

# **Adversarialism and the Family Court: A Family Court Judge's Perspective**

---

THE HONORABLE GERALD W. HARDCastle\*

## **Introduction**

The battle for the heart of the family court presents a historic struggle. One force views law as an instrument of government. This force, with philosophical support from Hobbes and the Utilitarians, asserts that the principle purpose of government is to secure the greatest good for the greatest number. In the present family court battle, mental health professionals and family court judges stand ready to advance this philosophy. This force rejects the traditional adversarial processes in favor of inquisitorial processes. They view the adversarial process as a barrier to the goal of making families whole and healthy. Their war cry is "therapeutic justice."

Against this mighty, oncoming force stands America's historic force: traditionalists with a long commitment to the adversarial process. Their philosophical support comes from Justice Oliver Wendell Holmes, Jr., who asserted there is no overall good of the community, only conflicting interests of competing groups.<sup>1</sup> To date, the Traditionalists with their

---

\* This article was written in partial fulfillment of the requirements of the Master of Judicial Studies program at the University of Nevada, Reno.

M.J.S. 2004, University of Nevada, Reno; J.D., 1973, University of Utah; B.S. Sociology, 1970, Weber State College. Judge Hardcastle has been a Juvenile and Family Court Judge in Las Vegas, Nevada, for the past 12 years. Prior to that, Judge Hardcastle was a sole practitioner for 19 years. His prior works include "Joint Custody: A Family Court Judge's Perspective" in the ABA's *Family Law Quarterly*.

<sup>1</sup> Sheldon N. Novack, *Introduction to the Dover Edition* of OLIVER WENDELL HOLMES, JR., THE COMMON LAW, at xi-x11 (1991).

commitment to the adversarial process are holding the line of battle in general civil litigation. However, the Utilitarians have broken into the family court in a pell-mell attack – an attack that lacks planning and consistent direction but survives despite those deficiencies. This article will discuss this struggle and the role of adversarialism in family court.

Part I considers adversarialism as a pure legal model. It compares the characteristics and policies behind the adversarial model with the characteristics and policies behind the inquisitorial model. In addition, it examines existing legal process research regarding which model is subjectively considered most just.

Part II considers the fundamental nature of the family court. What policies lie behind the formation of the family courts? What are the expressed expectations of the family courts by those designing family courts? What are the components of the family court? What role does the concept of therapeutic justice play as it relates to family court?

Once there is a preliminary understanding of the nature of adversarialism and the nature of the family court and therapeutic justice, this article considers whether the nature of the family court precludes or diminishes the role of adversarialism. Part III hypothesizes that the adversarial process should remain important in the unified family court.

## I. THE ADVERSARIAL PROCESS

There are many ways disputants can resolve their differences short of, or without, judicial decision. But for those who are otherwise unable to reach resolution, the judiciary stands ready to provide “the decision.” Reduced to its essence, the product of judicial institutions is a decision. This much is not disputed. Dispute arises, however, when the issue is how courts and judges should make those decisions. America has a long commitment to decision-making through the adversarial process. American judges and lawyers are educated in the adversarial method of dispute resolution. Without question, attorneys appear daily before judges

applying the formal and informal rules fundamental and ancillary to the adversarial process.

Further, there is no absence of public exposure to the adversarial process, whether it be through *Perry Mason* reruns, through contemporary “court” programs such as *Judge Judy*, and *Divorce Court*, or actual trials such as the O.J. Simpson trial. *CourtTV* is dedicated to the public exposure of adversarial trials. Even teenagers on the *Blame Game*, through the adversarial process, determine who is to blame for the failure of their relationship with the winner to receive an exotic vacation.

Regardless of its long history in America, the adversarial system has received, and continues to receive much criticism. Roscoe Pound referred to the adversarial system as “the sporting theory of justice.”<sup>2</sup> One author has stated:

The main problem with the American legal system, the primary reason it is not working very well is the nature of the trial system itself. It is an adversarial trial system. Adversarial in the context of hostility, antipathy, contrariness, and even repugnance; adversarial with a capital “A.”<sup>3</sup>

There are even those who have declared the adversarial ideology dying.<sup>4</sup>

---

<sup>2</sup> ROSCOE POUND, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 29 A.B.A REP. 395, 404-05 (1906).

<sup>3</sup> RICHARD D. SPARKMAN, FAILED JUSTICE: A SOLUTION FOR AMERICA’S FALTERING LEGAL SYSTEM 4-5 (Easterly 2<sup>nd</sup> ed. 1997). Sparkman finds little benefit in the adversarial trial process. In fact, he calls it the “antithesis of rational problem-solving.” He finds it difficult that out of a “cauldron of conflict and fiery words the truth will emerge.” While trials can and very often do lack civility, there is nothing inherent in the adversarial process that demands or tolerates incivility. Incivility can occur in any dispute resolution process where the parties feel strongly about the issues or the other parties. Mediation can be uncivilized. The important thing to note is that incivility has no place in any dispute resolution process.

<sup>4</sup> Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary*

### A. Adversarial Process: Contrast and Assumptions

The adversarial process is obviously not the only way to resolve disputes. Parties may always agree among themselves to resolve a dispute (private ordering). Disputes may be resolved by a variety of other methods from flipping a coin to fighting a war. However, when government-sanctioned process is involved, we expect decisions will be made “in an evenhanded, non-partisan basis, reflecting broadly accepted notions of equity, fairness and impartiality.”<sup>5</sup>

Modern disputes are resolved through processes that are essentially either adversarial in nature or inquisitorial in nature. The adversarial process resolves disputes by having adversaries present their respective positions before an impartial decision-maker.<sup>6</sup> The fundamental assumption of the adversarial process is that the fairest and most effective way of resolving private disputes is to allow the parties to present their respective cases before a neutral judge.<sup>7</sup> Accordingly,

Our legal system relies on the notion that two or more professional adversaries representing the parties to the dispute will draw forth all relevant information to the contest and the process of putting forward their clients’ best positions, thereby allowing the decision-maker

---

*System*, 64 IND. L.J. 301, 355 (1989). Sward states, “Adversarial ideology has failed. The adversary system is transforming itself into a more inquisitorial, less individualistic methodology even as apologists debate the various justifications for adversarial adjudication.”

It cannot be denied that the American justice system is becoming more inquisitorial. But the debate over whether this unplanned transition has merit is a fair debate. The adversarial ideology may have problems that need to be addressed but it is not dead and its burial is premature.

<sup>5</sup> Steven Mintz, *Children, Families and the State: American Family Law in Historical Perspective*, 69 DENV. U. L. REV. 635, 637 (1992).

