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## A Family Court—Why Not?\*

*The author argues for the consolidation of all litigation affecting the family into one court, instead of the present dispersion. Such consolidation would enable the court to treat the entire family problem, rather than attempt to treat one symptom at a time. Thus, conflicting treatments by courts dealing with separate but related family problems would be eliminated. Judge Arthur suggests criteria for the "Family Court," and notes that of all the courts treating family problems, only one approaches the ideal.*

Lindsay G. Arthur†

### I. RATIONALE

People suffering from several medical problems are taken to one hospital where trained personnel treat all problems together under the direction of an expert who supervises the treatments and makes certain that no one treatment conflicts with any of the others. People suffering from several family problems are taken to as many as five different courts where personnel of varying degrees of training each treat one particular aspect of the problem under the direction of whatever judges happen to be unwillingly assigned to the court for that month.<sup>1</sup> The various courts are seldom aware of other courts involved, and know much less what they are doing.

Under current practice, if a mother becomes intimately interested in another man, her husband may beat her and be charged with battery; he may leave her without funds and be charged with nonsupport; her children may become ill-fed and she be charged with neglect; a child may steal and be charged

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\* Summation of remarks by the author to the 68th Annual Convention of the Colorado Bar Association on October 14, 1966.

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1. Treating the family situation as a series of single separate controversies may often not do justice to the whole or to the separate parts. The several parts are likely to be distorted in considering them apart from the whole, and the whole may be left undetermined in a series of adjudications of the parts.

Pound, *The Place of the Family Court in the Judicial System*, 5 CRIME & DELINQUENCY 161, 164 (1959).

with delinquency; a divorce may be sought, parental rights may be terminated, a child placed for adoption, and on and on, through different courts, before different judges, with numerous caseworkers, and with no one concerned about the whole family.<sup>2</sup>

In the earlier years of an agrarian society, a community could be well served by a single judge who, though he might wear different hats, knew most of the people in his area personally or by reputation, and could handle all problems before him with some cognizance of the whole situation. Whatever the particular jurisdiction, the judge was usually the same, and he was aware of other areas of litigation involving the family. But the sheer pressure of a population which has doubled every few generations, and which has become urbanized and concentrated in massive metropolitan centers, has denied the majority of people the concerned and acquainted knowledge of a single judge. Counties of half a million people with fifteen or twenty judges are no longer unusual. The majority of such judges are engaged in litigation arising from automobiles and business, but are rotated into the unfamiliar divisions where family problems arise. Each judge, with his temporary competence, gives his best and brief efforts to the narrow area before him. However, the areas often overlap and the judges have neither central records nor adequate staffs. As a result, the judges are frequently inconsistent and seldom aware of what their colleagues are contemporaneously doing with the same family. On too many occasions, orders and solutions are in direct conflict.<sup>3</sup>

Thus is conceived the idea of a "Family Court": a consolidation of all of the areas of family litigation into one court where there can be unity and consistency; where a judge who is interested in the assignment can develop his skill and his empathy; where a staff can be trained in co-ordination of all aspects of family social work; and where, above all, jurisdictional strait

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2. "Justice, service to people, and efficiency in functioning demand that our present diversity of tribunals with their segmented jurisdiction over family problems give way to family courts with integrated jurisdiction and services."  
U.S. DEPT. OF H.E.W., CHILDRENS BUREAU, *Family Courts—An Urgent Need*, 14 (1960).

3. "It is better to have one court handle all of these problems; this avoids overlapping jurisdiction, waste of time and money, and successive appeals. It is much more flexible and allows administrative leadership over the whole."  
U.S. DEPT. OF H.E.W., CHILDRENS BUREAU, NATIONAL COUNCIL ON CRIME AND DELINQUENCY & NATIONAL COUNCIL OF JUVENILE COURT JUDGES, *Standards for Juvenile & Family Courts* 44 (1966).

jackets can be removed and each hearing can take account of all problems and administer all remedies.<sup>4</sup>

## II. EXISTING JURISDICTIONS

There are presently about twelve separate forms of litigation affecting families scattered in various arrangements among different courts and divisions of courts. Even listing them alphabetically demonstrates their familiar similarities.

**ABANDONMENT** - Where a parent is so unwilling to provide for his child that he leaves the child unprotected.

**ADOPTION** - Where a child who cannot be raised by his natural parents is given to blood strangers to provide needed parental care.

**CONTRIBUTING** - Where an adult encourages criminal conduct in a child or neglectful conduct in a parent.

**DELINQUENCY** - Where a child exhibits lack of parental control or lack of respect for society's necessary restrictions.

