

FAMILY COURTS — THEIR NATURE AND FUNCTION

It would be hard to conceive of an area of the law that bears more directly on the social health of a community than the law of domestic relations. It comprises nearly half of all civil litigation, and yet it is an area that is generally despised by lawyers and avoided by judges whenever possible. The litigants are for the most part from the lower economic classes and their shabbiness is reflected in the administration of the law meted out to them. Nothing could be more indicative of a middle class society and its morality than the paltry sums spent on the provision of facilities for those in need of family help. As the lower rung of the judicial ladder, family courts have been begrudgingly sustained as a sop to the more enlightened segments of the community and the dirty unwashed that lie beyond. It is instructive to note that the most advanced family courts have been located in that most turbulent, futuristic and bizarre of American states, California, where morality of the Victorian order is not a healthy virtue.

It will be the purpose of this paper to explore in some depth, the history and development of specialist family courts, to note their failures and their triumphs and the lessons to be learned from them, and to probe the possibilities for the future with special regard to our own province of Manitoba. In doing this we shall concentrate on the issue of marital dissolution as this is the most neglected and wanting area of the law of domestic relations and should be the prime concern of family courts.

The first specialist courts to take cognizance of the social circumstances surrounding a legal issue were those created to meet the problem of juvenile delinquency. Such courts were founded on the premise that the state has an interest in the well-being of its children, that as *parens patriae* it must assume the necessary parental responsibilities for delinquent children who, presumably, are being neglected by their real parents. Such responsibilities were most patently not being exercised by the criminal courts, which prior to the turn of this century were the institutions that regularly dealt with complaints involving juveniles. If delinquent children were to be turned into productive assets of real benefit to society, they must be treated, not as hardened criminals, but as socially maladjusted children who had been steered in the wrong direction by overreaction to a hostile environment. It was with this goal in mind that the first juvenile court was established in Chicago in 1899, an initiative that was soon followed by other jurisdictions.

The new courts operated generally as courts of equity, guided by the principle that the best interests of the child should be the fore-

most consideration. Social investigations were made a part of the procedure and a system of probation was introduced as the most important and effective method of correcting the situation of the delinquent child. The proposal was so reasonable and practical, so full of down-to-earth common sense, that it enjoyed an almost unparalleled acceptance among the public at large and their elected representatives. Few questions were raised. Indeed the general consensus of opinion was that the new court did not go far enough. This seemed to be borne out by the results of the social investigations which revealed what had long been suspected, that many of the delinquents were in fact dependent and neglected children. The result was an expansion of jurisdiction to bring such children within the care of the court, and more important, to bring within its aegis the adults who in so many cases were responsible for the neglect and dependency or were otherwise contributing in more deliberate ways to juvenile delinquency.

This extension of judicial intervention in the interests of neglected children assisted and was part of a growing awareness of the family as a unit whose problems were interconnected in such a fashion that treating one meant treating all. Hence arose the idea of a "family" court that would do for the family what was already being done for the child, a concept that was based squarely on the experience of the juvenile court. As one of its leading American exponents unabashedly proclaimed,

The family court . . . lifts bodily the main features of the philosophy, methodology, and procedure of the juvenile court and adapts them to the family court.¹

The connection is equally close in Canada. The family courts of Manitoba, British Columbia and Ontario were all formed simply by giving the juvenile court wider powers. Only in Alberta were the two kept quite distinct in legislation and in practice.

The Winnipeg Family Court was established in 1946 by an amendment to the Child Welfare Act, and was entitled the Winnipeg Juvenile Court and Family Court, a name that has since been shortened to the Family Court of Winnipeg. The institution is essentially a magistrate's court (of record),² modified by a relaxed procedure, with hearings held in private,³ and the addition of an auxiliary staff of family counselors and probation officers. The court was originally housed in what is now the Vaughan Street Reception Centre, an antiquated facility that has been roundly condemned by all who have ever had dealings

1. Alexander, P. W., *Legal Sciences and the Social Sciences: The Family Court* (1956) 21 *Missouri L. R.* 106 at 106.

2. *The Corrections Act*, R.S.M. 1970, c. 230, s. 6 (4).

3. *Id.* s. 8 (3).

there. Sheer lack of space with a consequent frustration and decline of morale among the staff forced a move, and in July, 1968, the court and its attached services were re-established in a renovated, three-story army administration building on the Fort Osborne Barracks site. The setting is reasonably pleasant although the walled in nature of the area does give a feeling of being confined. The building itself is clean and bright but quite obviously a renovation. Signs of overcrowding are already beginning to show and it can only be a matter of time before expansion will be necessary. The family counsellors all have private offices and a waiting area is provided for clients. Receptionists are stationed on each floor, with the one on the ground floor conspicuously placed in the centre of the foyer.

The staff consists of sixteen probation officers, six family counsellors, two enforcement officers, a psychiatrist and psychologist, and other clerical personnel. Four of the counsellors have Masters of Social Work degrees and all have had fairly lengthy experience in their jobs. There are three judges, including a chief judge, appointed pursuant to s. 7 (1) of the Manitoba Corrections Act by the Lieutenant Governor in Council. Only one has any real background in family law, having once been a lawyer for the Children's Aid Society.

The court was, for a period of two years, under the control of the Department of Health and Social Services, a most unhappy situation that did no one any good, consequently it has been returned to the supervision of the Attorney General's Department, while the auxiliary staff have remained with the Health Department. The administration, therefore, is divided between two government departments, with the court and the ancillary social services headed by a Chief Clerk of the Court and a Director of Court Services respectively, and the immediate overall supervision being provided by the Chief Judge.

As defined in s. 8 of the Manitoba Corrections Act, the court has ". . . jurisdiction over any and all charges, offenses and matters arising from or under any one or more of the following acts:

- (a) The Juvenile Delinquents Act (Canada).
- (b) The Child Welfare Act.
- (c) The Wives and Children's Maintenance Act.
- (d) The Reciprocal Enforcement of Maintenance Orders Act.
- (e) The Parents Maintenance Act.
- (f) Such other Acts or matters as the Lieutenant Governor in Council may designate."

The majority of applications to the court under its family jurisdiction are for separation, and if there are minor children, custody of the children, together with an order for maintenance of the applicant and the children. Default charges, i.e. failure to comply with the conditions of a court order are the second largest category. In 1969 there were 851

applications under the Wives and Children's Maintenance Act and 407 default charges.⁴ The court's jurisdiction therefore, covers most of the areas involving domestic relations except divorce and annulment and the related issues of alimony, custody and support, which are tried in the Manitoba Court of Queens Bench. Family Criminal matters are also, by choice, outside of its jurisdiction.

The court serves the Metropolitan area of Winnipeg and maintains close contact with such outside services as the Children's Aid Society, the City Welfare Department, Alcoholics Anonymous, etc. It is the only court in the Province to offer anything near adequate therapeutic services. The family court in St. Boniface has one counsellor and there are none at the Brandon court. The remainder of the Province's population have their domestic affairs settled in circuit magistrate's court. By s. 7(3)(4) of the Corrections Act every magistrate is a family court judge in and for the Province. Thus although the Province gives complete financial support to the family courts it cannot be said that there is equality of service. Indeed the Winnipeg Family Court is hard put just to serve the Metropolitan area.

The family court in Manitoba is typical of most of those in Canada and the United States. Its jurisdiction is a partial integration of family matters intended primarily to deal with juvenile delinquency and the domestic conditions that foster it. From this point of view even to call it a "family" court is a misnomer, a point which was recognized in the United States many years ago, and made the subject of a fervent and impassioned movement to establish a real "family court," one that would live up to its name and ideal.