<sup>6</sup> *Id.*

<sup>7</sup> AUSTRALIAN LAW REFORM COMM’N, REVIEW OF THE ADVERSARIAL SYSTEM OF LITIGATION, RETHINKING FAMILY LAW PROCEEDINGS 22, 2.35 and 11.21 (1996) available at <http://www.austlii.edu.au/au/other/alrc/publications/issues/22/02.html>.

to determine the “truth” and to make the best decision.<sup>8</sup>

By contrast the inquisitorial process is fashioned as an official inquiry.<sup>9</sup> Sean Doran, John D. Jackson, and Michael L. Siegel describe the fundamental process:

The [inquisitorial] model of proof shifts the focus of activity from the contestants to the enquirers. Even in cases involving private disputes, the aim is to involve a judicial enquirer at as early a stage as possible. Contestants may bring their disputes to the inquiry in the first place, but it is the enquirer who determines the contours of the dispute within the ambit of the substantive law. This, in turn, gives the enquirers the primary responsibility for gathering, testing, and evaluating evidence relevant to the dispute.<sup>10</sup>

They also note that from this basic structure, several processes flow:

1. The role of contestants or litigants is less involved than in the adversarial process where litigants are in “full charge” of the process.
2. There is a layered approach to fact-finding. The process is a series of hearings or a continuous process rather than the seminal event or trial found in the adversarial process.
3. The enquirer is idealistically viewed as an independent trained expert with expertise to investigate and ferret out the truth. In the adversarial process, the responsibility for the fact-finding process rests with the

---

<sup>8</sup> Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of the Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 82 (1997).

<sup>9</sup> MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 3 (Yale UP 1986).

<sup>10</sup> Sean Doran, John D. Jackson, & Michael L. Seigel, *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 18 (Fall 1995).

litigants, with the judge being responsible for making certain the playing field is kept fair.

4. The control of the process rests with the enquirer. Successive enquirers have the ability to add to the file or “dossier.”<sup>11</sup>

Mirjan Damaska adds, “[I]n the inquisitorial mode one finds features such as a career judiciary, preferences for rigid rules, and reliance as official documentation ...”<sup>12</sup>

Because these processes represent the two recognized alternatives of formal dispute resolution, it is necessary to define and understand the fundamental or pure aspects of each as well as the assumptions about government behind each process.<sup>13</sup>

Defining these processes creates purely special perspectives. First, as the purity of a model dissipates, one model shifts toward the other, leading us to conclude the adversarial and inquisitorial processes in their pure states are opposite ends of a continuum.

But we do not intuitively conclude that the adversarial and inquisitorial processes are opposites. The conclusion is better understood in terms of the role of governmental involvement in determining what is appropriate for citizens. Accepting that government should provide a means for disputants to peacefully resolve disagreements, the issue is how deeply should government accept responsibility for the right resolution of the dispute?<sup>14</sup> The adversarial process

---

<sup>11</sup> *Id.* at 18-21.

<sup>12</sup> DAMASKA, *supra* note 9, at 4.

<sup>13</sup> Realistically, no process is entirely or purely adversarial. Likewise, no pure inquisitional process exists in fact. All legal systems exist on the continuum between the pure systems. American courts are considered as being most adversarial, with British courts being less adversarial but clearly more adversarial than inquisitional in nature. French courts are considered fundamentally inquisitorial in nature.

<sup>14</sup> Recognition here must be given to Prof. Damaska. While the thoughts are mine, it was when reading Prof. Damaska’s works that the thoughts were formed. While I believe Prof. Damaska would agree with much of what I write, I do not presume he would agree with all the thoughts or express them the way expressed here. Prof. Damaska’s work in *The Faces*

recognizes the role of government as limited. By requiring the parties to present their proof before a passive, neutral magistrate, the adversarial process preserves the limited role of government.

The other end of the spectrum is heavy governmental involvement. The premise is that government has a fundamental obligation to define and provide its citizens with a better way of life. Governments, particularly courts, not only tolerate disputes, they embrace them. Thus, the inquisitorial process arises.

That the adversarial process and inquisitorial process lie on a continuum is supported by the observation of change in legal systems. When adversarial process becomes less important, inquisitorial processes arise. As government becomes more active in determining how disputes ought to be resolved, inquisitorial processes become more important. The movement is along an adversarial/inquisitorial continuum, not otherwise.

The second perspective gained by defining pure models is a sense of movement when a given system is analyzed. Not only can present location be made, but movement can be determined. Is a given process becoming more adversarial or more inquisitorial?

Finally, understanding the characteristics of the pure processes and the underlying principles and assumptions behind each helps us understand the significance of movement and change in any court process. For example, do joint custody presumptions indicate an ideological shift from the adversarial process to the inquisitorial process (i.e., movement toward a government's definition of a better life, or, as Damaska states, "a posited organizational goal"?<sup>15</sup>).

A comparison of family court to pure models not only allows us to see process changes but also allows us to consider underlying philosophical changes, particularly as those

---

*of Justice and State Authority* and *Evidence Law Adrift* are classic works and valuable in understanding legal process.

<sup>15</sup> DAMASKA, *supra* note 9, at 21.

changes document the role of government in family court disputes.<sup>16</sup>

### *1. The nature of the adversarial process*

Defining and describing the adversarial process is like dissecting a frog – everyone presumes to know what a frog looks like, but if we want to be a frog expert, greater attention must be paid to the details. There are three generally recognized features of the adversarial process:

First, the parties control and bear responsibility for decisions about both commencing and terminating litigation and about assembling and presenting evidence and arguments. Second, within limits the parties may press losing claims without fear of sanctions. Third, the litigation proceeds before a neutral, passive tribunal – often a jury – that plays a limited role in gathering and presentation of evidence.<sup>17</sup>

Put another way, the adversarial process grants the parties

---

<sup>16</sup> While it is recognized that there is a difference between a legal process and a justice system in which that process operates, the determination is often murky, and cause and effect difficult to ascertain. THOMAS D. ROWE, JR., *American Law Institute Study On The Paths To A “Better Way”: Litigation, Alternatives, and Accommodation: Background Paper*, 824 DUKE L.J. 824, 830 (1989). For example, Prof. Thomas D. Rowe, Jr. states:

The litany of complaints about the civil justice system is largely a familiar one. Perhaps most frequently mentioned among the perceived problems are cost, high volume, and delay. Common dissatisfactions also include excessive complexity and formality; stress and aggravation of tensions between parties; lack of access to justice for many, especially the poor and those with relatively little experience in the legal system; and high incidence of frivolous claims.

Because of the harsh sound of the term adversarial, the term itself seems to take many of the blows for systemic failures regardless of whether there is anything inherent in, or related to the adversarial process which contributes to the process.

<sup>17</sup> Stephen MCG Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 7 (1992).

control over the process and the decision-maker, whether a judge or a jury, controls over the decision.

From these central features, a whole range of other processes flow and from those processes, implications follow. The Australian Law Commission precisely defined the essential elements of the adversarial process as follows:

1. The process is controlled by the parties.
2. There is an emphasis on oral argument by counsel.
3. The judge hears the evidence and does not direct investigation or examination of the evidence.
4. The trial is the climax of the process.
5. Courtroom practice is subject to rigid/technical rules.
6. The judiciary (or the jury) has the power to make the decision.
7. The expense and effort of the litigation falls on the parties.<sup>18</sup>

Returning to the two essential characteristics, party control of the process and judicial control over the decision, many issues arise as to each. For example, relative to party control of the fact-finding and presentation process, party control presumes the parties are equal in terms of competency and resources.<sup>19</sup> This presumption may rarely be true. Second, party control can be abused. Lawyers may attempt to make the facts fit the law and parties may be frustrated in efforts to tell their stories by rules of evidence and procedure.<sup>20</sup> Third, Sanford Katz has stated that the process itself and the role attorneys play in the process can actually increase or reinforce the conflict between the parties.<sup>21</sup>

The concept of a neutral, passive decision-maker also

---

<sup>18</sup> AUSTRALIAN LAW REFORM COMM'N, *supra* note 7, at 2.31.