**DEPENDENCY** - Where parents are temporarily unable to provide needed care for their child.

**DIVORCE** - Where parents are unwilling or unable to continue jointly providing care for their child.

**MARRIAGE** - Where a child wishes to enter into legal parenthood before the accepted age of maturity.

**NEGLECT or NONSUPPORT** - Where parents are temporarily unwilling to provide needed care for their child.

**PATERNITY** - Where a parent refuses even to acknowledge any duty towards his child.

**POLICE COURT CRIMES** - Where a parent injures a child by physical or emotional violence.

**TERMINATION** - Where parents are permanently unwilling or unable to provide care for their child.

Thus, each jurisdiction is concerned with a child; each with negative parental or adult conduct towards a child; each requires public intervention into a family's normally private affairs in order to impress treatment, supervision, or sanctions. These

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4. "A true family court is headed by a specialist judge and has integrated jurisdiction over all legal problems that confront the family in conflict."

CALIFORNIA ASSEMBLY, INTERIM COMMITTEE ON JUDICIARY, *Final Report on Domestic Relations* 84 (Jan. 11, 1965).

similarities demonstrate the feasibility and reasonableness of establishing a Family Court with jurisdiction over all litigation concerning the family.

### III. REASONS FOR CONSOLIDATING

A Family Court would add nothing new, but would merely consolidate the existing structure into a single court. It should not be considered as a novel, social encroachment into individual and family privacy; these invasions now exist, usually at the request of the family itself. A Family Court would merely combine the various existing forms of judicial intervention into family affairs. Nothing new would be added except the fruits of the consolidation—consistency and efficiency.

Consistency and an overview of family complexities are surely the primary justifications for the consolidation. A consolidated court could provide consistency of case assignment, consistency of judicial training, consistency of judicial approach, consistency in the objectives of judicial intervention, and consistency in social casework. Similarly, it could provide an overview of the whole family rather than simply an investigation of a delinquent child, or a cruel and inhuman father, or financial inadequacy of parents, or similar forms of tunnel vision forced on our courts by the present jurisdictional strait jackets and separations. A single court could examine the entire relationship between parent and parent, parent and child, child and child, family and in-laws, and family and the public. And, having explored the whole complex of relationships, a single court could provide consistent and continuing consideration of each aspect of the problem.<sup>5</sup>

A further reason impelling urgency in the consideration of a Family Court is the increasing breakdown of the American divorce system. It has become trite to say that the divorce rate has reached a crisis stage, or that divorce laws create more hostility than they solve, or that divorce procedure is overly expensive and unduly complex, or that the evidence in divorce

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5. [P]ressures have developed for a family court wherein the symptomatic behavior of members of the family would be handled in one court with an effort made to help the family avoid divorce, family breakdown, delinquency, or other behavior giving society concern, for the very reason that the family was and is the cornerstone of our whole society.

Knudson, *Report to the Judges of the Fourth Judicial District Court of Minnesota*, Jan. 6, 1959, p. 37.

courts has little correlation with the true reasons for divorce, or that the divorce courts have lost the respect of the bar and the public.<sup>6</sup> The point has been passed where the public merely expresses dissatisfaction: the press is publishing articles and editorials about the problem; husbands' unions are forming; legislative committees are holding more and more meaningful hearings; the clergy decries the system vociferously. American divorce procedures have been challenged, found wanting, and changes will be made. Since a major segment of family litigation is in flux, it would seem opportune to re-examine the entire area of family litigation with a view toward establishing a Family Court.

#### IV. EXISTING COURTS

A true Family Court: (a) is a court of law; (b) encompasses all litigable areas of family trouble; (c) is under the control of a single and continuing judge; (d) deals with fact rather than jurisdictional pleadings; and (e) is supported by a competent staff. Based upon preliminary research it appears that only the court of Judge Paul Alexander, in Toledo, approaches all of these criteria. It is a consolidated court, with an excellent staff, and is presided over by one of America's great judges. It lacks nonjurisdictional pleading; but given a strong judge, a consolidated court, and a manageable caseload, this does not prevent the integrated consistency which is the Family Court objective. If proof is necessary that the Family Court concept is valid, the Toledo Court has provided the proof by its decades of effectiveness.

New York has recently moved closer to the Family Court concept. It has established a strong and integrated court, although it is still only a juvenile court expanded to include divorce custody problems. The Uniform Family Court Act<sup>7</sup> calls for expanded courts apparently of the same style as the New York Juvenile Courts, where divorce is excluded and where, curiously, the presiding judge of a multi-judge court would rotate and thus negate a basic element of consistency.

Wisconsin<sup>8</sup> has established a modern domestic relations court

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6. "[The laws that govern divorce] tend to embitter spouses, neglect the welfare of the children, prevent reconciliation and produce a large measure of hypocrisy, double-dealing and perjury." *Time*, Feb. 11, 1966, p. 26.