Several institutions that were lauded as embodiments of the ideal family court were actually established. Among the more noteworthy were those in Toledo and Cincinnati, Ohio, and the County Conciliation Court of Los Angeles. Their organization and apparent success, boosted by the very able propaganda campaign of men like Judge Paul W. Alexander of the Toledo court, led to a general acclamation that was startling for its lack of criticism. One scholar noted in 1955 that although, ". . . more and more law journals, social science publications and even daily newspapers are carrying articles describing family court functions . . . I do not recall reading an article attacking the family court."⁵ Until 1968, his was virtually the only voice that dared to raise any objections. No doubt a large part of this uncritical consensus was due to the partisan enthusiasm that is characteristic of all advocates

4. Department of Health and Social Services, Annual Report 1969, p. 184.

5. Kephart, W. M., *The Family Court—Some Socio-Legal Implications* (1955) Washington U. L. Q. 61 at 66.

of reform, but there was also, despite the lack of any really reliable research, a widespread conviction that the family and juvenile courts were achieving wonderful results. It was almost as if the court and its staff of trained specialists could not help but succeed and yet, as the Dysons reported,

We have found no convincing evidence that family courts are any more—or any less—successful in promoting family stability than their predecessor courts.⁶

The first flush of pride in the United States has now given way to some serious reappraisals and since juvenile and family courts in Canada have a similar history and function, it behooves us to pay careful attention to the reasons for this disillusionment.

Judge Alexander described his ideal family court as,

. . . one designed and equipped to protect and safeguard life in general and family units in particular by affording to the members thereof, in addition to their purely legal remedies, various other types of help; and by resolving all their justiciable problems and conflicts arising from their intra-familial relationships in a single integrated court, having one staff of specially skilled personnel, with one philosophy, one underlying purpose, working as one team, with one set of records, all in one place, under one direction, that of a specialist judge or judges.⁷

This plan was put into more concrete terms by the Standard Family Court Act of 1959, a product of the National Council on Crime and Delinquency. It proposed a court with the status and facilities of a court of general trial jurisdiction and forming a division of that court, with an integrated family jurisdiction, including the major matrimonial actions of divorce, separation and annulment, specialist judges, and a well trained auxiliary staff of counsellors and probation officers.

At first sight this is a very reasonable and worthy plan and indeed the court structure that it suggests is as valid today as when it was first proposed. Experience, however, has shown that implementing this plan within the framework of our present matrimonial law and court procedure, is an exercise of limited usefulness because it is based on several assumptions that have proved in practice to be untenable. In exposing these assumptions it will be necessary to explore in some detail the philosophy that lay behind the provisions of the Standard Family Court Act, and the nature of the law and procedure that was to be applied in the court which they proposed.

The basic premise underlying any form of social control is that the state, in the interests of its own preservation, has a right to interfere

6. Dyson, R. B. & E. D., *Family Courts in the United States* (1969) 9 J. of Fam. Law 1 at 91.

7. Alexander, P. W., *op. cit.*, p. 106.

to a certain extent with the liberty of action of its citizens. That the state has such an interest in the preservation of the family is a firm belief of all who advocate family courts, and it is a belief that is given credence by those experts who have studied it. The sociologist Parsons has noted that, ". . . the family is the functioning unit which provides the primary basis of psychological and emotional security for the normal adult and acts as the primary agency for the socialization of children."⁸

The individual member of the family unit also has an interest at stake, an interest deeply cherished in Western civilization and given permanence in the constitution of the United States in the words ". . . life, liberty and the pursuit of happiness." That these words should appear in a nation's basic political document is an indication that the individual's "pursuit of happiness" is also a matter of great benefit to the state as well as to its citizens. And surely this makes eminently good sense. Stable marriages are happy marriages and happy marriages produce reasonably well adjusted individuals who can be expected to have some appreciation of the need for regulating social interaction in an orderly and consistent manner, which of course is the primary function of the law. Without this basic respect for the interests of others, no society could function. There is, however, a source of conflict between the state and its citizens in the areas of their mutual concern. The conflict exists essentially because of the manner in which the state has attempted to safeguard its interest in the family. It has done this traditionally through its regulation of the formation, incidents and termination of the marital status. As was stated in the case of *Cook v. Cook*,

This status not only involves the well being of the parties thus united, but the good of society and the state. It is, therefore, a proper subject of legislation. It may from public considerations, be fixed, regulated and controlled by law.⁹

Similar judicial pronouncements may be culled from the case law of almost any common law jurisdiction.

The control exercised by the state has taken two forms: (a) substantive control (b) the institutions of decision. The substantive control of marriage is essentially bound up in the law of divorce and rests on the ecclesiastical definition of marriage as a match prescribed and sanctified by divine ordinance as the only legitimate form of co-habitation that will not jeopardize the chance of entry into heaven. To this other-worldly sanction the state, in its formative years, lent wholehearted support, partly for reasons of internal security and partly be-

8. Kay, H. H., *Family Court: The California Proposal* (1968 56 Calif. L.R. 1205 at 1245).

9. (1882) 56 Wisc. 195 at 207.

cause those in power were themselves believers in the holiness of marriage. This union of the church and state worked well enough for a while but only because the religious faith of the individual citizen and his basic lack of personal rights were enough to make him endure an unhappy marriage, either in the belief that he would be rewarded in an after life, or conversely condemned to perpetual roasting in the ovens of Hades or incarcerated in the dank dungeons of his lordship's keep.

Since the end of the Mediaeval era, however, Western man has become increasingly humanistic in his approach to himself and the world around him. Happiness in this life has ceased to be a state of mind dependent on the winds of chance. It has instead become the object of an active search, a consciously sought commodity that must inevitably involve a considerable element of choice. A man rejects what he finds unsuitable and goes on to find something better. This freedom of choice, as pointed out earlier in reference to the American constitution, has become for us a birth-right, an inviolable feature of our way of life, and one that has been recognized by the state as an area of vital concern to its well being as a democratic community. But this freedom of choice has inevitably meant a decline in the moral influence of the church. In the Mediaeval world the legal status of marriage, with no consideration made for the happiness of the parties, could be enforced because of the accompanying sanction of a divine will in which all believed. But what happens when a state attempts to enforce rigid substantive controls over marriage while at the same time condoning the "pursuit of happiness" in an atmosphere of relaxed religious values?

The result is a conflict of interests between the state and the individual, a conflict that has steadily eroded the substantive law of divorce in favour of the latter. From an indissoluble union to be endured by the parties for life on pain of excommunication or imprisonment, the status of marriage has been slowly, very slowly, relaxed to allow for termination. Not until 1857 was it possible in England to have a marriage dissolved in a civil court of law, and then only on proof of a serious matrimonial offense, adultery. The ludicrous inadequacy of this situation was enough to eventually widen the grounds for obtaining divorce but the concept of matrimonial offense remained and along with it the inevitable abuses of connivance and condonation, perjury and fraud. It seems that individuals will always find ways to evade the substantive rules as is testified to in the United States by the popularity of Nevada's six week domicile requirement. Migratory divorces are a measure of the extent to which the individual has

triumphed over the attempts of the state to stabilize marriage.

Whether restrictive or liberal, the law relating to divorce has never succeeded in abating the number of unstable unions by encouraging the parties to such marriages to accept the legal rules as a norm of behaviour. Mere manipulation of substantive law has obviously failed to stabilize marriage as a unit of society.¹⁰

Not only has the law of divorce failed from the point of view of its substantive rules, it has also failed with regard to the institutions by which it is administered. When marriage was considered indissoluble the more wealthy and influential members of English society resorted to Parliament for private acts of dissolution. The procedure was costly, cumbersome and far beyond the reach of most citizens, thus the hearing of divorces was gradually transferred to the courts. The question now is whether the courts should not also cede to some more suitable body their jurisdiction in family matters.

Unlike disputes about a breached contract or an irregular bill of exchange, domestic affairs do not really lend themselves to objective proof. "These are personal, intangible, interpretive, emotional and highly subjective circumstances . . ." ¹¹ that require a good deal of careful and tactful examination. The decision making process of the adjudicating tribunal should provide for an intelligent and objective gathering of information that will reveal not only the facts of the alleged complaints but also the surrounding circumstances because a great many marital troubles are really only symptoms of deeper and more intangible disturbances. In our courts as they are currently constituted, the heart of the fact finding and blame adjudgment process is the adversary system of opposing parties, each striving to establish his own case to the detriment of the other. The method is unquestionably one of the best yet devised for ascertaining the truth of objective facts but consider for a moment its effect on the parties to a contested divorce action.