<sup>19</sup> Bundy, *supra* note 17, at 8.

<sup>20</sup> Weinstein, *supra* note 8, at 99.

<sup>21</sup> Sanford N. Katz, *Historical Perspective and Current Trends in the Legal Process of Divorce*, 4.1 THE FUTURE OF CHILD. 45, 46 (1994).

presumes equality in terms of competency and resources between the parties. A judge cannot reasonably be expected to remain passive in the face of inequality in the court.<sup>22</sup> Second, the adversarial process and the decisions produced by the adversarial process are viewed in terms of a contest with a “win/lose” result. Third, the judge or jury has a broad range of possible decisions available in any given case.<sup>23</sup> The decision-maker is not searching for the “right answer” but rather for a decision within a range of acceptable answers.<sup>24</sup>

The primary philosophical attraction of the adversarial process is its commitment to limited government. While the

---

<sup>22</sup> Bundy, *supra* note 17, at 8.

<sup>23</sup> BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (Yale UP 1921). Justice Cardozo defined judicial discretion as follows:

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principals. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by decision, and subordinated to the primordial necessity of order in the social life. Wide enough in all conscience is the field of all discretion that remains.

<sup>24</sup> The distinction between the decision-maker’s search for the right answer and his making a decision within the range of discretion is important. The right answer implies that within a range of answers, both acceptable and unacceptable, there is one answer that best fits. It fits because it is the *best* answer, taking into consideration the situation of the parties and public views on what constitutes the good life. The decision-maker accepts responsibility for the case until the right decision is reached. This may require a series of hearings or status checks.

Discretion implies there is a range of acceptable decisions. Once the decision fitting the normative standard is made, the parties are expected to accept the decision and adjust to the decision. Their only other recourse is to appeal the decision to a higher court, whose review of the lower court decision is limited to discretionary abuse.

Of course, there are circumstances where the appellate courts consider the matters so important that *de novo* review of the trial courts efforts is warranted. In these cases, the appellate court substitutes its decision for that of the trial court decision-maker. The impact of the search for the right answer and *de novo* appellate review is that the transition to an inquisitorial process is complete.

decision-maker is expected to apply facts against applicable normative standards, the decision-maker does not attempt to impose governmental standards. Individual differences, so long as they remain within normative standards, are accepted and tolerated. While lines can be crossed, individuals are freer from governmental interference in an adversarial process than in an inquisitorial process.

There are other, more practical advantages of the adversarial process:

1. The process is more likely to reflect the truth because the parties have the opportunity to present the case.
2. Attorney representation enables parties who have limited knowledge about legal process to navigate through it safely.
3. The adversarial process is better equipped to handle issues of credibility through cross-examination.
4. The adversarial process is more cost-effective than a process in which government takes the role of investigator.<sup>25</sup>

Some view the adversarial process as more responsive to individual rights and more supportive of private ordering.<sup>26</sup>

In its pure form, the adversarial process is a means of dispute resolution of, by, and for the people, with very limited interference from government. The lawsuit is the business of the parties, not reason for public concern, and certainly not justification for government interference. If anything, the adversarial process exists to challenge and control official action, not to encourage its involvement.<sup>27</sup>

---

<sup>25</sup> AUSTRALIAN LAW REFORM COMM'N, *supra* note 7, at 55.

<sup>26</sup> Robert A Kagan, *Do Lawyers Cause Adverse Legalism?: A Preliminary Inquiry*, 19 LAW & SOC. INQUIRY 1, 10 (1994).

<sup>27</sup> See *id.* at 3. Certainly, there is an undeniable commitment in law to preventing government from abusing individuals. It must also be recognized, however, that through the use of the adversarial process, it is the individual that can abuse government. In that regard, Kagan notes:

Whatever the policy area or social function studied - compensating injured people, regulating pollution, equalizing educational opportunity, deterring malpractice

## 2. The nature of the inquisitorial process

In 1914, Franz Kafka began writing his second novel, *Der Prozess*. The book tells the story of Joseph K. who was arrested one morning at breakfast for some undefined offense. While he was largely allowed to go on with his life, he was subjected to a legal process concerning but not involving him. He was ultimately executed.<sup>28</sup>

The English translation given to Kafka's novel was not more correctly *The Process* but *The Trial*. Americans reading the novel experience disorientation because Joseph K. is not allowed to control the process in any way. How could government take anything, much less someone's life, without giving the person a chance to defend himself? Certainly, in a country that respects adversarialism, the legal process Joseph K. is subjected to is alien. But to those who experience the inquisitorial process, Joseph K.'s experience may be extreme, but it is not alien.

The recognized characteristics of the inquisitorial process are:

1. Proceedings are characterized by a series of meetings, hearings, and written communications. This contrasts with the "day of trial" trait of the adversarial process.
2. Rules are minimal and uncomplicated.<sup>29</sup> The rules, however, are more rigid than in an adversarial process.
3. The role of the lawyer is less conspicuous in the

---

by the police, physicians, or product manufacturers - the relevant American legal process tends to be characterized by (1) more complex bodies of legal rules, (2) more formal, adversarial procedures for resolving political and scientific disputes, (3) more costly forms of legal contestation, (4) more punitive legal sanctions, (5) more frequent judicial intervention into administrative decision making, and (6) more political controversy about (and more frequent change of) legal rules and institutions.

<sup>28</sup> Franz Kafka, *The Trial* (Knopf, 1957).

<sup>29</sup> See MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT 59 (Yale UP 1997) (regarding the role of evidentiary rules in the adversarial process).

inquisitorial process. The emphasis is on written, not oral submissions.

4. The judiciary is proactive and “inquisitive.”

5. The judge has no separate and inherent power to adjudicate.

6. The greater portion of effort and expense of litigation falls on the state.<sup>30</sup>

Hence, the dispute resolution process becomes a bureaucratic process. There is a career judiciary and a reliance on official documentation.<sup>31</sup>

What results is a process in which disputants turn over their disagreement to an official who conducts the investigation. The official then makes decisions consistent with governmental standards on how a dispute of this type ought to be resolved. Government, of course, has the obligation to define and to some degree provide the “better life.” Society as a whole has an investment in how the case is resolved.

#### *B. Subjective Perception of Justice Favors Adversarial Process*

Opponents of the adversarial process use inflated rhetoric but seldom refer to available research. The issue is whether the public views the courts as institutions that produce just results. If so, what is it about the process of courts that the public views as just?

Justice is subjective. Whether justice has been done to a significant degree involves perceptions by those inside and outside of the process. The factors that make up the perception of justice and fairness are varied. For example, the perception of the accuracy of decisions impacts the perception of justice, as do costs of litigation and other features.<sup>32</sup> Judge Judith S.

