependent children and the prosecution of adults responsible for such delinquency and dependency; (d) All matters pertaining to adoption and guardianship of the
person of children; (e) All divorce and alimony matters.” The sound ideas underlying this grouping were the interest of the State in the conservation of childhood, the intimate relation of all justiciable matters directly involving family life, and the need for administrative aid in the wise solution of such questions.

Concerning the general scheme Dean Roscoe Pound made the following discriminating comments: “The main work of the courts is with the economic activities of the community—in a large sense property and contract. Next to that comes injuries to personality through the aggression or negligence of others. In these cases the administration of justice calls for rules or standards applied according to a settled technique. On the other hand, in the class of cases belonging to a domestic relations court the technique of application of legal rules has more of an administrative character. Attempts to deal with these cases along the lines of property and contract have failed. We have had to recognize that common sense and experience backed up by administrative facilities and a staff of social investigators, and even, perhaps, a psychological laboratory, are required for a proper administration of justice in this field. This does not mean that we should make the mistake of setting up separate courts of hard and fast jurisdiction, but rather that in our courts of general jurisdiction we should make provision for specialist judges handling this group of cases as a unit. In the end it is wasteful for a man whose time is primarily given to that portion of the administration of justice which has to do with interests of substance to turn from time to time to fragments of situations calling for a different sort of treatment and involving different interests, and endeavor to deal with them through a different technique. The chances are infinite that he will do what, by and large, most of our judges have done, namely, apply the habits and methods of property law and commercial law to the solution of problems of human conduct.”

This is the clear and moderate statement of a philosophical jurist. The present writer, after many years of judicial responsibility for child and family welfare, must speak with greater emphasis. Experience shows that in cases which fall within Dean Pound’s third category, judicial specialization is highly desirable, and the assistance of expert social workers is always useful and often essential to any assurance of wise action. Where either technique is available, to ignore it habitually is to play fast and loose with sacred human interests. Nor should the cooperation of social workers be
rejected even when they cannot be classed as "expert." With negligible exceptions they are intelligent and deeply interested; and since they can make contacts not open to the judge they are likely to find new and relevant facts which may prove of great importance. It is too late to question this after fifty years of the juvenile court; and custody issues in divorce cases call for juvenile court methods, as is well settled by experience, approved by high authorities and expressly recognized by statute in several states, including Minnesota. The judge who after the abundant demonstrations of the last half-century despises the aid of social agencies, and fancies that he can always rely on his own perspicacity in observations from the bench, or on the sound judgment of a "good" parent who is under the stress of a marital cataclysm, fails to appreciate one of his most important responsibilities.

In respect to judicial specialization perhaps a word on the positive side should be added to Dean Pound's analysis. Willingness of a judge to give special attention to socio-legal matters implies an interest without which the work would be unendurable and illy performed; and there is, of course, valuable education in such a focalized experience. The net result of the specialization Dean Pound favors would therefore seem likely to produce, in the long run, judges who are peculiarly fitted to deal with human problems. And in saying this the writer is not unmindful of the dangers of too great release from the techniques of ordinary trial procedure.

In the summer of 1916 Governor J. A. A. Burnquist appointed a commission to study the need for revising the laws of Minnesota which directly concerned children, and to formulate new proposals which might be found necessary. Forty-one bills were submitted to the 1917 legislature and thirty-five were enacted. The report of the commission contains the following paragraph: "There is a recent tendency to centralize all judicial dealing with family conditions in a court of domestic relations, exercising the functions of a juvenile court and dealing also with desertion and other phases of disturbed domestic life. There is evidence enough in favor of this experiment to entitle it to further attention before the work of reconstructing our Minnesota children's laws can be deemed to be completed." No legislation to this effect was recommended, nor

any other measure specially designed to safeguard the interests of children in divorce proceedings. However, the “family court” idea began to be discussed among those who were interested in new attempts to relate the state’s authority more closely to social maladjustments, and in 1920 the State Conference of Social Work appointed a committee to study the subject. In Ramsey County divorce cases where there were young children involved were already being heard by the judge in charge of the juvenile court through a voluntary agreement among the district court judges, thus securing important features of the most advanced family courts. The Conference committee prepared a bill designed to implement a similar arrangement in each county where it should be approved by the district court and county commissioners. This measure received support from welfare organizations and informal judicial approval in Hennepin and St. Louis Counties. The prevailing sentiment of the bar was against it. It was introduced in the 1921 legislature and favorably reported out of committee in each house, but was never brought to vote. Since 1921 no similar legislation has been seriously urged, although there has been a very great advance in socialization of the attitude of judges, practicing lawyers and the public.