Once we require husband and wife, in order to secure the legal help they need, to build their complaints with respect to each other to such formidable proportions as 'extreme cruelty' . . . or of being 'an unfit parent' . . . we have enclosed the parties in a frame of reference from which, even though they may want to, they cannot or at least find it most difficult to escape.¹²

Thus the bitterness that brought the parties to court in the first place is fostered and perpetuated by the very procedure used to determine their dispute. All this, of course, is based on the assumption that the parties actually do contest the divorce.

10. Biggs, J. M., *Stability of Marriage: A Family Court* (1961) 34 Aust. L.J. 343 at 346.

11. Lindsley, B. F., *The Family Court* (1968) 5 Calif. Western L.R. 7 at 15.

12. Lindsley, B. F., *op. cit.*, p. 15.

In fact “. . . not more than 10% of all the divorce cases are so tried,”¹³ and since the adversary process only activated the latent powers of the court through the efforts of the parties to the case, the result is virtually divorce by consent. As was said in *Churchward v. Churchward*,

. . . when the parties to a suit are acting in complete concert the court is deprived of the security for eliciting the whole truth, afforded by the contest of opposing interests and is rendered unable to pronounce a decree of dissolution of marriage with sufficient confidence in its justice.¹⁴

All too often the uncontested divorce action is over in less time than it takes to hear a parking violation, with the judge simply asking the parties if suitable arrangements have been made for the welfare of the children and being satisfied with a positive reply. Of equal seriousness is the disrespect which is engendered for the court by the fraud and deception so frequently perpetrated on it. In regard to this, a New York judge unburdened himself of the following sarcastic comment.

Furthermore, has not my good brother overlooked the fact that a certain amount of naivete is an essential adjunct to the judicial office? Does not the Supreme Court grind out thousands of divorces annually upon the stereotyped sin of the same big blond attired in the same black silk pyjamas? Is not access to the chamber of love quite uniformly obtained by announcing that it is a maid bringing towels or a messenger boy with an urgent telegram?¹⁵

The abuses are probably greater in New York state than in any other jurisdiction because of their restriction of the grounds for divorce to adultery and presumption of death, but wherever the adversary procedure prevails and the fault concept underlies divorce law, uncontested petitions will make a mockery of the judicial process.

In looking back then, it can hardly be said that the interests of the state or of the individual are being maintained in proper balance. The legal machinery entrusted with the task is, if anything, doing more to alienate the two than find a suitable accord. Institutions, if they are to have any relevance at all, must be in tune with the needs of the society they are intended to serve. When they no longer meet those needs they become so much deadweight, to be avoided by all the myriad means that human ingenuity can devise, and unless they are replaced with more suitable institutions, the state will lose its chance of control.

Although the framers of the Standard Family Court Act were well aware of the balance of interests that must be maintained between, “. . . the security of social institutions and the well-being of the indivi-

13. Day, L. B., *The Development of the Family Court*, in *Selected Essays on Family Law*, 1950, p. 100.

14. (1895) p. 7 at 31.

15. *Reed v. Littleton* (1936) 159 Misc. (N.Y.) 853 at 855.

dual . . .,” and even agreed that, “. . . the concrete social interests and needs of the individual as distinct from social institutions are paramount . . .,” they failed to deal with the problem of a divorce law based on matrimonial fault and a courtroom procedure based on the adversary system.”¹⁶ Sol Rubin, in an article on the Standard Family Court Act, explained this failure on the grounds that the committee, “. . . did not feel that the substantive law was its province . . .,” and besides, “. . . liberalization of divorce laws is not all, and perhaps not more important than procedural changes . . . Although the Standard Act does not assume to alter the basic nature of the proceeding, it provides a method within that framework by which the proceeding may be softened through the application of constructive social efforts. The Model Act offers a plan to exploit certain procedural possibilities.” What are those “procedural possibilities?” The intervention of family counsellors in an intake procedure designed to investigate the causes of the conflict, and then provide for “. . . whatever informal adjustment is practicable without the filing of a petition, but no person in such cases shall be deprived of the right to file a petition or complaint . . .” According to Rubin, “. . . about fifty per cent of cases coming into juvenile court intake are disposed of in this way.” No source is given for this interesting figure and notice that it refers to juvenile courts. Proceeding further he states, “What this does is propose to substitute the solution to problems in place of the resolution of legal issues. Legal issues revolve around the question of legal fault, a much too simple approach to family problems. If the problem solving approach fails, the court can then turn to the legal issue . . . Meanwhile the problem solving approach must have illuminated the problem. Thereby improvement in procedure will be the catalyst in arriving sooner at reforms in substantive law.”¹⁷

This philosophy can be seen in action in the Family Court of Toledo, Ohio, one of the oldest in the United States.

When the petition is filed, the couple concerned are encouraged but not compelled, to consult the marriage counsellor to see if a reconciliation can be effected. If the counsellor succeeds all well and good. If he does not succeed in achieving a reconciliation, his function has not ceased; he can still help the parties to work out ancillary matters such as property settlements and child custody in an amicable and informed manner instead of leaving it to the judge to decide in an atmosphere of semi-hostility between the parties. The process is one of helping the parties to help themselves; they are encouraged to withdraw their problems from the sphere of public decision and be guided in working out their future by private arrangement so far as is legally possible. In striving to get the parties to come

16. Goldberg, H. L., Sheridan, W. H., *Family Courts; An Urgent Need* (1959) 8 J. Pub. L. 537.

17. Rubin, S., *The Standard Family Court Act* (1961) 1 J. Fam. L. 105 at 106.

to an amicable settlement either completely or in part the idea of adversary proceedings is played down as much as possible.¹⁸

The intention then, is to circumvent to the greatest degree possible, the courtroom and its atmosphere of hostility by (a) reconciling the disputing parties or at least arranging an amicable settlement of their differences through the use of therapeutic counselling, and (b) diluting the court's procedure to the point where it resembles an administrative board and not a court of law.

One of the assumptions behind this is that therapeutic counselling can be successful in a court setting at the stage in the development of a marriage when the parties have decided to seek legal remedies for their marital difficulties. Evaluating the success of counselling on any sort of concrete statistical basis is a frustrating task because large scale follow-up studies of claimed reconciliations are simply not available. All we have is “. . . a fairly extensive body of verbally eloquent, albeit non-documented literature,”¹⁹ that really tells us nothing beyond the missionary zeal of social workers. The usual figure given for the withdrawal of divorce suits is thirty percent of the total petitions filed, but as Kephart points out, “. . . so far as I can discover this is about the same percent withdrawn in a regular court.”²⁰ In other words the *legal system with all its defects* is not being circumvented to any appreciable degree by the use of therapeutic counselling on parties seeking matrimonial relief.

The problem is not that counselling itself is basically unsound but that too much is expected of it in the court setting.

The old cliché of leading a horse to water but not being able to make him drink is certainly applicable to conciliation proceedings. The best a conciliation court can hope to accomplish in most cases, is to “break the ice,” to act as a catalyst in helping the spouses to resolve their differences, and to show the parties how and where to obtain any necessary professional help. But if one of the spouses is determined to proceed with dissolution of the marriage, and if both spouses are not willing to take the necessary steps to remedy their situation, no third person can prevent the eventual breakup of the family.²¹

Most troubled marriages do not surface until one or both of the parties seeks legal aid, and by then they may have lost the desire to reconcile. Ideally counselling should come before marriage not just prior to its termination.

18. Biggs, J. M., *op. cit.*, p. 350.

19. Kephart, W. M., *op. cit.*, p. 66.

20. *Id.* at 66. The Family Counselling Service of the Winnipeg Family Court reported in regard to applications under the Wives and Children's Maintenance Act and the Child Welfare Act for separation and custody, that “Our records would indicate that approximately one-third of these terminated in reconciliation.” Department of Health and Soc. Ser., Annual Report, 1969, p. 184.