---

<sup>30</sup> AUSTRALIAN LAW REFORM COMM’N, *supra* note 7, at 2.32.

<sup>31</sup> DAMASKA, *supra* note 9, at 14.

<sup>32</sup> E. ALLEN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 112-13 (Plenum 1948).

Kaye notes the importance of process in the public's perception of justice:

The irony, of course, is that the average citizen's perception of our legal system is probably more profoundly shaped by how the courts are run than by the content of the law.<sup>33</sup>

She also notes that lawyers are trained to focus on process, trusting that fair procedures will produce just results.<sup>34</sup>

Assuming Judge Kaye is correct, the argument is that by designing procedures that litigants and the public accept as fair, there is a greater probability the courts will be perceived as doing justice. Researchers E. Allen Lind and Tom R. Tyler state:

In essence, the existence of the effect means that we can increase the net satisfaction of all those who come in contact with the law by designing procedures so that they lead to judgments of greater procedural fairness. Because we now know that it is possible to produce a net gain in disputant satisfaction by proper procedural design, we have more reason than ever to study the relationship between the characteristics of a procedure and the judgment that the procedure is fair.<sup>35</sup>

So then, between the procedural aspects of the adversarial process and the inquisitorial process, which process is seen as more just or fair? A fair summary of the research commencing with John Thibault and Laurens Walker states:

The effect of procedural justice on distributive justice is diminished when there is no direct involvement or participation in the procedure.

---

<sup>33</sup> Judith S. Kaye, *Lecture: Changing Courts in Changing Times: The Need for a Fresh Look at How Courts are Run*, 48 HASTINGS L.J. 851, 853 (1997).

<sup>34</sup> See *id.* at 854.

<sup>35</sup> ALLEN E. LIND & TOM R. TYLER, *supra* note 31, at 75.

Walker, Lind and Thibault (1979) studied the procedural and distributive fairness judgments of disputants who participated actively in the procedure, observers who had an outcome interest in the dispute but who did not participate actively, and observers who neither had an outcome interest in the dispute nor participated ... [O]nly the disputant subjects showed any procedure-linked differences in their distributive fairness judgments. Walker, *et al.* speculated that direct participation in the procedure is necessary to activate the causal link from procedural fairness to distributive fairness.<sup>36</sup>

---

<sup>36</sup> See *id.* at 71. See also Gary B. Melton & E. Allen Lind, *Procedural Justice in Family Court: Does the Adversary Model Make Sense?*, 5 CHILD & YOUTH SERVICES 65, 67 (1982). It is noted that these findings are cross-cultural. With few exceptions, adversarial processes were viewed as more fair and just even in countries where the inquisitorial process was employed.

The application to "distributive" justice is capable of some twisting. Distributive justice refers to cases involving the relative interests of the parties. For example, if plaintiff wins a monetary judgment, defendant loses money. The argument is that matters such as child custody are not distributive in nature. Accordingly, the "win/lose" rationale, it is argued, should not apply. The quest is for a "win/win" situation.

Child custody disputes are distributive disputes. Generally, they involve where and when the child is physically going to be. A dispute that a parent gets four days per week versus three days a week is a distributive dispute. While disputants like to argue differently, most child custody disputes are over divisions of time that have little factual consequence but significant legal and emotional consequence. The conclusion is that a result is a win/win situation is not generally based on any determination that the conflict was not distributive in nature but upon a determination the parties accepted the result regardless of its distributive nature - both conclude that they won in spite of the fact that there was a change in position by one or both disputants. The other aspects of divorce, such as property distribution and alimony, clearly are distributive issues.

For a fuller understanding of the work of Thibault, Walker and others in this area, consider John Thibault & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 54 (1978); Laurens E. Walker et al., *The Relation Between Procedural and Distributive Justice*, 65.8 VA. L. REV. 1401 (1979); and LIND, *supra* note 32.

This statement is significant. What it simply states is disputants are more willing to accept the court process as fair and thus accept the decision if the disputant participates in the process.<sup>37</sup>

Prof. Tom Tyler more specifically defines the elements contributing to the perception of procedural fairness.<sup>38</sup> They are: (1) voice/participation, (2) trustworthiness, (3) interpersonal respect, and (4) neutrality.<sup>39</sup> These elements are more precisely defined as follows:

### 1. Voice/participation

“People feel more fairly treated if they are allowed to participate in shaping decisions that affect the resolution of their problems or conflicts.”<sup>40</sup> This element supports an

---

<sup>37</sup> Weinstein, *supra* note 8, at 154. “Those who experience a sense of control over the outcome of the problems are more likely to feel that the process has been fair.” A challenge has been made to the adversarial process by researchers. Lind and Tyler have concluded that while the adversarial model is rated as most fair, it is also more objectively biased than the inquisitorial model. See Lind & Tyler, *supra* note 32, at 113-23. The argument is that attorneys in the adversarial process select from available evidence that tends to favor a client rather than provide a representative sampling of the available evidence. The reply is that while objective accuracy is desirable, cases rarely concern objective accuracy and more often concern why someone did what he admitted he did. For example, it may be that the issue is whether A shot B but it is also likely that A admits shooting B but in self-defense, raising issues of B’s state of mind. It is B’s ability to tell his story in the way he desires that becomes important.

<sup>38</sup> There is a strong sense, supported by the earlier research of John Tibaut and Laurens Walker, that the adversarial process has great value in that in spite of the criticism it is more objectively biased. People believe the adversarial process is fair and they are more willing to accept the decisions resulting from the process. Since the early work of Thibault and Walker, advancing adversarialism, much effort has been made by others, particularly Prof. Tom R. Tyler and E. Allen Lind. For family court judges and others who emotionally reject the value of adversarialism, the research of these researchers should be considered.

<sup>39</sup> Tom Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Court Procedure Reform*, 45 AM. J. COMP. L. 871, 887 (Fall 1997).

<sup>40</sup> *Id.* The earlier researchers define this element as “party control over the

adversarial process where the parties maintain control over the gathering of facts and the presentation of their case before the trier of fact.

## **2. Trustworthiness**

“That is, their judgment about whether or not the [decision-maker] is motivated to treat them in a fair way, to be concerned about their needs, and to consider their arguments. Interestingly, trustworthiness is the primary factor that people consider when evaluating the fairness of legal authorities.”<sup>41</sup>

## **3. Interpersonal respect**

“Studies suggest that being treated politely, with dignity and respect, and having respect shown for one’s rights and status within society, all enhance feelings of fairness.”<sup>42</sup>

## **4. Neutrality**

Basically, people like a level playing field in which no one is unfairly advantaged.<sup>43</sup> Taking the last three elements together, a clear picture of the preferred decision-maker emerges. The terms compassionate and neutral come to mind. Still, the decision-maker is not a personality but an operator in a process. Objectively, a decision-maker may not care who wins a given dispute, but if the process in which he/she is involved makes him/her appear partial, neutrality and trustworthiness disappear from the litigants’ perspective. If the decision-maker is responsible for fact-gathering and presentation, those elements and the perception of fairness are compromised. Taking all the elements together, we can make a strong argument the adversarial process has much value in being maintained if for no other reason than litigants perceive it as fair. As a result, litigants are more willing to accept the

---

process of fact-finding and presentation of evidence.” The issue raised by this characterization is how much of a voice is sufficient to produce the perception of fairness. Is a “small voice” in the process sufficient? Or must there be a perception of “control” over the process? Since this element is found not to be dependent on control over outcome, it is difficult to accept that the amount of “voice” can be less than substantial.