Present Law and Practice

Much attention has been given to our subject in other states. Local needs have been studied and remedies applied which in some instances have gone far beyond the experimental stage. We shall consider relevant laws and facts as they now exist in Minnesota, and insofar as conditions are found which appear less than satisfactory, present, by way of helpful suggestion, some methods adopted elsewhere.

In Minnesota, as generally, when there is a decree of annulment of marriage, separate maintenance of the wife or divorce of the parties, the law gives discretion to the court to award custody of a minor child and to determine and enforce parental responsibility for its care and support. The natural rights of parents are to be respected, but the welfare of the child is the prime consideration, and in this respect the decree remains subject to revision. On appellate review of a decree or order for custody much confidence will of course be placed in the conclusions of the trial court, but if abuse of discretion is found the Supreme Court will not hesitate to interfere in the interest of the child. As between the parents there is a presumption in favor of the mother as the fit custodian
for a child of tender years, but this yields to contrary evidence. Divided custody between the parents is recognized as sometimes appropriate, but is commonly viewed with disfavor. "As a general rule divided custody of such a child [four or five years old in the case under consideration] is not for its best interest; and if the mother is a fit and proper person, and able to and does properly care for the child, she should have its custody and care." When the parents agree as to placement of a child their wish will be carefully considered but is not conclusive.

Except as modified by decree or order the common-law obligation of the father to support his children continues after divorce, and is not limited, as is alimony to the wife, to one-third of his income. Permanent abandonment of dependent children is a felony, and failure to support, without intent to abandon, a misdemeanor.

The prohibition of special legislation in the Minnesota constitution has not prevented marked diversity in the organization and functions of juvenile courts throughout the state. These courts are so large a factor in our problem that the existing situation must be presented with some detail.

In Hennepin, Ramsey and St. Louis Counties, containing the three large cities of Minneapolis, St. Paul and Duluth, the district court has exclusive jurisdiction in juvenile cases. In other counties the probate court functions as the juvenile court to a limited degree, but only to determine the status of the child as dependent, neglected or delinquent and designate a guardian.

In Hennepin County a district judge is nominated and elected on a separate ballot whose duty, taking precedence of all others, is to have charge of the juvenile court. In Ramsey and St. Louis Counties the district judges are required to designate one, and if necessary two, of their number to act as judge of the juvenile court for one year unless otherwise ordered.

In every juvenile court some provision is made for probation officers for investigation and supervision under the direction of the judge; and in Hennepin County these officers are by statute expressly placed at the disposal of all the district judges, for any required service in behalf of children in divorce cases.

Jurisdiction in cases involving children is scattered and overlapping. The district court, with exclusive jurisdiction of divorce,

6. The jurisdiction over "contributory delinquency," sought to be conferred by Minn. Stat. 1945, Secs. 260.27 and 260.28, has been declared unconstitutional by the Attorney General; Opinion Mar. 31, 1932.
separation and annulment, virtually appoints guardians through commitments to custody, while guardians are also appointed by district and probate judges acting under the juvenile court law, and by probate courts in their regular capacity. Criminal prosecutions for abandonment are in the district court; for non-support in municipal courts, before justices of the peace and often in the district court through the reduction of an original charge of abandonment. Non-support may also be dealt with as contempt in three district-juvenile courts after jurisdiction of a child has been assumed through an adjudication.

Adoption and establishment of paternity are in the district court,7 but support by illegitimate fathers may also be enforced in three district-juvenile and three probate-juvenile courts.