21. Winter, W. T., *The New California Divorce Law, 1969*, p. 138.

But more fundamental than the delayed application of counselling is the attempt to circumvent the due process of an adversary court, on the assumption that such process is totally unsuited to treating the non-legal aspects of family matters. What has happened in effect is an attempt to split the responsibility for family problems and thus the responsibility for weighing public policy against individual interest between the court and the social workers. This unhappy division has served to thoroughly confuse the respective functions of the two, and has reduced the court's prestige to that of being either a "social worker's paradise" or a "den of legal technicalities" depending on which side you belong to.

The experience of the juvenile courts showed the confusion of roles that could arise when social workers literally took over a court, and lawyers were removed from the proceedings. The probation officers were put in the position of both prosecutor and helper and this conflict between coercion and confidentiality was so basic that the system could not survive it. And on the legal side, having the court function as though it were an administrative tribunal robbed it of that due process of law for which our judicial system is so rightfully renowned. The landmark case of *Re Gault*²² exposed,

. . . the essential wrongheadedness of attempting to help children by depriving them of safeguards guaranteed to adults. As Mr. Justice Fortas opinion notes, the substitution of unbridled discretion and the concept of *parens patriae* for the specific protections of the Constitution in delinquency matters too often produced arbitrariness rather than 'careful' compassionate, individualized treatment.²³

Adversary courts may not be suited to the task of settling domestic problems, but slyly shifting the burden on to family counsellors is not the solution. We must either make a definite commitment to use the courts for settling domestic affairs or develop some kind of administrative forum to replace them. Halfway measures that change the court's function without changing its procedure or the law that it applies will not supply the administrative element that is so sorely needed in the processing of family matters. Is the court really unsuitable? What advantages does it have and can its procedure be reformed without destroying those advantages?

The need for such court administered legal standards as due process for the protection of litigants is well illustrated by the semi-criminal nature of juvenile delinquency. Curtailing the liberty of an individual through incarceration demands a searching assessment of the competing interests of the state and that individual, and only in a court can the

22. (1967) 387 U.S. 1.

23. Kay, H. H., *op. cit.*, p. 1209.

judicial aloofness and impartiality be found that is required for such an objective analysis. Divorce cases also involve issues that are primarily legal such as the identification and division of marital property, the assessment of support and the enforcing of judgments concerning those matters. It is also necessary to protect the parties and their children by orders for temporary custody and support during the proceedings and to provide for adequate techniques of review that will guard against basic unfairness. The California Governor's Commission on the Family reported that,

. . . to treat family matters as subjects for administrative determination by an independent agency would be to debilitate the administration of justice and diminish the efficacy of the process by inviting successive appeals to the courts. The enforcement of orders would be rendered more complicated and less effective, and a process already ill-suited to the cases it must handle would be made more complex and costly.²⁴

In view of these considerations therefore, it would appear more appropriate to provide courts with non-legal techniques and personnel than to supply legal authority to non-judicial agencies even though the latter might be more suited to dealing with the primarily emotional problems of family dissolution. But what kind of court do we want?

Creating a new and independent specialist court would appear to be an anachronistic approach to the problem. The modern trend, as evidenced by the English Judicature Act of 1873, is to have a single court, complete in itself, with the inferior local and special courts as branches or departments, with further divisions as needed, within those several departments. This has the obvious advantages of removing jurisdictional conflicts, avoiding successive appeals, centralizing and streamlining court administration and saving both the litigant and the taxpayer a lot of needless expenditure.

The most popular view is that the family court should be a division of the highest court of general trial jurisdiction, and this has much to commend it, in the way of status and jurisdiction.

To date the general status of family courts has received far too little attention from legislators. Providing the additional staff was expensive enough it seems, without having to pay for new court houses and the higher salaries of superior court judges. And besides the family courts clientele is mostly made up of people from the lower economic classes, notoriously poor lobbyists for their own causes. As a result there are few jurisdictions that can boast of a really adequate physical plant for their courts. Hawaii and Ohio come close but only on the local level.

24. Dinkelspiel, R. C., Gough, A. R., *A Family Court for Contemporary California* (1968) *Journal of the State Bar Ass'n.* 363 at 366.

The First Circuit Family Court of Hawaii shares with the Supreme Court such physical advantages as air conditioning and access to the latter's library, and at least it can be said that whatever physical disadvantages exist, they are shared equally between the two courts.

In 1954, the Toledo, Ohio family court was housed in a brand new \$1,700,000 building, an event that elicited the following paean of praise from a Washington, D.C. journalist.

The edifice is something to behold — a structure of modern architecture and handsome appointments. It is a bright and cheerful place with lots of comfort. Its informal rooms would appeal to anyone, but especially to children for walls are painted in pastel colours that match the shades of popular ice cream.²⁵

The wording may be quaintly humorous but the building that inspired it is a reflection of the very real concern felt by the people of Toledo for the welfare of their children and the need for surroundings that would promote humanity and compassion in dealing with broken families. For most other jurisdictions the story is not so happy.

In Rhode Island the facilities can only be described as appalling. Probation officers are forced to conduct their interviews in a room where desks are squeezed together and privacy can only be partially achieved in cubbyholes lining the walls. When the door to the Chief Judge's office cracked, it was replaced by a spare from the basement reading "Supplies," a label that remained for months. In contrast to this humiliating situation, the Superior Court building is well heated and in good repair.

The family courts of New York City have been called "dumping grounds" for the poor and the physical facilities offer ample evidence of this. Courtrooms are bare, toilet walls are defaced, the waiting rooms crowded, noisy, and decrepit.

An argument frequently advanced against giving the family court exclusive jurisdiction over adoptions was that nice middle class people would then be exposed to the shabbiness of family court waiting rooms.²⁶

The impression one gets is that only people from the wrong side of the tracks ever have domestic problems or raise juvenile delinquents. A family court can only function if it is accepted and respected by the people it is intended to serve. Reading a crude remark on the washroom wall about the judge one is shortly to appear before is not going to lend to an atmosphere of confidence and trust.

Although the provision of first class facilities, designed with an eye to future expansion, is the obvious ideal, legislators should at least be

25. Biggs, J. M., *op. cit.*, p. 350, from the Washington Evening Star, 22 Feb. 1954.

26. Dyson, R. B. & E. D., *op. cit.*, p. 523.

prepared to offer facilities equivalent to those enjoyed by the superior courts of general trial jurisdiction. The public image of the family court is formed as much by the comparison as it is by the actual condition of the facilities. Having the family court set up as a division of the superior court would probably promote an immediate improvement in facilities and in this regard it is interesting to note that the family court in Hawaii is a division of the Supreme Court while those of Rhode Island and New York operate separately and apart.

One of the most basic requirements of any proposed family court is that it have an integrated and exclusive jurisdiction over all matters affecting the family. As was pointed out in the Report of the California Governor's Commission on the Family,

If the goal of the law . . . is to further the stability of the family, then . . . it must be able to take account of the total impact of the marital breakdown: upon the spouses, upon their children, and upon society as a whole.²⁷

It is vital that the family and its problems be seen as one complex, and not that, ". . . the whole be left undetermined in a series of adjudications of the parts."²⁸

That there is a need for integration is indicated by the experience of multi-problem families within our present court structure. In Ontario, for example, it is possible to have, either pending or in course of trial, support proceedings in Family Court, proceedings for the partition of property in County Court, and a divorce action in the Supreme Court, and to compound the issue the same cause of action may be litigated two or three times over in different courts. For example a custody petition could be tried in Family Court, retried in County Court, and retried again in Superior Court as part of divorce proceedings. Other jurisdictions in Canada and the United States suffer from the same problem.

In California,

. . . there is no 'family law' as such. In the judicial system we have a series of special and limited areas of jurisdiction attempting to deal with a different aspect of family concern, as though the family and its several members experience only separable problems, each of which may be approached in its own jurisdictional vacuum.²⁹

The experience of the New York Court is even more revealing. By leaving major matrimonial actions outside the court's jurisdiction, and instead substituting a complex referral scheme, the state's legislators have simply recreated the old problems of multiple actions and con-

27. Lindsley, B. F., *op. cit.*, p. 11.

28. Pound, R., *The Place of the Family Court in the Judicial System*, 1959, p. 536.

29. Lindsley, B. F., *op. cit.*, p. 11.

flicting jurisdictions in a new form. This is one of the major reasons why New York's family court judges are anxious to see their court merged in the Supreme Court.