<sup>41</sup> *Id.* at 889.

<sup>42</sup> *Id.* at 891.

<sup>43</sup> *Id.* at 892.

decisions because they perceive them as being arrived at in a fair fashion.

Tyler makes an interesting comment regarding criticism of legal process generally:

Lariviere (1966) notes that there is widespread dissatisfaction with the justice system in France. This dissatisfaction develops from limited opportunities for participation in that country's inquisitorial procedures, and occurs despite the fact that the resolution of cases is relatively swift and inexpensive. He notes that litigants in the civil justice system have no opportunity to address the court, which hears evidence from experts who have interviewed the parties prior to trial. Consequently, people find the litigation experience emotionally and psychologically dissatisfying.<sup>44</sup>

Perhaps people just like to complain about legal systems. But research tells us much about what people perceive as just. To increasingly meander toward an inquisitorial process will (1) result in the loss of the perception of fairness characteristic of the adversarial process, and (2) raise new criticism occasioned by the inquisitorial process.

Having examined the adversarial process and the inquisitorial alternative, we will now explore the concept of the family court.

## **II. THE NATURE OF FAMILY COURT**

### *A. A Search for Definition*

Changing a court system is serious business. It is also complex business. The interesting conclusion about the establishment of "family courts" or "unified family courts"<sup>45</sup>

---

<sup>44</sup> *Id.* at 889 (referring to D. S. LARIVIERE, AN OVERVIEW OF THE PROBLEMS OF FRENCH CIVIL PROCEDURE (1966)).

<sup>45</sup> The terms family court and unified family court do not have agreed

is that no one has agreed on a definition of "what family courts are or how they differ from many of the existing court systems that they are meant to replace."<sup>46</sup> An Arizona commission formed to establish that state's family court system noted:

The term "family court" has different meanings for different persons. Its broad connotation is of a single court dealing with all the legal problems of the family. It is often described as a court that must be more than a forum for resolving legal conflicts of the family members. It must be a person-oriented court, one that makes the law work for the people, rather than merely fitting family problems into a preconceived legal framework.<sup>47</sup>

While lofty statements of purpose are not necessarily intended to provide a basis for true definitions of process, it becomes extremely difficult in the case of family courts to determine where the rhetoric ends and the definition begins. Huffing, perhaps acceptable in selling cars, should not be so easily accepted when redefining legal systems. Yet that is what has occurred relative to the family court.<sup>48</sup>

---

definitions. There is some sense that the word unified reflects a family court with extensive jurisdiction over the many different types of legal proceedings involving families. For those jurisdictions that have specialty family courts, there seems to be little difference and the term unified does not appear to add much.

In jurisdictions without specialized family courts, the term, "family court," can refer to the general jurisdiction judge's domestic calendar or to the general jurisdiction judge's judicial assignment. In jurisdictions without specialized family courts, the term, "unified family court," is not applicable. The author has sat in a "unified family court" in Clark County, Nev., for nearly 12 years.

<sup>46</sup> Anne H. Geraghty & Wallace J. Mlyniec, *Special Issue: Family Court Reform: Unified Family Courts: Tempering Enthusiasm With Caution*, 40 FAM. CT. REV. 435, 436 (2002).

<sup>47</sup> William J. O'Neil & Barry C. Schneider, *Recommendations of the Committee to Study Family Issues in the Arizona Superior Court: A Family Court System*, 37 FAM. & CONCILIATION CTS. REV. 179, 181 (1999).

<sup>48</sup> For example, Judge Anne Kass in considering family court states: "We no longer view custody disputes as tragedies that need to be ended as soon

A forum to resolve divorce and custody matters existed well before the advent of family courts. The search for definition requires the proponents of the new system to justify why change is necessary. If I give up my old car, why should I buy this new car? This decision requires consideration of (1) the defects of the old car, and (2) the benefits of the new car. If presented with a new court system, what are the advantages of the new system and what are the failures of the present system? In deciding to commit the precious resources available to structural changes in the courts, there should be a clear understanding of what is being purchased.

### *1. The new, improved court*

What do those who advocate change from the traditional processes espouse to be the benefactors of the new family court? The Australian Law Reform Commission in defining the “guiding principles” of its family court, listed:

1. The need to protect the rights of children and their welfare,
2. The need to preserve the institution of marriage,
3. The need to give protection and assistance to the family,
4. The need to ensure safety from domestic violence,  
and
5. The means to assist parties to consider reconciliation or improvement of their relationship to each other and to their children.<sup>49</sup>

The Arizona Commission sought to establish in its family court a system that would broadly:

- Deal with problems of the family in an

---

as possible. Rather, we try to regard custody disputes as opportunities to inspire and motivate one or both parents to learn how to be better parents.” Letter from Anne Kass, District Judge, State of New Mexico, Second Judicial District, Division XVII, to Gerald W. Hardcastle, District Judge, State of Nevada, Eighth Judicial District Court, Family Division (Oct. 7, 1997).

<sup>49</sup> AUSTRALIAN LAW REFORM COMM’N, *supra* note 7, at 2.7.

integrated manner,

- Be more than a forum for resolving legal disputes,
- Be a person-oriented court,
- Make the law work for the people, and
- Do more than fit family problems into a preconceived legal framework.<sup>50</sup>

While these are certainly laudable goals, expecting even a judge or any legal system to accomplish them seems to set the judge and the court process up for failure. The difficulty with lofty declarations – whether they are goals, guidelines, or principles, is they create expectations. When people enter the process, they expect that goals, guidelines, and principles will be met. Further, those involved in the process may be compelled to remain involved until the lofty declarations are met. For example, is the judge's obligation met when he/she makes the best judgment he/she can upon the evidence, or must he/she monitor the results of that decision to make certain that he/she made the "right" decision and solved the problem? Tension arises between judges who view their obligation as providing the best legal decision they can and those who view their obligation as not only making the best decision but making the family, however defined, whole and well. This tension results in part from a failure to agree on even the basic definition of the family court.

Another way of defining the concept of a family court is to look at the ill(s) in the traditional legal system that the new system is designed to correct. Most family court proponents agree with Janet Weinstein who believes a "process that pits family members against each other is not

---

<sup>50</sup> O'Neil, *supra* note 47, at 183. It is interesting to note that to accomplish the missions they defined, the Commission set four "goals":

1. The creation of a non-threatening court, especially for use by the ever-growing *pro se* population,
2. Improved case management,
3. Funding for public and/or private services, and
4. Training and education for judicial officers and staff.

conducive to relationships.”<sup>51</sup> Furthermore, proponents argue that in resolving legal disputes involving families, courts must recognize “divorce is not an end to a family. It is a reorganization of the family. The family continues past the ending of the marriage but in a different form.”<sup>52</sup>

When we seek to intellectually define why family law disputes are different from disputes presented to other courts, we discover the concepts of “integrative” and “distributive” disputes. The Oregon Commission defined the difference as follows:

What is apparent is the unique character of family law when compared to the civil and criminal arenas: Family law involves both integrative (relationship) and distributive (property) issues; the problems brought to the court are not simple matters suited to adversarial black and white, bi-polar answers. The problems are poly-centric and non-linear.<sup>53</sup>

---

<sup>51</sup> Weinstein, *supra* note 8, at 138 ; see also O’Neil, *supra* note 47, at 180.