We thus see that Minnesota statutes in the field with which we are concerned have little unity or coordination. This, on the negative side, tends to reduce the sense of social responsibility felt by the judges in divorce cases, and to keep them in ignorance of facts in the family history which ought to be considered; and on the positive side it often results in the regrettable confusion which follows when trial judges with co-ordinate jurisdiction take inconsistent action on practically identical issues.

In 1921-2 a study was made of 89 divorce cases in Hennepin County, taken at random from those begun in those years, under the direction of the University of Minnesota Training Course for Social Work. The report8 shows 239 children, nearly all under 15 years of age. It was observed that due to overlapping jurisdiction and the system of rotating assignment the judges who heard the cases were at a great disadvantage in dealing with the family problems which concerned these children so intimately because they were not advised of various phases which had previously arisen in other courts or before other judges of the 4th District. In 19 cases the family had appeared in the district, municipal and juvenile courts; 37 others had been in two courts; 37 had been in the juvenile court and in two-thirds of this group the delinquencies dealt with were those of the parents rather than the children.

Divorce conditions in the United States are widely criticized. We shall not discuss nor even mention notorious evils. An accredited student of public affairs has said recently that “in the whole administration of justice there is nothing that even remotely

7. Under Rule 6 of the 4th District, adoption cases are referred to the Judge in charge of the Juvenile Court.
can compare in terms of rottenness with divorce proceedings.\textsuperscript{9} For our present purpose we accept the substantive law as it is,—and it is far better in Minnesota than in some states,—and are concerned only with the protection of the children involved. An estimate sufficiently accurate for our purpose is that there are young children in about one-half the divorce cases which come into court throughout the United States. The 1947 World Almanac reports 502,000 divorces in 1945,—one to every 3.2 marriages! Let us assume that in 250,000 of these there was at least a single child. Here, as in all the groups of cases we have mentioned as involving children, the court must deal with a family situation. It seems clear that this can best be done when the picture is seen as a whole, and that—other things being equal—there is an advantage in having all its aspects that come into court presented in the same tribunal. We have in Minnesota no legislative plan designed to secure this advantage. Whatever steps have been taken to this end have been purely voluntary.

**Defaults**

In Minnesota 7,808 divorces were granted in 1946 and 5,705 in 1947. Our judges doubtless tried to give protection to children in these cases when they knew the facts. In contested cases the facts are likely to come out if the contest is a genuine one—as often it is not; but in the vast majority of cases which, no defense being interposed, are heard pro confesso, no full showing of relevant facts will be made unless through direct or indirect intervention by the judge himself. The estimate accepted by Mr. Justice Black in the second Williams case\textsuperscript{10} that 85 per cent of divorces in the United States are uncontested is probably conservative. An expert study of divorces granted in Hennepin and Ramsey Counties, 1929-1932,\textsuperscript{11} found only 10.2% even nominally contested; and it was suggested that in many of these the contest did not go "beyond the filing of an answer to expedite the suit." A district judge in Hennepin County is thus quoted: "The default divorce is a divorce by mutual consent in all but rare instances. The suit is filed; with it an affidavit of no answer; it is placed on the default divorce calendar; three persons appear to testify to the 'cruelty' alleged; an order is drawn and signed—and that's all there is to it. Of the 1,117 divorces granted in the last year 53 were contested by answers filed to the original suits. When the contested cases came to trial