The situations described above leave little doubt of the value of having an integrated jurisdiction, however, there is still some controversy over the extent of that jurisdiction. What are matters that affect the family? How do we decide what things belong in a family court and what things do not?

The authors of the Standard Family Court Act posed three questions as their criteria for deciding whether the family court should have jurisdiction over a particular action.

Is the issue one which involves intra-family social relationships? Is it one in which the state has an interest or responsibility, such as the protection of children and the preservation of family life?
Is it one where the proper discharge of state responsibility and the efficient and effective administration of justice require the specialized services of the court?³⁰

Applying this touchstone, the list of justiciable domestic and juvenile issues would include: divorce, annulment, alimony, maintenance, desertion and non-support, custody, adoption, neglect, bastardy, intra-family conduct problems and juvenile delinquency. There has been general agreement on all of these grounds except the last two. The question of inter-spousal assault, has raised for some the spectre of introducing criminal proceedings into the family courts, and indeed in Manitoba the present Chief Judge of the Family Court of Winnipeg has seen fit to remove such charges from his docket and have them transferred to City Magistrate's Court. Similar reservations have been held in regard to juvenile delinquency cases and there may be some foundation for this. Criminal matters do not belong in a court of reconciliation, but nevertheless they can be a very real part of the discord within a family unit, and leaving them outside the court's jurisdiction would defeat the whole purpose of treating the family and its problems as a whole. The answer is probably to have a physical plant large enough to keep such proceedings apart from the non-criminal matters. The California proposal suggests a division within the court between the Juvenile and Domestic departments, both, however, sharing the same physical location.

Creating an integrated jurisdiction requires more than simply consolidating all justiciable family matters under one judge, because that judge will still be limited to the remedies of the particular action. In a divorce case he cannot send a child to a correctional institution, even

30. Goldberg, H. L., Sheridan, W. H., op. cit., p. 542.

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.

A system of courts devised to deal with the typical single issue required by the system of formulating an issue in pleadings, reducing the controversy by a series of successive formal arguments to a fact asserted by the one and denied by the other, is not adequate to the troubles of a family in the complex society and manifold, diversified and complicated activities of today.³¹

What is required is a court of general equitable jurisdiction that can determine all of the ancillary problems that are likely to crop up in a domestic proceeding without the parties having to start several causes of action, each restricted to the facts presented in the formal pleadings. Roscoe Pound has suggested four applications of the analogy of a proceeding in Chancery which should prevail in family court procedure:

1. The procedure should be investigatory, rather than contentious.
2. The purpose should be to establish whatever plan is best for the family as a whole without ignoring the interests of the individual members.
3. All persons who may be affected by a complete disposition should be made parties to the proceedings and there should be a simple method of making them parties or dismissing them.
4. An adequate staff of well-trained assistants who will provide the best of professional advice and assistance.

To the objections of those who will feel that this is subverting the judicial process by introducing an abnormal amount of administrative action, he replies,

It does not mean supplanting the judiciary by administrative agencies but rather that all government action, whether legislative, executive, or judicial has a necessary and inseparable element of administration which does not involve importing the technique of executive action into the judicial. . . . Hearing by a competent specialist of particular questions incidental to complete dispatch of the differences which have come to exist in a household, as part of a complete judicial winding up of the general situation, is as legitimately a part of the work of the judiciary as adjudicating the claim of a defrauded customer of a deceased dealer may be when dealt with as part of the administration of the dealer's estate.³²

And as a parting shot at the die-hard traditionalists we offer this comment by J. C. MacDonald,

The investigation and report (or inquiry) of the Official Guardian with respect to some matters involving children does not make the Supreme Court of Ontario anything less than a court of law.³³

We have noted elsewhere the evil effects of the adversary proceeding in a marital dispute, and the inhibiting nature of pleadings which define the legal issues rather than the social problems. The answer to this is to have fact pleadings which would describe the root causes and

31. Pound, R., op. cit., p. 536.

32. Pound, R., op. cit., p. 537.

33. MacDonald, J. C., *A Comprehensive Family Court* (1967) Can. B.J. 323 at 333.

needs of a family's problems and thus permit the court to seek a solution taking such things into account. As suggested in California such pleadings should be in the form of a neutral petition to the court, captioned "In re the marriage of A and B" and termed a "petition of inquiry." This would simply request the court to inquire into the continuation of the marriage and would confer upon the court plenary jurisdiction to dispose of all facets of the matter before it. Such non-accusatory pleading will eliminate the need for the parties to assume a formal adversary posture at the outset of the proceedings. Any contentious issues of fact could then be tried during the proceedings but with the court in a position to conduct its own inquiries through a staff of professional social workers.

It has been said that a court is only as good as the judge who presides over it and there is a lot of truth in this, especially in domestic matters where judicial discretion is a marked characteristic of the proceedings. One of the prime reasons for the failure of the juvenile courts in the United States was the conspicuous absence of ". . . the mature and sophisticated judge, wise and well versed in law and science of human behaviour."³⁴ The family courts did manage to attract a few outstanding judges but the overall calibre was low, principally because of the conditions in which they were forced to work. Competent men simply did not want to end up being relegated to the bottom of the judicial barrel. The Chief Judge of the Rhode Island Supreme Court was quoted publicly as saying he knew of at least one family court judge who detested his work. In New York, family court positions are commonly regarded as stepping stones to higher judicial rank. In 1967, the New York Times commented, in regard to the state's family court judges urging that the court be made a division of the Supreme Court, that ". . . inherent in such a merger would be automatic increases in status and income for Family Court judges."³⁵

Even if the desired status and pecuniary rewards were achieved there would still be problems in getting competent men because of the methods of appointment currently in use. Far too often the dictates of politics or nepotism have intervened in the selection of the family court bench, with the result that mediocrity has become all pervasive. A system of nomination by a representative, disinterested board followed by appointment by the Lieutenant Governor in Council would do much to eliminate this abuse.

The family court judge is a man with unique responsibilities on his

34. Kay, H. H., *op. cit.*, p. 1208, from the President's Task Force on Juvenile Delinquency.

35. Dyson, R. B. & E. D., *op. cit.*, p. 525, from *New York Times*, 27 Jan., 1967.

shoulders, responsibilities that demand a full knowledge of the situations being determined. He should not come to his task armed solely with a knowledge of the law. Understanding and tact must be a part of his makeup, and he should at least be acquainted with the fundamentals of the social sciences, if for no other reason than to improve his patience with avid young social workers. Since it is politically naive to think that a judge will be well trained before his accession to the bench, some provision will have to be made for the necessary training after appointment. The Ontario Law Reform Commission recommended that inter-disciplinary courses, specially adapted for family court judges, be established at a university, covering both law and the social services with the emphasis on either depending on the particular judges strengths and weaknesses.

The basic aim is to create specialist judges, whose work is concentrated solely in the area of family law, and if rotation of these judges is necessary because of a widespread and sparsely populated jurisdiction then it should be done slowly and entirely within the family court structure. In one family case in Washington, D.C. hearings were heard before ten different judges before the whole case was completed.

While all of these provisions are intended to produce competent and informed judges, the realistic view is that complete success will be infrequent at best. Therefore consideration should be given to the possibility of having the judges sit *en banc*, as was suggested in a British White Paper, Social Work and the Community. The drawbacks of course would be possible intimidation of the parties to a case being heard, and the strain that would be put on the available judicial personnel who are stretched pretty thinly already considering the backlog of cases that has piled up in some courts.

We saw earlier how the therapeutic ideal of the original family courts had failed to work because it was being applied to parties who in most cases were already beyond the point of reconciliation. This does not indicate that counselling is a waste of time, but merely that it was being misapplied in a faulty environment. Its true function is revealed in the California proposal for a non-adversary court applying, in private hearings, the irreconcilable breakdown principle to divorce actions.