7. N.Y. FAMILY CT. ACT § 686.

8. WIS. STAT. ANN. § 252.016 (1953).

with a specializing judge and a program of conciliation procedures, but juvenile problems have not been integrated into this court. Pennsylvania has considered empowering domestic relations judges to acquire competent staffs, though apparently without consolidation with juvenile courts and without specializing judges.

Texas and Minnesota have achieved consolidated courts, with little procedural integration, in some larger cities by the de facto route of placing both divorce and juvenile matters under the control of a single judge.

There has been much written; there has been much study; there have been many conferences. But, with the exception of Judge Alexander, little has been done.

#### V. THE CRITERIA: A COURT OF LAW

Family Courts must be law courts, not social courts. Family problems requiring public intervention usually involve a dispute of facts, an invasion of privacy, and a restriction of liberty. Of all our institutions, only courts can fairly approach a determination of truth, reasonably limit investigative license, and adequately protect liberty. Nothing can sort the kernel of truth from the chaff of imagination, prejudice, and falsehood better than the confrontation of witnesses under the examination and cross-examination of skilled lawyers before an impartial judge. Human experience has consistently demonstrated the danger of clothing the police and other administrative investigators with the mantle of authority unless limited by the simple expedient of judicially considering only properly secured evidence. To delegate to any individual the unchecked power privately to restrict the liberty of another individual, however fine the motives and objectives, is to beg petty tyrannies. Hence, the Family Court must be a court of law, a court of lawyers, and a court of justice.

The literature is replete with insistence that the adversary system, by definition, amplified bitterness and hostility and that lawyers, trained as advocates, lack objectivity at finding viable compromise solutions. It may well be true that cross-examination engenders bitterness, but if truth be necessary to the viable solution, the crucible of adversary proceedings will best find that truth. It is also certainly true that lawyers are advocates. This is necessary because most people are unable to relate their own

stories completely and comprehensibly when personally and emotionally involved. As the axiom goes, even "a lawyer who defends himself has a fool for a client." Moreover, lawyers are quite able to find compromise; possibly eighty percent of the lawsuits started in our courts are ended by a compromise found by the lawyers. That lawyers lack objectivity in adversary proceedings is also true; they are appearing as advocates, not as arbitrators. It is the judge who is objective, and in a Family Court with a trained judge, this objectivity will encompass both the legal and the social aspects. It has been said that "lawyers provide great therapy for the messianic complex of judges." A judge of a Family Court would often need such therapy.

## VI. THE CRITERIA: JURISDICTIONAL AREAS

It has been pointed out more than once of late that a juvenile court passing on delinquent children; a court of divorce jurisdiction entertaining a suit for divorce, alimony, and custody of children; a court of common-law jurisdiction entertaining an action for necessities furnished to an abandoned wife by a grocer; and a criminal court or domestic relations court in prosecution for desertion of a wife and child—that all of these courts might be dealing piecemeal at the same time with the difficulties of the same family. Indeed one might add an action for alienation of the affection of the wife, actions about receipt of a child's earnings, habeas corpus proceedings to try the immediate custody of the child, a proceeding in a juvenile court for contributing to the delinquency of a child, and another in a juvenile court to determine what to do about certain specific delinquencies of the child. It is time to put an end to the waste of time, energy, money, and the interests of litigants in a system, or rather lack of system, in which as many as eight separate and unrelated proceedings may be trying unsystematically and frequently at cross purposes to adjust the relations and order the conduct of a family which has ceased to function as such and is bringing up or threatens to bring up delinquent instead of upright children.<sup>9</sup>

Family litigation contains three pervasive elements, present in one form or another in every case, which should be handled consistently. The overlap of different courts and their ignorance of each other's treatment of the same problem can only result in more harm than help. Therefore, jurisdiction of the Family Court should include all forms of litigation which contain any of these three elements:

**CHILD CARE** - Where the court must provide for the care, control, or custody of a child because of parental inability or unwillingness.

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9. Pound, *supra* note 1, at 167-68.

**FAMILY ESTRANGEMENT** - Where the court must provide counselling, control or dissolution of a family by reason of its apathy, lack of communication, or hostility.

**FINANCIAL ALLOCATION** - Where the court must provide a division of the family's income or property for the adequate support of its various members.

These pervading elements are a distillation of the underlying reasons for families appearing before the courts. Each requires specialized treatment which is consistent from one problem to the next, and which is modified as circumstances change. To the extent that any litigation or jurisdictional channel impinges upon any of these pervading elements, it should be included within the Family Court.