\textsuperscript{11} Calvin F. Schmid, Social Saga of Two Cities, (1937).
only 32 defendants appeared. So for all purposes there were 1,085 divorces by mutual consent.” The writer feels quite safe in saying, on the basis of observation and experience during the years covered by Dr. Schmid’s study, that in these 1,085 cases the judge was little more than a figure-head, being careful—at the most—that the record should contain a *prima facie* basis for the decree. Often the amount of alimony and support money and the disposition of the children were covered by undisclosed agreements between the parties; otherwise the wishes of the plaintiff as submitted to the judge were almost always adopted without any facts which the plaintiff’s attorney did not choose to present. The good judgment and conscience of the plaintiff and counsel were the only safeguards of the children’s interests, and—to put it mildly—were not always adequate. Often the sum ordered to be contributed for support, determined in this one-sided way, was more than the father could possibly pay and acrimonious disputes ensued, taking much time of the court which full knowledge of the facts at the original hearing would have saved; often the order was not accompanied with provisions for enforcement, and again court time was wasted, sometimes with an interim expense to the public for emergency relief; often the children were committed to the custody of unfit persons in ignorance of the real facts; often a change of circumstances, such as remarriage of one of the parents, led to an application for change of custody, and then the luckless children, caught between the upper and nether millstones of bitter controversy, needed protection from the court which the judge was not equipped to give.

It can hardly be emphasized too much that default cases, where the dangers we are considering are most likely to threaten, make up an overwhelming proportion of all divorces. Taking another example here at home: on the basis of a record of 887 consecutive cases assigned to him in regular order during 112 months next prior to May 1947, District Judge Gustavus Loevinger of St. Paul estimates that more than nine-tenths of the divorces granted are uncontested.12 We find in Tennessee a recent example of conditions elsewhere. In 1946 an investigation made by a committee of the Chattanooga Bar Association showed that out of 985 divorce cases tried in 1945 by a circuit judge of Hamilton County there was no answer in 68 per cent, and an actual contest in less than 10 per

It was stated in the committee's report that on a recent Saturday morning Judge .......... granted 12 divorces in seventeen minutes! The committee is careful to say that it does not "impugn the motives of Judge .........., whom we all know to be the very soul of honor. He is truly the friend of everyone and deserves the respect of all." (One wonders if there were in the twelve cases any children to receive the friendly attention of the honorable judge.) Probably Minnesota cannot match this record, but most lawyers with memories of practice going back fifteen or twenty years will recall some pretty fast work.

PROTECTION IN MINNESOTA IS INADEQUATE

How well does Minnesota avoid the dangers and fulfill the needs to which we have given attention? Local conditions vary so greatly that they must be considered separately.

From 1935 to 1941 the writer, then judge in charge of the juvenile court of Hennepin County, took all other cases involving children except criminal prosecutions and contested divorces. This was done through a voluntary arrangement with his colleagues. The plan received universal approval and had loyal support from the bar and social agencies. Not only could children be better safeguarded by the court than under the former practice of assigning divorce trials in rotation, but a considerable number of reconciliations were effected,—counsel cooperating almost without exception when they were not convinced that this would be useless or not for the children's good. A new juvenile court judge took charge in 1941 and the same arrangement was continued until 1945, when default divorces and motions for custody and support went back to the general and special calendars, with assignments among ten judges for two months' periods. This was regarded as a retrogressive step by the bar, social workers and the informed public. A representative group, the directors of the Legal Aid Society, passed the following resolution and sent it to each district judge: "The experience of the Legal Aid Society has demonstrated that in divorce cases where there are young children their interest is best served by the assignment of such cases for a substantial period to a single Judge. The Directors of the Society therefore recommend to the District Judges that the practice of the Court in this regard as it existed for several years subsequent to 1935 be resumed." One judge responded and pointed out the difficulty of inducing any judge to spend all his time, or even part of his time regularly, on domestic relations matters. The suggestion has not been followed
further than that for convenience a judge has sometimes kept defaults for longer than his two months' assignment.

Aid from the social organizations remains available when desired. In divorce and criminal cases involving the support of children there is general use of the probation office to enforce collection. The potential value of this practice is disclosed by the following comment found in a probation office report: "A great many individual social problems are present, in varying degrees, in the majority of cases. . . . Our function in relation to these problems is far more important and requires much more time than the mere duty of enforcing an order for support. . . . In finally evaluating the results of this supervision of domestic matters there can be little doubt that much more is accomplished in the solution of human problems than may be indicated in any financial showings." Investigation preliminary to orders and decrees is rarely made. In 1947 there were 36. Only one was ordered in an uncontested case, where the need was likely to be greatest.

