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A SUGGESTED FAMILY COURT SYSTEM FOR CALIFORNIA†

Aidan R. Gough*

During the period from July 1st, 1961, through June 30th, 1962, 89,212 actions for divorce, separate maintenance and annulment were filed in California.¹ Roughly speaking, since 1960, for every four marriages in California there has been one divorce—and some areas of California run higher than this.² In 1960, in Sacramento County, for example, there was more than one divorce for each three marriages, and in Napa County three divorces for every four marriages.³ To be sure, these figures must be viewed in the light of California's population explosion and myriad other societal factors. The fact remains that the problems are there, and they cry out for solution—or at least understanding and alleviation. The need for intensive cross-disciplinary study of these problems is apparent.⁴ It is the purpose of this paper to suggest a point of inquiry for such study.

As the number of marital severance actions mounts, so does the concern over the reflected disorganization of more and more families. Increasingly, there is felt a need to have the law take steps to ameliorate the problems raised by family dissolution. We have seen, in recent years in California, an increased use of the court

† This article is based upon a memorandum of testimony submitted by the author, representing The State Bar of California as a member of its Committee on Family Law, before The Assembly Interim Committee on the Judiciary at hearings in January, 1964. The views expressed herein are those of the author and do not necessarily reflect those of The State Bar of California or the University of Santa Clara.

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¹ *Report of the Judicial Council of California, 1962*, quoted in *Transcript of Hearings on Domestic Relations Law Before the Assembly Interim Committee on the Judiciary* 278 (1964).

² *Transcript of Hearings on Domestic Relations Law Before the Assembly Interim Committee on the Judiciary* 280 (1964).

³ *Id.* at 281.

⁴ Really, we know appallingly little about the "real picture" behind the figures we too often blithely cite. For example, how many of the divorces cited involved under-age marriages? How long had the parties been married? Is there any significant difference in dissolution rate between marriages contracted in California and those entered into elsewhere? What study there has been of these trends and patterns of marital behavior has been too often fragmentary and isolated to a particular discipline or field.

of conciliation, both in Los Angeles County and elsewhere, and we have seen the development of community resource agencies designed to provide assistance to families in distress.⁵ These efforts are laudable. They are also, however, vastly insufficient. In many ways, the legal system of adversary procedure within which they operate negates their efficacy.

When we speak of "reconciliation" in terms of this adversary process, we speak, it seems to me, of opposites. We go "to a goat's house for wool." Nothing would appear more effectively designed to preclude resolution of marital problems than a procedure which, at the outset, pits the parties one against another, angers opposing spouses, and may well force a spouse into a position (*i.e.*, of seeking permanent marital dissolution) he or she did not really wish to take. It is not enough, however, merely to point out the defects in the existing system. There must be provided a constructive framework within which the efforts of the court and the community can be effective. To that end these suggestions are offered.

ESTABLISHMENT OF A FAMILY COURT

The ideal of the Family Court is that of a court designed to bring every possible resource to bear upon the family problems before it and thus to prevent the ultimate problem: family break-up.⁶ To be effective as such, it must be an "integrated" court—*i.e.*, in terms of California, a single autonomous family division in the superior court with jurisdiction over all cases dealing with family life and its difficulties. These would include cases of adoption, paternity, civil and criminal nonsupport, child neglect and dependency, delinquency, child custody, and guardianship (of the person, at least) of minors.

In addition to having integrated jurisdiction over family cases, the Family Court would adopt a conference or non-adversary procedure, save in those cases where a spouse demanded an adversary hearing for the finding of disputed fact.⁷ The investigative staff of the Family Court would examine the cases referred

⁵ See, *e.g.*, Burke, *The Role of Conciliation in Divorce Cases*, J. OF FAMILY LAW 209 (1961); ABA SECTION OF FAMILY LAW, PROCEEDINGS 211 *et seq.* (1962).

⁶ Alexander, *Legal Science and the Social Sciences: The Family Court*, 21 MO. L. REV. 105 (1956).