<sup>52</sup> Hugh McIsaac, *Changing the Paradigm: The Effect of Recent Family Law Legislation in England, Australia, and the United States*, 16.2 MEDIATION Q. 163, 164 (1998).

<sup>53</sup> OREGON JUDICIAL DEP’T, STATEWIDE FAMILY LAW ADVISORY COMM., *Oregon’s Integrated Family Court of the Future*, 40 FAM. CT. REV. 474, 480 (Oct. 2002). The language becomes even more technical and scientific:

The traditional adversarial nature of court systems is inappropriate for the resolution of family legal matters.

As Professor Menkel-Meadow has stated,

[t]he binary nature of the adversary system and its particular methods and tactics may thwart some of the essential goals of any legal system ...

...

Modern life presents us with complex issues, often requiring complex and multifaceted solutions. Courts, with ... their limited remedial imaginations’ may not be the best institutional settings for resolving some of the disputes that we continue to put before them. Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform In Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 475 (1998); see also MCISAAC, *supra* note 52, at 181.

The difficulty with the integrative/distributive distinction is its artificiality. It is one thing to reasonably conclude that in hearing family law matters, the court should be sensitive to the fact the parties are parents and will have ongoing parenting issues.<sup>54</sup> It is another to suggest courts are incapable of making decisions in child custody matters simply because the decision may impact on-going relationships. The process can be contentious, but the dispute must be resolved. The flaw in the integrative/distributive distinction is there are simply a number of litigants who are not going to be able to agree on a resolution of their issues within a reasonable time.

Ultimately then, if the dispute is to be resolved, the court must find some process must be found that results in a decision. It does not matter whether the dispute raises an integrative or distributive issue. The parties are aware that if they cannot agree, and they always have the right to try to agree first, some process will resolve the issue. At that point, the artificiality of the integrative/distributive distinction is apparent. Courts decide issues lawfully put before them

---

It is noted Babb raises the issue of whether family court is the appropriate place to resolve these integrative issues. Is it fair to the institution to ask it to do something fundamentally different or that the institution is not fundamentally capable of doing? If it is not fair, then who or what is it that should be doing the job that courts are being inappropriately asked to do? Or is it that the goals the court is asked to achieve cannot be achieved by anyone except the parties themselves? Are the family courts going to be destroyed because unreasonable goals and expectations have been set because the institution and how it is defined in its role to society matters as much as how happy litigants are after a divorce?

<sup>54</sup>It is noted the arguments justifying the existence of family courts revolve around child custody issues. For non-parent litigants, there appears no justification for the continuing relationship argument. Property can be divided and alimony established without great concern over whether the relationship between the parties is healthy. These distributive issues are no greater than those tried by courts in the vast majority of civil cases.

It is, of course, understood that where child custody issues exist, child custody can become a tool affecting inappropriately other issues. But judges and attorneys with any divorce experience understand the issue. Regardless, it is important to note that, in fact, divorce actions are fundamentally distributive in nature excepting, perhaps, cases involving child custody.

regardless of what distinction can be drawn relative to the types of issues.

Hugh McIsaac, when discussing the Washington State statute regarding temporary and permanent parenting plans, notes the dilemma of the integrative/distributive distinction when parties are unable to agree. He states:

[The Washington statute] preserves the adversarial nature of the process by inviting competing plans when a joint case planning process ... would be more desirable. ... The issues are what Raiffa (1982) calls *integrative* issues. They deal with relationships and not with property or material issues, which he labels *distributive* issues. The problem with the ...Washington statute is the inadvertent treatment of relationship issues as though they were property issues and therefore distributive in nature. The strength of the new formulations lies in the separation of integrative (relationship) issues from distributive (property) issues ... This plan is to be created by the parties together, in consultation with their attorneys or in mediation. *If they are unable to agree, then and only then does the court become involved.*<sup>55</sup> (emphasis added)

Other than re-emphasizing a commitment to private ordering, McIsaac's analysis is no different from the way courts have traditionally handled disputes. Settlement of lawsuits by private agreement is not a secret. The vast majority of cases settle without trial. Trial has always been the last option. Accordingly, while settlement occurs within the shadow of the law (i.e., with the understanding of what may happen if the matter goes to trial), little in the integrative/distributive distinction justifies establishing an entirely different court system.<sup>56</sup>

---

<sup>55</sup> McIsaac, *supra* note 52, at 164.

<sup>56</sup> *Id.* While the child custody issue and its integrative/distributive

## *2. A simpler outlook*

In the midst of those advocating for major overhaul of the legal process to accommodate the extreme goals of a family court, one judge sees the problem as less complex. His perception of the primary issue calls not for a vast overhaul of the process but for dedication to more efficient use of existing processes. Judge Landerkin states:

The problem with family cases is *largely case management. What is lacking in [family court] is a sense of its identity, demonstrated by its lack of uniform procedures.* This Court has the right to declare its own practice rules ... If it does not exercise this authority, the existing system will continue. Currently, the Court does ... reasonably well. Judges engage in a continuing educational experience sitting in this Court through the constant contact with

---

distinction seem to be the primary reason for the attack on adversarialism and the expressed need for the family court, other reasons have been given. Many reasons are vague, such as McIsaac's statement:

Many [families sharing joint custody of children] began to advocate for change ... They provided information for other families who might benefit from their experience. What has emerged is a new family law system that is not better or worse, merely different. These authors and inhabitants of this new system called for a different set of social supports, recognizing the emergence of this family system and supporting its continuance. One of these supports is to change the language and the process of divorce.

*See also O'Neil & Schneider, *supra* note 47.*

The Arizona Commission was more concrete on what it viewed as the problems justifying a family court:

Family court matters often present unique problems not encountered in other litigation. Among other things, family law cases are distinguished from other, more traditional cases by the continuing relationship of family members, the multiplicity of potential disputes affecting a family, the adjudication of rights and responsibilities of persons who are not formal parties, the increasing number of unrepresented litigants, and the frequently emotional nature of the issues to be determined.

psychologists, psychiatrists, and other mental health professionals, as well as probation officers. In consequence, judges offer something substantive to the community. What they do not do well is articulate a process which involves people coming before the court, nor do they take charge of this process to make it efficient and beneficial for both the Court and the litigants.<sup>57</sup> (emphasis added)

Judge Landerkin's statement establishes two simple principles. First, family court does not clearly articulate itself. Second, efficiency (i.e., the fair and timely resolution of disputes in accordance with a clear mission) is necessary. Landerkin's comments suggest family court need not abandon its traditional processes in a wholesale manner. What is necessary is an understanding of what can reasonably be expected of a family *court*.