## VII. THE CRITERIA: THE JUDICIARY

A Family Court is, by definition, created to handle the most sensitive problems of human relationships. As a court of law, it must be knowledgeable in the entire range of procedural law as well as in complicated areas of substantive law. As a court supported by a staff of social workers, it must be versed in the methodology and philosophies of that discipline and the related disciplines of psychology and correction. In metropolitan areas, it will be involved in administrative and personnel problems, though properly only on a supervisory basis. Thus, of all things, the judge of the Family Court must be well-trained. Since it is politically naive to think that he will be thus trained before his accession to the bench, the necessary training must come after appointment.<sup>10</sup>

For consistency, the Family Court requires a dedicated as well as a well-trained judge. Necessarily, then, the judge must be free from other assignments and must be guaranteed a continuity of the Family Court assignment. A rotating system of judges will ensure both lack of training and lack of continuity.

The Family Court must be a division of the highest court of

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10. Since the skills required to be a good juvenile or family court judge are not taught in law schools and the judge's primary discipline must be law, he can only learn the rest of what he needs to know *after* he becomes a judge. To do this, he must have time, an intense interest in his field of work; and only a full-time juvenile or family court judge can possibly have this time, interest, and opportunity.

NATIONAL COUNCIL ON CRIME & DELINQUENCY, *A System of Family Courts for Louisiana* 52 (Survey 1961).

general jurisdiction. It cannot be an inferior court or it will attract inferior people and acquire an inferior image. It must have the broadest of judicial authority, which can only be found in the general court. It must have more than statutory powers; it must have the general powers inherent in the most powerful of the trial courts.<sup>11</sup>

Where the Family Court has a volume of litigation requiring more than one judge, necessarily there must be a presiding judge. Whether this is accomplished by a judge empowered to direct the policies of his fellow judges with sufficient sanctions to make his directives meaningful, or by the use of referees or commissioners whose tenure is at the discretion of the judge matters less than the clear establishment of a single, determining head of the court.<sup>12</sup>

### VIII. THE CRITERIA: THE PLEADINGS

It is reasonably easy to consolidate jurisdictions so that one judge hears all cases affecting the family. Although this promotes consistency, it is insufficient, since in each case the judge is limited to the remedies of that particular case. In a divorce case he cannot send a child to a correctional institution even though the need may be obvious. In a neglect case, he cannot allocate the family's income between husband and wife. In a delinquency case he cannot grant a separation or divorce, however desired or indicated. More than merely consolidating all the reins in one hand, there is need for a single rein, for fact pleadings, for posing to the court the problems of the family rather than the jurisdictional grounds with the consequent jurisdictional limitations. Thus, provision should be made for a departure from the present method of pleading by which only the superficial symptoms are brought before the court: that a child

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11. Its judicial work is necessarily of a high order, and it should not be either a so-called "inferior" court or a specialized court, either of which would suffer the inherent limitations of inferior or special courts. The family court requires the full jurisdiction of the general trial court.

Although the family court should be placed within the existing court organization, it should be a separate division within the court structure at the level of and a part of the highest court of general trial jurisdiction.

*Standard Family Court Act*, 5 CRIME & DELINQUENCY 109 (1959).

12. "With supervision and policy establishment originating from one source, there was great uniformity . . . [in] the extensive use of Commissioners in the Los Angeles Domestic Relations Division."

CALIFORNIA ASSEMBLY, *supra* note 4, at 84.

stole a car, that the husband was cruel, that the wife drank excessively. Instead, pleading should be based on a child's need for control or care, or on the family's need for remedies for its estrangement, or the family members' need for an allocation of the family's income. Fact pleading which would go to the root causes and needs of the family's problems would permit the court to go to the root causes and seek a solution to the family's problems.

#### IX. THE CRITERIA: THE STAFF

There are two phases to family litigation, possibly to any litigation: determining the facts, and interpreting the facts so as to provide meaningful treatment. In determining the facts, the Family Court is, above all, a court of law, searching for the truth, with all of the benefits of adversary procedure. But, once the truth is known, once it has been determined what the situation is, then the Family Court must search for the treatment. The treatment necessarily will be of a social nature. At this stage the court must fall back on its staff to give social interpretation to the facts and to pose social solutions, always, of course, with the clear understanding that the court, with the help of lawyers when available, will test the proposals and examine their validity and application before they become orders under public sanction. But, while the methods of law are paramount in finding the facts, the methods of social work are paramount in determining the best way to help the family and the community faced with such problems. The second phase of the litigation, treatment, cannot be successful unless the court is well assisted by persons of considerable training in social work. To settle for less than a well-trained staff is to settle for inferiority.

#### X. CONCLUSION

Presently, when the problems of children or of a family become sufficiently serious to require public intervention, the litigation is channelled according to ancient forms of legal action. Thus, the problems may be heard in various courts by countless judges. A consolidated Family Court would bring all family problems before a single judge in a single court where the facts, rather than the jurisdictional grounds, would be investigated with the help of lawyers and interpreted with the help of social workers.