It will be recalled that in Hennepin County continuity of service of the juvenile court judge is secured by statute. In Ramsey and St. Louis Counties there has also been a substantial degree of permanence through willingness of judges to accept the assignment for longer than the year required by law; but since Judge Orr's retirement in 1930 divorce cases in Ramsey County have taken their regular course in rotation among eight judges. Cases where there are young children are often referred to the county probation office or a private social agency for preliminary investigation and, when deemed necessary, for supervision after an award of custody,—the practice of the judges differing, however, in this regard. In Duluth there were only two juvenile court judges from 1905 to 1943. There has been no centralization of divorce cases. Investigation preliminary to orders for custody appears to be only occasional,—chiefly when there is a contest for the child. Collections of support money are referred to the probation office and some incidental supervision after divorce is thus secured.

In the other 84 counties of the state conditions in our field are found to vary, as might be expected, according to density and character of population; number, temperament and social attitude of the district judges; availability of extra-judicial cooperation and other local factors. Out of nineteen judicial districts there is but a single judge in each of nine, comprising thirty-six counties. Five districts, with twenty-six counties, have two judges each; one,
with nine counties, three judges, and one, with ten counties, four judges. While juvenile court jurisdiction remains in the probate courts it is plain that there can be no useful specialization in these sixteen districts, except to a limited extent in counties containing cities of substantial size.\textsuperscript{13}

In few counties other than Hennepin, Ramsey and St. Louis, are there trained probation officers or social agencies with skilled executives. Churches, schools and county welfare boards are practically all the administrative aids open to a judge who is dealing with a social problem, however conscious he may be of need. That need is of course much less frequent in rural and small urban communities than in large centers of population; though when it does occur the human interests at stake are no less vital.\textsuperscript{14} The typical family status is likely to be more stable, and when disturbed less complicated; and the judge's personal acquaintance with the character, record and environment of parties, to which he may properly refer in the exercise of his discretion, is more frequently adequate.

This survey of the needs of children of divorce in Minnesota, and the supply of those needs by laws and court procedure, may be thus summarized: In the three judicial districts containing the largest cities and separately organized juvenile courts, the selection and education through experience of a judge for specialized service is not now carried beyond the statutory juvenile-court assignment. The law provides (484.34, Stats. 1945) that the business of the courts "may be divided among the judges . . . as they

\textsuperscript{13} E.g., the following rules recently adopted by the judges of the 7th District:

"No action for divorce or separate maintenance shall be heard upon its merits within thirty days following service of summons, and after July 1st, 1948, all default divorce cases shall be placed upon the calendar and heard only at general term, and in all such default divorce proceedings a stenographic record shall be taken and transcribed by the official reporter, a minimum fee of Five Dollars to be paid such reporter by the moving party."

"Proceedings to reopen and to modify judgment in divorce matters, whether pertaining to alimony and property settlement or to the custody, maintenance and support of minor children, shall be heard by the judge upon whose order such decree was docketed if such judge then continues to hold judicial office in this district, unless he be then incapacitated by illness."

\textsuperscript{14} In 1946 and 1947 divorces granted in counties containing Minnesota's six largest cities comprised 62 and 66 per cent, respectively, of the state's official total; and doubtless there was considerable overflow, through our easy change of venue, into adjacent counties. For example, in Carver Co., with a population of 17,606 (1940) there were 160 divorces in 1946 and 69 in 1947. The averages for the 2 years, respectively, in 21 other counties of between 15,000 and 20,000 were 23.7 and 10.8.
by rule or order may direct." They are, however, hardly likely to impose distasteful work on a colleague indefinitely or for a long period; but there can be specialization if a judge can be found who is willing to do the work with substantial permanency, provided his colleagues are willing to surrender to him appropriate cases which in the customary rotation would fall to them. The difficulty lies, for obvious reasons, in the first of these conditions. Consent of colleagues may be assumed; few persons with the background, personal characteristics and ambitions likely to be found in successful candidates for the district bench would object to being relieved of cases involving family quarrels and miscellaneous child-welfare problems. In St. Paul and Duluth the majority of the judges have in their own hands an important first step, for they make the juvenile court assignment.\textsuperscript{15} In Minneapolis, as we have seen, this is done by popular vote on a special ballot; and the Governor in an initial appointment to fill a vacancy, or the voters at an election, may take into account the willingness and fitness of a candidate for juvenile court judge to assume the full duties of a family court. In other counties and under present laws judicial specialization does not offer a path to improved conditions. The reliance must be on the individual judge's sense of social responsibility and willingness to seek aid from lay sources, of which the one most generally available is the county welfare board.\textsuperscript{16}