The fundamental premise of this court's functioning is that it cannot be effective without an accompanying reform of the law of divorce. No amount of procedural change will help if the law to be applied is based on the objective finding of a specific matrimonial fault. Such neat legal compartments are hopelessly inadequate for defining the subtle causes of marital dissension.

The court's objective, when it is petitioned to inquire into the continuance of a marriage, must be to discover the facts; when the facts lead to the conclusion that the marriage should be dissolved, the court must be prepared to act accordingly. Only in this way will the court's professional staff be free to work honestly with each other, rather than feeling compelled to produce statistical 'reconciliations' to justify the court's existence.³⁶

The emphasis on therapy is no longer to be placed at the intake stage (unless the parties wish such counselling) but on the settlement of the dissolution (where a divorce is desired). In other words, "divorce" counselling rather than "marriage" counselling, in an effort to make the separation as amicable as possible, and to prepare the parties for their new status, because divorce is a beginning as well as an end. If such counselling can help the parties to gain insight into the reasons for the failure of their marriage, then perhaps the same mistakes will not be repeated in any remarriage. Thus, paradoxically, "divorce" counselling may turn out to be more fruitful of the therapeutic ideal than "marriage" counselling because it is given before a possible marriage and not just prior to its termination.

At the intake stage the family counsellor's role is principally investigative, and aimed at helping the court not the client. He will determine, at the initial mandatory interview if the parties are reconcilable or not, and within thirty days of the filing of the petition, inform the court of their decision, whether to proceed with the divorce or to attempt reconciliation. If the latter, they are given sixty days in which to meet with the court's counsellors or with some outside agency to which they may be referred. If, after the allotted time period, the parties have not reconciled, then their petition is taken up by the court, which will have before it the counsellor's initial investigative report, the petitioner's testimony, and any other evidence which they may wish to introduce. Should the court find that the marriage has not in fact broken down, it may extend the proceedings for another and final period of ninety days; but must at the end of that period, and in the absence of any reconciliation, grant the divorce decree. This is to prevent judges who dislike divorce from refusing petitions to hopelessly broken marriages.

The California plan is a highly realistic proposal that protects the interests of both state and individual, by attempting through a deliberately delayed procedure to effect reconciliations, with time as the principal healer and the social staff there to give advice and direction when needed, but not to the extent of attempting reconciliations simply for the sake of reconciliations. If it is in the best interests of all concerned that a marriage be dissolved then the spouses are given the opportunity

36. Kay, H. H., *op. cit.*, p. 1248.

of parting with dignity and accord. Children are protected through the power of the court to conduct full scale investigations on its own, without being hamstrung by conniving litigants and limited jurisdiction. Both the social staff and the court have clearly defined roles with the court being given its due status and weight, as the chosen instrument for implementing the policies of the state.

Although the above plan represents the ideal, it is, alas, for most jurisdictions only a dream because of the critical shortage of trained auxiliary personnel. Nowhere is the general reluctance to properly finance family courts felt more keenly. Until salaries are raised and the output of social work graduates catches up with the demand, ". . . any discussion of the desirability of such facilities must be academic."³⁷ In the meantime the courts make do with what they can find. In Rhode Island, although counsellors were included in the 1961 Family Court Act, none were actually hired until 1967. The court therefore, decided to take matters in its own hands and unofficially hired "divorce investigators" who functioned more like a private detective agency than anything else, and "family relations aides" who performed rudimentary intake investigations. Those employed included,

. . . a former deputy sheriff, an owner of a men's clothing business, a former state representative, a former aspirant for several democratic offices, . . . a person of unidentified profession 'active in Judge Doris' past political campaigns . . . a former state senator, a retired captain of the Providence Police Juvenile Division, . . . a mayor's executive secretary, and a city claims investigator.³⁸

The list reads like a rogue's gallery of impeached politicians, bankrupts and defunct officers of the law, although many were no doubt quite sincere and even effective in their work. One wonders if young social workers, fresh out of college with degree initials proudly emblazoned on their office doors could be any more effective. The greatest tool any human advisor can have is experience, and that is a hard won qualification with no *summa cum laudes* to brighten ones office decor. It is no easy task to match personalities or help the troubled members of a family explore the depths of their own unreasonableness, but this is the therapeutic ideal and a family court without social workers would not be a family court.

Other required auxiliary personnel include law clerks for the judges, prosecutors attached to the court and enforcement officers for the collection of support money.

The appearance of children in divorce actions and the need for

37. Report of the Special Joint Committee of the Senate and House of Commons on Divorce, 1967, p. 154.

38. Dyson, R. B. & E. D., *op. cit.*, pp. 554-5.

adequate safeguards of the basic personal rights of juvenile delinquents and others involved in the counselling process, has prompted the demand for some form of independent legal counsel to advise and represent these third parties and defendants. In England the Official Solicitor fulfills part of this need, but the real pioneering is being done in New York where the Legal Aid Society has provided a Law Guardian service for the protection of the rights of minors. The twenty-two lawyers engaged in this service have so far not attempted to expand their role beyond that of pure advocates. They handle about fifteen thousand cases a year and apparently have managed to shake up some of the complacency engendered by the family court's informal procedure.

Judges found the presence of law guardians difficult to accept at first; long used to the free-wheeling methods of the old domestic relations court, many felt great hostility at being brought up short on procedural points . . . Indeed the attorney in charge of the program still considers one of the most important qualities of the good law guardian to be the ability to stand up under judicial pressure.³⁹

One is reminded of the old saying that lawyers provide great therapy for the messianic complex of judges.

The success of the Law Guardian project has inspired the Ontario Law Reform Commission to recommend a similar venture for Ontario, but as a department of the court and with an expanded role to take into consideration the general welfare of the child as well as his legal rights, thus taking over the function of the Official Guardian.

The presence of a Law Guardian's department protecting the child's interest, also means as a necessary corollary, the establishment of a Legal department within the court to give advice to intake counsellors, to absorb the function of the Queen's Proctor in representing the state as third party to some proceeding, and to provide official prosecutors in juvenile court proceedings and family criminal matters. The presence of lawyers in the court would also act as a salutary counterweight to the influence of the social workers.

One of the most vital areas in the functioning of any court or court system is an efficient administration, and yet most jurisdictions are sadly deficient in this regard. Roscoe Pound wrote, twelve years ago that, "what appears most conspicuously needed is responsible administrative leadership over an all-embracing court or court system and in each branch and division."⁴⁰ The intervening years have not made his words any the less meaningful. The waste of judicial manpower and money continues to plague our courts. The Toronto Daily Star

39. Dyson, R. B. & E. D., *op. cit.*, p. 59.

40. Pound, R., *op. cit.*, p. 534.

recently ran a two page, special report on the backlog of cases in Ontario.⁴¹ It was entitled "You can wait three years for justice in our courts." One of the articles reported a judge who while on circuit, found that most of his cases for the week had been adjourned or settled out of court. He went partridge hunting for three days while elsewhere in the province cases piled up for lack of a judge to hear them. Not only is the available judicial manpower being wasted but its application is haphazard. Difficult cases should have the most experienced and best qualified judge to hear them, not simply the judge who happens to be in court on that particular day.

Family courts are no exception to these criticisms. Their administration can be as complicated, inefficient, expensive and time-consuming as any other courts, and since their jurisdiction is concerned more than any other with the personal lives of people, young and old, there can often be a strong element of tragedy to compound the issue.

Substantial hardship can be caused to parents who have to undergo long waiting periods before cases are called or have to return frequently to the court. This may mean getting off work or loss of wages, or, in the case of a mother with young children, the problem of finding someone to look after the rest of the family.⁴²

If delay in court action can bring about reconciliations, it should at least be conscious and planned delay, and not simply the result of an antiquated process of record keeping and court scheduling.

There have been many experiments in improving the functioning of family courts with administrative control both in and out of the court, in the hands of a judge or board or judges, or a Director of Court Services or some completely divorced Administrative Council.