⁷ On the retention of adversary process in such cases, see Huard, *Memorandum of Testimony at Hearings on S. 2701 Before the Committee on the District of Columbia of the United States*, 83d Cong., 2d Sess. 3 *et seq.* (1954). Some have suggested provisions for jury trials of matrimonial issues within the Family Court; see GELLHORN ET AL., CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY 12 (1954).

to it to determine the possibilities for reconciliation, and undertake to exploit them; it could also provide information leading to surer and more amicable settlement of family problems other than divorce.⁸

In addition to the benefits of the non-adversary proceeding, the Family Court system would provide immediate practical benefit in other areas, by eliminating much of the duplicated effort and congestion of calendars which characterizes our present process. Consider the following hypothetical case—which would by no means be atypical:

After some months of increasing family friction and discord, the wife obtains an interlocutory decree of divorce, and is given custody of the minor child, a boy aged 11. Upset by the discord between his parents, the boy develops more and more problems at school, and finally refuses to attend at all. He is then referred to the juvenile court as a truant, and is made a ward of the juvenile court. After the final decree, the father petitions the court for appointment as guardian of the minor's estate, feeling that the mother is incapable of sound business management. Shortly thereafter, the mother remarries, and her second husband wishes to adopt the boy through a step-parent adoption. After some time, mother and her second husband seek to adopt another child.

Involved in this case are five separate divisions of the superior court, and at least as many ancillary agencies.⁹ The reports of one are not readily available to another; much testimony is repetitive; investigations are duplicated; calendars are clogged; and parties as well as taxpayers are put to needless expense and confusion. Since a marital severance proceeding frequently generates one or more such "collateral" actions, such as petitions in juvenile court, attention should be given to the possibilities of combining them within a single division of the court.

NOTICE OF INTENTION TO FILE FOR MARITAL SEVERANCE;
SUBSTITUTION OF PETITION FOR COMPLAINT;
TEMPORARY INJUNCTIVE RELIEF

Under our present method of pleading in actions for dissolution of marriage or separate maintenance, the plaintiff files a complaint charging his or her spouse with some form of marital

⁸ The use of specially trained investigating staff is essential to the proper operation of the Family Court. It should *not* be the function of the staff to investigate the existence of grounds of divorce, defenses, and the like.

⁹ When the issue of the child's custody is first raised, the Court may order a custody investigation by the probation officer under section 582 of the California Welfare and Institutions Code (1963). (This may be done by domestic relations investigators in counties having such a system.) At the hearing in Juvenile

misconduct. It has been observed, in testimony before the United States Congress concerning this type of procedure in marriage cases, that "nothing could be more effectively designed to set the parties at sword's point and preclude any possibility of a friendly conciliation of their difficulties."¹⁰ In the proposed Family Court system, the initial pleading would be a simple notice of intent to file for divorce (or other form of marital severance). No charges would be levied or grounds set forth. This notice of intent would then be served in the usual manner upon the other spouse, who would not be required to answer. The sole function of this notice would be to bring the parties within the jurisdiction of the court.

With such a notice, there could be provided a means of temporary injunctive relief which would not force the parties into a permanent adversary position. At present, before any temporary relief *pendente lite* can be granted, there must be filed a complaint for divorce, annulment or separate maintenance. There would appear to be considerable need for some form of temporary restraining order in which the moving party did not have to set himself or herself out as seeking a divorce. In all too many cases the wife, for example, may need a means of keeping the husband away from the home and the children during a period of disturbance, and yet not wish a divorce at all. Under existing law the only way she can obtain such relief is to file for a divorce. The adoption of the proposed procedure would allow not only the granting of effective temporary relief without so drastic a change of position, but would also bring the parties within the jurisdiction of the court at a point in time when they might be most susceptible to the assistance which could be provided by the Family Court and a non-adversary process. By providing for such notice of intent and some form of temporary relief, grantable *ex parte* upon showing of sufficient urgency but made quickly returnable, the court's resources could be more effectively utilized toward resolution of the problems, rather than being focused on formal issues of law.¹¹

Upon the return of service of the notice of intent, at least in those cases involving children, the matter would be assigned to a

Court, the probation officer will present another report. If it wishes, the Probate Court may order an investigation (also under section 582) at the time of the hearing of the guardianship petition. This will be a third report. The step-parent adoption would be investigated by the juvenile probation officer, and finally the "straight" adoption report would be prepared by the State Department of Social Welfare.