Inquiries recently directed by the State Director of Social Welfare to the chairmen of county welfare boards elicited interesting information. Of the 84 counties outside the three metropolitan centers replies were received from 83. In 5 counties it is customary for the judge to order investigation or supervision, or both, in divorce cases involving young children; in 30 this is done occasionally; in 46 not at all.\textsuperscript{17} Sixty-two boards consider this service desirable; two think otherwise, and nineteen do not express an opinion. Nine boards customarily make collections under court orders; 29 occasionally, 42 not at all. Nowhere are there organized social agencies available to the court other than the welfare board.

In 3 districts comprising 11 counties and served each by a single judge the boards have not been called upon for any assistance al-

\textsuperscript{15} One of the two assignments authorized for St. Louis County is apportioned to the Iron Range (Virginia and Hibbing).

\textsuperscript{16} By Minn. Stat. 1945, Sec. 260.08, the services of the board are placed at the disposal of the probate-juvenile courts.

\textsuperscript{17} Answers to the question covering this point are omitted from two responses.
though divorces in the districts in 1946-47 numbered 488. In the total of 46 counties so reporting there were 2,399 divorces during the same period. Of these more than 2,100, with approximately a thousand children, were probably defaults. Aside from more important points, it would be interesting to know how many of these divorces were virtually subsidized out of public funds through aid to dependent children, because all the facts were not disclosed at the trial.

**SUGGESTIONS FROM OTHER STATES**

The statutes of all the states excepting South Carolina provide for judicial divorce; and everywhere but in Pennsylvania there is statutory provision for custody and support of children as incidental to divorce proceedings. A few courts have specific statutory rules for adjusting custody between contending parents. Some of these are quite archaic and in none do we find useful suggestions for Minnesota. Many states recognize the duty of the court to affirmatively secure and maintain for young children the protection they should have received in the homes into which they were born. Legislative steps to this end indicate trends of public opinion and areas of experience which invite our attention.

Family courts, or courts of domestic relations, have spread to at least twenty states, for the most part under local laws by which they serve only counties which contain the larger cities. Some have been granted divorce jurisdiction,—e.g., in Iowa, Missouri, Nebraska, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, Wisconsin and West Virginia. These represent an effort to secure for the children of divorce contact with an interested and informed judge, qualified through special and enlarged experience. Along with this approach there have been extended to these children methods found useful in the juvenile courts in obtaining facts needed for thoroughly adequate court action, and in making sure that during the period of the court's responsibility its orders, as modified on the basis of changing conditions, are obeyed.10

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18. In Nebraska divorce jurisdiction is expressly granted to the juvenile court. Rev. Stats. '43, 43.203. Most of these details as to statutory provisions in other states are from a compilation of laws of all the states relating to divorce made by the United States Children's Bureau, which originally covered 1940 and has been brought down to include later legislation in some but not all of the states. The writer does not profess to have made an up-to-date study of divorce laws in the United States, his purpose being not to compile a digest, even of relevant material, but find useful suggestions.