Hawaii followed the Standard Family Court Act and established a Board of family court judges to administer the court, however, it has turned out to be little better than an information exchange with the real control in the hands of Directors of the Family Court. New York went in the opposite direction with administrative responsibility placed in an Administrative Board of the Judicial Conference. The plan has succeeded in giving the State's courts a uniform practice and procedure but it has one very serious deficiency. The financing of the courts is done largely through the local counties with the State underwriting only about a third of the total cost. A lawyer, intimately involved with the family courts described the result:

Travelling from one court to another you would think you were in foreign countries in comparing endowment and outlook of the various family courts.⁴³

41. Toronto Daily Star, 9 Jan., 1971, pp. 6-7.

42. Ont. Law Reform Comm., Family Law Project, 1969, Vol. 10, p. 256.

43. Dyson, R. B. & E. D., op. cit., p. 538.

If equality of service is to be achieved financing on the state or province level is an absolute necessity, although no guarantee of a high standard of service. The Rhode Island court has yet to receive what is asked for, and reportedly there was little padding of the budgets. State legislators can be as hard-nosed as county councillors, but at least there will be a uniform grading plan and salaries for the staff. In New York there is a constant migration of personnel, including judicial, from the upper part of the State towards the more affluent south. The Ontario Law Reform Commission makes a strong plea for equality of services throughout the province along with the provincial financing that alone can assure such equality.

The court itself should be administered by the same government department that runs the other courts. This is essential if the court is not to become a "social workers court," as happened to many of the American courts. *To be effective a family court must be a court of law, a court of justice, and a court of lawyers.*

Whether the social staff should be included in the same administration is a controversial issue. If the court is to function as Judge Alexander thought it should, as ". . . a single integrated court, having one staff of specially skilled personnel, with one philosophy, one underlying purpose, working as one team, with one set of records, all in one place, under one direction, that of a specialist judge or judges," then the ancillary social services must also be under the direction of the Attorney General's Department.⁴⁴ Both Ontario and Alberta have had recommendations to this effect.

As a corollary to the administration of the court it is strongly advised that,

. . . court records and studies on a given family . . . be centrally indexed so that previously accumulated knowledge can be readily available and judicial dispositions arrived at in the light of prior dispositions.⁴⁵

No administration can ever function efficiently with scattered records. The minimal allowable division should be between legal and social records, principally because the latter have to be kept confidential.

An integrated family court should be the ideal laboratory for studying family related problems and their interaction. But as one social scientist sadly remarked,

Apparently family courts are making no attempt to build a solidified, factual body of knowledge which could be utilized as an aid to understanding and solving the very problems for which the courts were created.⁴⁶

44. Alexander, P., op. cit., p. 199.

45. Dyson, R. B. & E. D., op. cit., p. 578.

46. Kephart, W. M., op. cit., p. 68.

In Manitoba the Attorney General's Department does not even put out an annual report. The only statistics that could be found were for the two years that the court was administered by the Department of Health and Social Services which does publish an annual report. Perhaps one answer is to follow Hawaii's lead in appointing a special research analyst attached to the court, and responsible for such things as computer runs on the intake investigations which could be written up on IBM cards.

Having examined the basic features required of a truly effective court we may now ask what can be done in Manitoba and Canada. Unfortunately there seems little immediate prospect of doing away with the fault concept in divorce law or of creating a court without the adversary procedure, and lacking these two basic reforms, the best that can be achieved is half-measures. But perhaps we can establish the foundations of a court system that could in the future be transformed, with little difficulty, into something approaching the California model.

To begin with the general status of the court will have to be improved, although there are problems in raising it to the level of the Court of Queens Bench. The superior court's procedure is costly and involved, and the court itself is usually located only in major centres of population, with the outlying districts being served at Assizes by judges travelling on circuit. A far more suitable arrangement would be to vest jurisdiction over all family matters in the County Courts.

These courts have advantages over the Superior Courts for the disposal of local divorce cases. Their procedure is less involved and consequently less costly. County Court judges are resident in county towns and their local offices and officials are readily available at all times. The judges can be easily reached when an order needs to be explained or varied and when additional provisions are required. Furthermore, County Court judges are more familiar with the local circumstances and situation, as well as being more accessible, and consequently are in a better position to make helpful judgments.⁴⁷

This proposal is in line with Pound's ideal of a unified court system with all of its administrative advantages.

The plan proposed for Ontario by the Ontario Law Reform Commission is based on the Provincial Courts Act, Stats. Ont., 1968 c. 103, which divides the County Courts into criminal and family divisions, with the latter having jurisdiction over all those family matters that are within the province's control. Each division has a chief judge with general supervision over the courts and the power to assign judges where needed, s. 10(3)(4), keeping in mind the desirability of rotation.

47. Joint Committee on Divorce, p. 150.

It is proposed to give the judges of these courts exclusive jurisdiction over all family matters including divorce and annulment which are currently within the Federal ambit.

County and District Court judges could be given jurisdiction by the province in their capacity as local judges of the Supreme Court.⁴⁸

This has already been done in British Columbia and upheld by the Supreme Court of Canada in *Attorney General for British Columbia v. McKenzie*.⁴⁹ The Commission therefore recommends that the Ontario Judicare Act be amended so as to confer jurisdiction in matrimonial causes *in the local judges of the High Court*. In Manitoba this could be done through s. 9 of the Queens Bench Act, R.S.M. 1970, c. 000. The Commission goes on to outline a scheme involving two classes of judges, analogous to High Court and County Court judges, who will be classed as senior or junior, based on experience and qualifications. The senior judges are to be the standard setters for the judicial process, and will go on circuit while the junior judges are assigned to particular counties or districts. No rigid qualifications are established for the Family Court judges as the Commission feels to do so would hinder recruitment. Besides it is probably more important that the judges receive continuing studies after appointment than come to the bench fully trained in this or that subject.

The main problem seen by the Commission is in the appointment and status of the senior judges, and they resolve this dilemma by recommending that the senior judges be appointed by the Federal government on a permanent basis, as judges of the Divorce Division of the Exchequer Court under the new section 4(a) of the Exchequer Court Act, as well as being appointed to the Family division of the provincial courts.

To assist in the general development of policy for the new court, and to establish standards for the recruitment, training and qualifications of the personnel, a small Family Court Council is recommended, reporting directly to the Attorney General.

All ancillary services should be departments of the family court system and should work under the general direction of the Chief Judge as officers of the Family Court system.⁵⁰

This is a vital provision and one to be highly commended.

Considering the problem of providing services on a regional basis the Commission suggests having the more specialized professionals

48. Report to Attorney General for Ontario on Bill C-187, p. 4.

49. [1965] S.C.R. 490.

50. Ont. Law Reform Comm., Family Law Project, Vol. 10, p. 246.

located at the headquarters of the court system (e.g. Winnipeg), with provision for regular visits to outlying areas. Another important area that requires study is the functioning of interdisciplinary teams, e.g. where legal, medical and social work personnel are involved in consideration of the same problem.

A Law Guardian's Department and a Legal Department are included along with the Social Work Department. Commenting on the overall scheme and with an eye to the future the Commissions Report concluded, that,

The Family Law Project would stress that it has no desire in making these recommendations to prescribe a final form for a family court system in Ontario. What is proposed is an organization capable of working out its own development and self-improvement.⁵¹

This is an important consideration in view of the fact that further reform of the legal system will have to be undertaken before a really effective family court system can be created. In the meantime the Commission's recommendations, which are most certainly applicable to Manitoba, could improve the quality of the service offered, although care should be taken to ensure that the confusion of roles between the social staff and the court that robbed the similar American courts of much of their effectiveness, does not occur here. A strong judiciary and the presence of the Legal and Law Guardians Departments are healthy additions in this direction.

The family court began its life as an expression of the therapeutic ideal of the social sciences, of treating people as individuals with problems that are unique to them, and therefore requiring a personalized approach. Unfortunately this worthy aim was attempted in conjunction with a court of law that worked in the opposite direction, its procedure designed to ascertain the truth of objective facts and reduce them to defined legal issues. The two were not in harmony and the resulting confusion of roles served neither the individual nor the society of which he was part.