### *B. The Components of Family Court*

The lofty statements of purpose, goals, and anticipated successes of the new family court concept did little to clarify how the family court should actually look and how the new look would resolve the issues surrounding adversarialism. Some statements were so broad that any structure was possible.

The concept of a unified family court involves a single court *system* with comprehensive jurisdiction over all cases involving children and relating to the family. One specially-trained and interested judge addresses the legal *and accompanying emotional and social issues challenging each family*. Then, under the auspices of the family court, judicial action, informal court processes, and social service agencies and resources are coordinated to *produce a comprehensive resolution tailored to*

---

<sup>57</sup> Hugh F. Landerkin, *Custody in the Provincial Court of Alberta: A New Judicial Dispute Resolution Model*, 35 ALTA. L. REV. 627, 653 (1997).

*the individual family's legal, personal, emotional, and social needs.*<sup>58</sup> (emphasis added)

Other statements suggest a structure: "The central tenet of the UFC [unified family court]<sup>59</sup> is that one highly-trained judge handles all matters relating to a particular family with the assistance of support personnel and social service workers."<sup>60</sup>

Over time, and with experience and hindsight, the structural design of family courts has taken shape. Wallace Mlyniec notes the common characteristics of family courts are:

- Comprehensive jurisdiction over a range of family law matters.
- Implementation of one judge/one family systems.
- Application of therapeutic justice "rather than coercive and punitive measures." The focus is on *coordinated holistic services*.

---

<sup>58</sup> Paul A. Williams, *Symposium Issue: Children and the Law: A Unified Family Court For Missouri*, 63 U.M.K.C. L. REV. 383, 384 (1995).

<sup>59</sup> Stephanie Domitrovich, *Utilizing an Effective Economic Approach to Family Court: A Proposal for a Statutory Unified Family Court in Pennsylvania*, 37 DUQ. L. REV. 1, 5 (1998). The terms unified family court and family court are confusingly used. Family courts generally refer to courts with comprehensive jurisdiction over family matters. The term unified family courts generally refers to the same concept (i.e., a court with jurisdiction over all legal issues related to the family). However, in some contexts, the concept of a unified family court implies the one-judge/one-family concept that puts all cases in the family court system under one judge. The one-judge/one-family has additionally been designed to be one-family/one-team.

<sup>60</sup> See *id.* at 5. The intervention of social service experts will be discussed later. It should be noted the Pennsylvania Court Commission simply accepted the involvement of such experts without any clear definition of the role of the expert. On one occasion I attended a conference during which a panel of social service experts stated no judge should enter a child custody or visitation order without first consulting with experts in the area of child custody (which, of course, the panel was).

- One-stop shopping, generally in one building.<sup>61</sup>

Judge Robert W. Page defines the family court in terms of jurisdiction and functions.<sup>62</sup>

### 1. Jurisdiction

A family court gathers all types of family dispute cases into one unified court system. Judge Page includes not only divorce actions and all actions similar or incidental to the divorce action – such as paternity, child custody, alimony, and annulment actions – but also proceedings involving dependent and delinquent children, domestic violence, and termination of parental rights.

### 2. Functions

There are four separate functions characteristic of a family court. The functions are (1) the court function, (2) the social service delivery function, (3) a unified case processing and management system, and (4) the organizational structure and administration function.

#### a. The court function

Judge Page says it best:

A court derives its very existence and the validity of its orders from an initial determination of a legal basis to act. This is true regardless of the substantial needs of those who are affected most by the decision. A good rule of thumb is the more substantial the need for judicial involvement, the more the need to be substantial in finding the legal basis. A legal basis includes the findings of jurisdiction and

---

<sup>61</sup> Geraghty & Mlyniec, *supra* note 46, at 436.

<sup>62</sup> Robert W. Page, *Family Court: An Effective Judicial Approach to the Resolution of Family Disputes*, 44 JUV. & FAM. CT. J. 1, 7 (1993). The benefit of Judge Page's article is he separates the rhetoric about family courts from specific consideration about the design and nature of family courts. Everyone *hopes* the family courts can cure all the problems existing with American families. However, only by making an intelligent dissection of the components can we understand the realistic benefits, if any, all this change can make.

venue at the onset, full respect of the rights of due process, with reasonable notice and an opportunity for all to be heard and adherence to all statutes, court rules, case precedents and established legal and equitable principles. *The family court is no place for either judicial scofflaws or goodwill ambassadors without portfolio.*<sup>63</sup> (emphasis added)

It would seem virtually everyone would agree in the abstract with the principle that courts should not interfere in the lives of families without legal and factual basis. But when the decisions the court is required to make involve sensitive family and child issues, there is a tendency to bend the rules.<sup>64</sup>

As one author noted:

There is a fundamental tension between, on the one hand, the need to ensure that the rules of court are respected and complied with, so that the court can function; on the other hand, the fact that courts exist to decide disputes on their merits, and should eschew technicality whenever possible.<sup>65</sup>

This tension between the expressed vast good that

---

<sup>63</sup> Page, *id.* at 10, n.58. As noted in Judge Page's article, the *Gault* decision demonstrates what can happen when the good intention of courts overrides legitimate court process.

<sup>64</sup> Williams, *supra* note 58, at 395.

Finally, the family court is required to make factual determinations that substantiate the various evidentiary standards of proof before it can exercise powers. If the facts fail to support the evidentiary standards, the court must refuse to act even if the alternative is to return a neglected child to the parents or deny a modification of a visitation order for an allegedly sexually abused child.

<sup>65</sup> D. A. Rollie Thompson, *The Evolution of Modern Canadian Family Law Procedure: The End of the Adversary System?*, 41 FAM. CT. REV. 155, 164 (2003). One dispute with the quote is the implication that rules of procedure and evidence are technicalities. Far too often we assume that what we do not understand has no basis in reason. Much time is spent in teaching the rules of evidence and too little is spent teaching lawyers why those rules matter. *See also*, Damaska, *supra* note 31.

family courts purportedly can do and the technicalities of messy procedural rules may resolve to the detriment of legal process. In his article on the historical trends in divorce process, Sanford Katz notes that “if the immediate past history of divorce is any indication of the future, reforms will most likely be in the direction of further relaxing substantive and procedural laws regarding divorce.”<sup>66</sup> Prof. Linda Elrod provides an even broader suggestion. She states: “We may want to borrow a page from the English system, which places the ‘welfare of the child’ as the highest priority and allows judges to go beyond the evidence and agreements presented.”<sup>67</sup>

The disregard of process in favor of result is troublesome. Courts must be vigilant to protect the procedural rights of those before the court. Disregarding those rights, even for the good results, carries great danger.

#### b. The social service delivery function

Initially, the ease with which the family court has assumed the role of provider of social services amazes us. Judge Page notes that “when consideration is given to the orders of family courts and their related staff actions, it is *apparent* the family court system is a substantial provider of social services.”<sup>68</sup> (emphasis added)

Nothing inherent in the term or concept of family court demands the court itself necessarily engage in providing social services.<sup>69</sup> Yet clearly, the family courts are actively engaged

---

<sup>66</sup> Katz, *supra* note 21, at 55.