¹⁰ Huard, *op. cit. supra* note 7, at 2.

¹¹ Credit for this suggestion must be given its originator, James A. Wright, Esq., President of the Santa Clara County Bar.

domestic relations counselor on the court's staff, who would prepare an initial report on the possibilities of conciliation. No conciliation efforts would be undertaken without the consent of both parties, and copies of the report would be furnished each party. If conciliation were not achieved, there would be filed by the moving party a petition for divorce or other form of marital severance. This would set forth grounds for dissolution of the marriage, and would be captioned "*In re Marriage of Jones*," rather than "*Jones v. Jones*." This petition would be heard in a conference-type hearing, conducted much as juvenile court hearings are presently conducted, and would proceed in the spirit of mediation rather than contest. If the other spouse desired to litigate disputed facts, an answer to the petition could be filed, and the matter transferred to the trial calendar to be heard in the usual way.

The adoption of a petition form of pleading would streamline the procedure and be in keeping with the legal theory, long recognized in this state as elsewhere, that there is a "status" or "marital res" in which the state has an interest.¹²

It may appear that this is a time-consuming process. It is the author's belief that it is rightly so, so long as there is some means of affording rapid injunctive relief. The lapse of time, coupled with efforts at reconciliation conducted in a proper setting, can provide a "cooling-off" period at a time when this can be of greatest benefit. Under our present system, with the interlocutory period, we approach the problem backwards: When the parties first appear in court, we tell them, in effect: "You're severed; now you have one year within which to get back together." If our goal is the resolution of marital problems, and conciliation, this period of time should be provided before the decree severing the marital bond is rendered. In effect, the interlocutory period would be shortened, and placed between the time of filing of the notice and the hearing on the petition.

It is my firm conviction that the adoption of a Family Court Division, with non-adversary proceedings save for cases of disputed fact, would not result in an "easier" divorce. Conversely, it would give the attorneys, the court, and other agencies involved a framework within which the effective resolution of family problems could be carried out. It may be noted that the changes suggested above, though major, are largely procedural in nature.¹³ We already have in operation courts whose "juris-

¹² See collection of cases in 3 WITKIN, SUMMARY OF CALIFORNIA LAW § 8, at 2560, § 52, at 2601 (7th ed. 1960).

¹³ See Rubin, *The Standard Family Court Act*, 1 J. OF FAMILY LAW 105 (1961).

dictions" can be combined into an effective integrated whole. This could be done without altering the board structure of the superior court as it now exists, by creating within it the Family Court Division. This system would not sacrifice the best elements of our adversary process; would not displace the lawyer in his role as advocate and counselor in legal matters, but would at the same time allow greater use of skilled specialists in treatment of the family's problems; and would not result in the abdication of the safeguards of judicial control. Under such a system, the social sciences and the law could be combined to produce maximum effort toward preserving marriage and the family.

Obviously, the foregoing proposals do not pretend to be working drawings. They are, rather, preliminary sketches, and they should be construed as an invitation for criticism and suggestion. The concept of the Family Court Division for California is not new. In 1963, the Governor's Welfare Study Commission recommended that study be undertaken to determine the feasibility of such a system. In the words of the Commission, "The concept appears to have much merit."¹⁴ How much merit it may have, we cannot know until we have tried it.

¹⁴ *State of California, Final Report of Governor's Welfare Study Commission* 77 (1963).