That the situation remained unseen and uncriticized for so long was probably the result of wishful thinking on the part of white, middle class America, that social ills were the product of individual mental disorder and that they could be "cured" in an institutionalized setting that did not disrupt the established order of society, or require getting one's hands dirty. How nice, neat and practical it all was, to so conveniently combine humanity and firmness in forcing the morality of the decent on those untouchables who dared defile the American dream. A

51. Ontario Law Reform Commission, *op. cit.*, p. 264.

wonderful idea, and it was so cheap. Simply tack a few social workers onto a court, modify its procedure, get rid of those confounded lawyers, and all would be well. No one questioned the arrangement, and no one it seems was terribly anxious to verify its success.

This uncritical consensus reflects a practice common in America, of looking to legal institutions for the correction of social ills. This tendency is dangerous; our experience is that courts seldom contain answers to problems arising outside the legal system. We delude ourselves if we think that delinquency and family disorganization can be cured simply by reforms in legal institutions, when the roots of these problems are buried in poverty, a self defeating public welfare system, and social unrest.⁵²

And to this we might add the words of Roscoe Pound, reflecting on the enormous burden of domestic discipline now being placed on family law by the decline of the old agencies of social control, the church, public opinion, and the traditional hickory switch.

The law cannot bear the whole burden. Nothing in the way of law reform will achieve all that we seek through social control. There must also be strengthening of the old restraining agencies which have in the past shared with the law in maintaining civilized society.⁵³

Unfortunately the latter is not really a proper subject for legislative action, which means that the state has really, little choice but to follow the public lead, and literally take a chance on love. If the family unit is going to break down for moral reasons there is not much we can do about it except seek a viable alternative, if such exists. In the meantime, ". . . if there is any validity in having the institution 'marriage' and the 'family' continue, then they should not be allowed to flounder without adequate public help and direction. Certainly where the processes of the law add to their burdens it is time to re-evaluate and change."⁵⁴ This at least the family court can do. It can make the social controls it is called upon to apply, as palatable and compassionate as possible, so that treating the results of social inequality and the vagaries of human nature, will not in itself lead to further chaos.

The only reasonable approach to a really effective family court, one that will deal only with the issues that a court is meant to deal with, is through a sweeping reform of the law of divorce to eliminate the fault concept, and a change in court procedure from the adversary system to a modified inquisitorial procedure. The function of such a court should be to regulate the institution of marriage in the best interests of a happy family unit. The court should strive to find out all the circumstances surrounding the troubles of a particular unit, through its own powers of investigation, assisted by the expert help of social

52. Dyson, R. E. & E. D., *op. cit.*, p. 90.

53. Pound, R., *op. cit.*, p. 539.

54. Lindsley, B. F., *op. cit.*, p. 9.

workers, whose primary role will be investigative rather than therapeutic, and if reconciliation is possible and desirable, to foster it with all the advice and help available, but if the differences are irreconcilable, to dissolve the marriage without acrimony or recriminations and with the interests of any children protected through the services of a law guardian and a full judicial and social investigation into the arrangements proposed for their future well being.

Therein lies the future of the family court and if it is to develop we in Manitoba would be well advised to pay heed to the following words from the report of the Ontario Law Reform Commission's Family Law Project.

The people of Ontario ought to recognize clearly the great importance of solid public support, both in financial terms and otherwise, to provide a strong and well equipped family court system, backed by adequate ancillary services. Surely there is more at stake here in both the short and the long term, in human and financial values, than in many other aspects of public administration. There can be few things within the governmental sphere that touch more directly the pulse of the social health of the community.⁵⁵

P. J. E. COLE*

BIBLIOGRAPHY

1. Alexander, P.W. *Legal Science and the Social Sciences: The Family Court* (1956) 21 *Missouri Law Review* 106.
2. Alexander, P.W. *What is a Family Court Anyway?* (1952) 26 *Conn B.J.* 243.
3. Arthur, L.G. *A Family Court, Why Not?* (1966) 51 *Minn. L. Rev.* 224.
4. Biggs, J. M. *Stability of Marriage; A Family Court.* (1961) 34 *Aust. L. J.* 343.
5. Chute, C.L. *Divorce and the Family Court.* (1963) 18 *Law and Contemporary Problems* 49.
6. Day, L.B. *The Development of the Family Court* (1928) 136 *Annals-105 of the American Political Science Association in Selected Essays on Family Law*, Brooklyn, 1950.
7. Dinkelspiel, R.C., Gough, A.R. *A Family Court for Contemporary California* (1968) *Journal of the State Bar Association* 363.
8. Dyson, R.B. & E.D. *Family Courts in the United States.* (1968) 8 *J. of Fam. Law* 507; (1969) 9 *J. of Fam. Law* 1.
9. Finlay, H.A. *Family Courts — Gimmick or Panacea?* 43 *Aust. L.J.* 602.
10. Fraser, M. *Family Courts in Nova Scotia.* 18 *U. of Tor. L.J.* 164.
11. Friedmann, W. *Law in a Changing Society.* Los Angeles, 1959.
12. Goldberg, H.L., Sheridan, W.H. *Family Courts: an Urgent Need.* (1959) 8 *J. Pub. L.* 537.
13. Goldstein, J., Katz, J. *The Family and the Law.* New York, 1965.
14. Graveson, R.H. *A Century of Family Law, 1857-1957.* London, 1957.

55. Ontario Law Reform Commission, *op. cit.*, p.

* Student of the Faculty of Law, University of Manitoba.

15. Howard, G.G., Summers, R.S. *Law, Its Nature, Functions and Limits*. 1965.
16. Inglis, B.D. *The Hearing of Matrimonial and Custody Cases, in Family Law Centenary Essays*, Wellington, N.Z., 1967.
17. Johnstone, Q. *Family Courts*. (1953-54) 22 *Kansas City L. R.* 18.
18. Kay, H.H. *Family Court: The California Proposal*. (1968) 56 *Calif. L.R.* 1205.
19. Kephart, W.M. *The Family Court – Some Socio-Legal Implications*. (1955) *Washington U. L. Q.* 61.
20. Lindsley, B.F. *The Family Court*. (1968) 5 *Calif. Western L. R.* 7.
21. Little, W.T. *The Domestic Illness Profile seen in a Family Court Setting*. (1963) 5 *Can. J. Corr.* 243.
22. Macdonald, J.C. *A Comprehensive Family Court*. (1967) 10 *Can. B. J.* 323.
23. Mahaffy, F.I. *The Family Court of Winnipeg, Manitoba*. Winnipeg, 1967.
24. Pilpel, H.F., Zavin, T.S. *Separation Courts: Their Function and Future*. (1963) 18 *Law and Contemporary Problems* 33.
25. Purvis, S.S. *Family Courts – A Plan for Alberta*. (1967) *Can. B.J.* 374.
26. Rubin, S. *The Standard Family Court Act*. (1961) 1 *J. Fam. L.* 105.
27. Winter, W.T. *The New California Divorce Law*. San Francisco, 1969.
28. *Case for a Family Court – A Summary of the Report of the California Governor's Commission on the Family*. (1967) 1 *Fam. L.Q.* 70.
29. *The Family Court in Canada*. The Canadian Corrections Association, Ottawa, 1960.
30. *Annual Reports, Manitoba Department of Health and Social Services, Winnipeg, 1967, 1968, 1969*.
31. *Family Court and Social Services – A Study Prepared by the Family Law Project, Ontario Law Reform Commission, Toronto, 1969*.
32. *Report to the Attorney General for Ontario on certain aspects of the proposed divorce legislation contained in Bill C-187*. Toronto, 1968.
33. *Report of the Special Joint Committee of the Senate and House of Commons on Divorce, Ottawa, 1967*.
34. *Social Work and the Community White Paper, Cmnd. 3065, 1964*.
35. *The Child, The Family, and The Young Offender. White Paper, Cmnd. 2742, 1964*.
36. Interviews with M. Samphir, Attorney General's Department, Manitoba; M. Matheson, Juvenile Corrections, Department of Health and Social Services, Manitoba; N. Itterman, Chief Clerk of the Family Court, Winnipeg; Mrs. Milne, Director of Family Counselling, Winnipeg Family Court.
37. Pound, R. *The Place of the Family Court in the Judicial System* (1959).