19. No instance has been found where divorce jurisdiction once granted to a juvenile court or court of domestic relations has been withdrawn except
The legislatures of many states have recognized the need of giving protection to young children beyond the routine procedure of the divorce court. This has been done in many ways, with the common purpose to make sure that all relevant facts are brought before the court. Probation offices and other public agencies are expressly placed at the disposal of the court if required; and in Nebraska we find the following mandatory provision: "It shall be the duty of the court to make independent investigations of the merits of all default cases and cases where minor children are involved, through a probation officer or county superintendent of child welfare or other agency." Often it is made discretionary with the court, and sometimes obligatory, to appoint counsel to represent the interest of the public in divorce proceedings. In some states this duty devolves on the county attorney, on whom service of pleadings is required. Wisconsin provides for the appointment of "divorce counsel" in every county, who must appear at the trial whenever the case is to be heard pro confesso. In such cases no final decree may be filed until he has seen a copy. In several states it is made the express duty of the court and of counsel appearing for the public to undertake to reconcile the parties.

Michigan's "Friend of the Court" plan has been in successful operation many years, and has received wide publicity. In each judicial circuit the court recommends and the Governor appoints a proctor styled "Friend of the Court" to enforce payment of support money and otherwise protect the interests of minor children in divorce cases. In Detroit this official may act as referee to take testimony and make recommendations.

Since 1939 California has had a unique device. In each district the superior court may designate one judge annually to have charge of what is called "The Children's Court of Conciliation." The jurisdiction of this court may be invoked by either spouse to preserve

in Hamilton County, Tenn. (Chattanooga), where this occurred evidently through a legislative inadvertence. Reinstatement is recommended in the Bar Committee's report to which reference has been made. See Chattanooga Times, Nov. 24, 1946. On the recommendation of a distinguished cooperating committee of the American Bar Association, the National Conference on Family Life which convened in Washington in May, 1948, indorsed the further extension of courts of domestic relations with divorce jurisdiction.

20. Revised Stats. 1943, 42.307. And see Probation, April, 1947, p. 102.
a threatened home before it is broken up; and after action is begun the court may refer it if it appears that for the sake of a child involved reconciliation ought to be attempted. In aid of reconciliation the court may make orders effective for a brief period, during which divorce proceedings are suspended.  

A noteworthy experiment in the direction of socializing divorce proceedings was recently attempted in Illinois. The Act proceeded upon a declaration that the evils attendant upon the breaking up of families by divorce constitute a serious threat to the general welfare, health, morals and safety of the state, and recognized a causal relationship between the disruption of the home and juvenile dependency and delinquency, as well as increase in the financial burden of the public because of failure to observe court orders for the payment of support money. There was created in each judicial district having a population of more than 500,000 a "divorce division," consisting of masters in chancery appointed, with "technical and clerical assistants," under provisions differing from those relating to other masters. To these officials all divorce proceedings and matters involving the custody and support of children were to be referred for investigation, hearing and recommendation. It was made their duty to effect a reconciliation if possible; and to that end they might seek aid from religious and social agencies. The State Bureau of Public Welfare was expressly made available for investigations. Unless the court should otherwise direct, payments for child-support were to be made to and disbursed by the divorce division. Under the classification by population the Act and various implementing amendments of existing laws applied only to Cook County (Chicago); and in Hunt v. Cook County, 76 N. E. 2nd, 48, it was held that this group of laws was repugnant to the state's constitutional prohibition of special legislation, since no valid distinction could be drawn between different judicial districts with respect to the moral and social problems involved.

What To Do About It?

It is plain that conditions in Minnesota, in the field which has been studied, are far from what they ought to be. Some advance steps are at the command of the judges without legislative changes, and they have unused facilities already at their disposal.

The "divorce proctor" plan is simple, need not be expensive,

and has evident advantages which have been demonstrated elsewhere.\textsuperscript{25}

As this article is about to go to the printer there has been made public a preliminary redraft of Article VI of the state constitution which, with such changes as may be made after further consideration, will be submitted to the State Commission on Revision of the Constitution in June.\textsuperscript{26} From the standpoint of this study the noteworthy features are Sections 5 and 16, and various provisions relating to the status and jurisdiction of probate courts. Section 5 is as follows:

"A majority of the judges in any district having three or more judges may provide that the court shall sit in divisions consisting

\textsuperscript{25} A useful suggestion comes from Iowa. District Judge Milton J. Glenn, of Dubuque, has proposed to a committee of the State Bar Association the following "Rule of Civil Procedure":

"The Judges of each Judicial District shall appoint for each county in their district a Friend of the Court to act in divorce and separate maintenance cases involving the custody of children. The judges may appoint to said position the Probation Officer or Deputy Probation Officer of said county or such other person as said Judges deem qualified to perform the duties of the position. If the person appointed is not an official or employee of the Court, the County, or the State, said appointee shall receive such fee as the Court may fix in each case, which fee shall be taxed as part of the Court costs in the case.

"In said actions, a copy of each pleading filed in the case shall be mailed to or served on said Friend of the Court by council at the time said pleading is filed. When the issues are made up or when either party has been adjudged to be in default, said Friend of the Court shall make an investigation of the facts pertinent to the question of the custody and welfare of the children in the event a divorce or separate maintenance is decreed. A written report of the facts disclosed by said investigation shall be submitted to the Court before the case is set for hearing.

"After said report has been submitted and not less than five days prior to the hearing, the Court shall, in all cases where the parties are within the jurisdiction of the Court, conduct a pre-trial conference at which both parties shall appear. At said conference, the Court shall undertake to bring about a reconciliation of the parties. The attendance of the parties at said conference may be compelled by Court order, even though either party be in default, and counsel for the parties may also attend and participate in the conference. A record of said conference shall be made if either party demands it or if the Court so directs.

"In divorce and separate maintenance actions wherein the decree contains an order for the payment of support money for children and said payments are not made, the Friends of the Court shall have authority to make an investigation of such failure to pay. When said investigation indicates that the failure to pay may be willful, the Friend of the Court shall report the result of the investigation to the Court, and the Court may on its own motion issue a contempt citation against the party required to make said payments."

\textsuperscript{26} See Preliminary Report on Revision of the Judiciary Article of the Minnesota State Constitution, (1948) 32 Minn. L. Rev. 458.
of one or more judges for the performance of designated classes of judicial business." This would make specific and expressly constitutional in the 2nd, 4th, 7th, 11th and 15th districts the authority found in 484.34, Stats. 1945, above referred to, to centralize jurisdiction in divorce cases; but it is doubtful if the majority of judges in any district would be more likely to act against the will of an associate than they are at present. Whether juvenile court jurisdiction could be assumed in the 7th and 15th districts under present laws is at least doubtful; and whether election by popular vote of the juvenile court judge in Hennepin County might be affected should receive careful consideration.

Section 16 provides that—"The legislature may confer jurisdiction over cases and proceedings relating to domestic relations and the care or welfare of minors upon the court of probate or the district court of any county or upon a court created for such purposes." As to the creation of a new domestic relations court, this seems to be covered by the proposed Sec. 127 but there may be an advantage in explicit recognition of such a court as an appropriate feature of our judicial system; and the section would do away pro tanto with restrictions upon the legislature imposed by Art. IV, Sec. 33, forbidding special legislation. The possible grant of jurisdiction in this field to the probate court is a noteworthy and important feature. It is quite in line with other provisions designed to increase the dignity and authority of probate courts.

Sec. 7 provides that "For the complete determination of all matters" relating to guardianship and incompetency the probate court "shall have such additional jurisdiction, including trial by jury, as may be prescribed by law." This would empower the legislature to make the probate court a true juvenile court instead of a fractional one, which it must remain so long as its power is limited to orders for guardianship.

While these important changes are under official consideration it does not seem wise to make specific recommendations here. With constitutional revision impending this is a critical moment when social-minded members of the Bench and Bar, and all who have deeply at heart the welfare of our children, should make their influence felt.

"Until they are satisfied that no inadequacy of law or defect of judicial machinery is contributing to the vast aggregate of heart-
ache and human misery represented by a half-million broken homes a year, the Bench and Bar of America national, state and local, and others interested in the efficient administration of justice, should not cease to scrutinize their statutes and judicial processes with that end in view."\textsuperscript{28}

\textsuperscript{28} Editorial article, Journal of the American Judicature Society, April, 1947, p. 181.