<sup>67</sup> Linda D. Elrod, *A Minnesota Comparative Family Law Symposium: Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 545 (2001). It is recognized that Prof. Elrod is making only a suggestion.

<sup>68</sup> Page, *supra* note 62, at 11.

<sup>69</sup> There is a distinction between referring litigants and families to services existing in the community and having a court system that is responsible for the implementing and providing of those services. See David B. Rottman, *Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges)?* 37 AMER. JUDGES ASS’N. CT. REV. 22, 25 (2000). Rottman notes “courts also took on the role of coordinating the delivery of social services to individual families and

in providing social services, not only by referral to community agencies and programs that assist families generally but also by establishing court-attached programs.<sup>70</sup>

The depth of the commitment to provide social services has not been defined. In part, the depth of the court's obligation to provide social services must depend on its definition of its function relative to families. For example, if the family court's role is to assist families through the transitory divorce process, court administration has a much less involved role. In contrast, a system which coordinates court and social service processes, intending to produce a comprehensive resolution tailored to a family's total dysfunction, requires more involvement by the court.<sup>71</sup>

---

children." See also Victor Eugene Flango, *Creating Family Friendly Courts: Lessons From Two Oregon Counties*, 34 A.B.A. FAM. L. Q. 115(2000). Flango notes the family court system has four essential components: "(1) comprehensive jurisdiction; (2) efficient administration designed to support the concept of the 'one family, one team;'" (3) broad training for all court personnel; and (4) *comprehensive services.*" (emphasis added)

<sup>70</sup> Page, *supra* note 62, at 12 n.75. Page correctly notes the responsibility to provide social services is often imposed by the state legislature. Some legislative expressions are direct, such as legislative direction for courts to provide a program of treatment; other legislative expressions are more oblique, see, e.g., NEV. REV. STAT. 3.475, (directing the family court to consider alternative to the adversarial process).

<sup>71</sup> Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform In Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 480 (1998). Babb clearly intends the family court not only be seen as a court that resolves problems that courts traditionally resolve but that the family court be responsible for resolving all the families' "interpersonal" issues:

The purpose of a family court act is to protect and safeguard family life in general and family units in particular by affording to family members all possible help in resolving their justiciable problems and conflicts arising from their interpersonal relationships, in a single court, with one specially qualified staff under one leadership, with a common philosophy and purpose, working as a unit, with one set of family records, all in one place, under the direction of one or more specially qualified judges. (emphasis added)

While it cannot be disagreed that a unity of purpose and effective

Judge Page's characterization delineates a clear role of the family court as a *court* and a role of the court as a *deliverer of social services*. The integrity of the court as a judicial institution is maintained and the providing of social services supports the court in its judicial functions. More careful consideration reflects that this may not be true; that, in fact, the social service delivery function of the family court overrides, or at least makes less relevant, the judicial function. Mlyniec notes the conflict, stating: "Proponents of the unified family court claim that they do not want the court to become a social service agency. However, under the system they propose, adjudication of the original dispute seems to be a minor part of the process."<sup>72</sup>

David B. Rottman explains why:

The rationale for the current trend toward court specialization goes something like this. First, some categories of cases (and associated litigants) are marginalized within the vast volume and mix of cases in courts of limited and general jurisdiction. Second, a problem-solving approach is more appropriate and effective than the traditional adversarial process for these categories of cases. Third, special knowledge and special personal attributes (and perhaps special technology) are needed to be a judicial problem-solver. Fourth, the necessary special knowledge is as likely or more likely to be drawn from the fields of mental health and psychology than from knowledge of the law. Fifth, a judge needs continuous access to social and psychological services to problem-solve effectively.<sup>73</sup>

---

management practices are good for courts, the depth of involvement in the lives of families and how this involvement will affect the court and the families involved is not addressed by reference to good management practice.

<sup>72</sup> Geraghty & Mlyniec, *supra* note 46, at 442.

<sup>73</sup> Rottman, *supra* note 69, at 22.

What is effectively pointed out by this explanation of the specialization process is that what Judge Page calls a “social service delivery function” is much more pervasive than initially thought. It is one thing to provide resources that assist litigants in resolving disputes relative to obtaining a divorce; it is quite another to accept responsibility for “problem-solving” (i.e., to make them well and whole).

When we consider Rottman’s rationale for specialized courts, its application to family court is clear. Tied to the specialization process is the concept of “therapeutic justice.” Therapeutic justice becomes the defining philosophy when the specialized court evolves. As Rottman states:

Specialized courts were laboratories in which traditional adversarial court processes could be modified, collaborations with public and private service providers forged, and judicial oversight extended to cover the life of the treatment program. *Therapeutic justice formally entered the picture when judges sought a legal theory that could justify and guide their experimentation.*<sup>74</sup> (emphasis added)

What is “therapeutic justice” or “therapeutic jurisprudence”? Simply, Babb states: “Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent. It looks at the law as a social force that, like it or not, may produce therapeutic or anti-therapeutic consequences.”<sup>75</sup> To carry out the ambitious task of maximizing the therapeutic ability of the court, Babb recommends the need to restructure the court system.<sup>76</sup>

---

<sup>74</sup> See *id.* at 26.

<sup>75</sup> Babb, *supra* note 71, at 508.

<sup>76</sup> See *id.* at 511, stating:

“Resolving family disputes with the aim of improving the lives of families and children requires structuring the court system to enhance the system’s potential to maximize the therapeutic consequences of court intervention.”

The concept of therapeutic justice is not new. In his excellent

Wallace Mlyniec defines the relationship between courts and therapeutic justice more precisely:

A court is, at its core, an instrument of social control. What it does best is resolve disputed factual issues at a point when the litigants cannot resolve them by themselves. Courts gain control over these acrimonious situations only through the threat or reality of coercion. Thus, courts are generally seen as an option of last resort ...

The concept of therapeutic justice, central to the operation of the family court, is premised on the view that courts can be more than instruments of social control. Proponents of therapeutic justice believe that a court can work with families to provide positive, lasting resolutions to family problems ...<sup>77</sup>

Mlyniec notes, however, there are two problems with the concept of therapeutic justice. First, it fails to recognize court-ordered sanctions are inherently coercive, whether they are called “therapeutic” or not. Second, the court may be distracted from its role in dispute resolution by focusing instead on therapy.<sup>78</sup>

Before leaving the definition of therapeutic justice, we need to note another consequence of the family court’s adoption of this theory of justice. Therapeutic justice assumes courts know how to resolve the interpersonal difficulties between the parties. Therapeutic justice implies the court system will not only resolve litigants’ disputes but also will

---

historical perspective of family law, Mintz notes therapeutic justice arose within the context of families in the late 19th century. See Mintz, *supra* note 5, at 648. Juvenile court judges should be familiar with the concept and its extensive use for over a century in addressing the issues concerning abused, neglect, and delinquent children. Equally, judges are aware that therapeutic efforts can also become unjust. See *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428 (1967).

<sup>77</sup> Geraghty & Mlyniec, *supra* note 46, at 440-41.

<sup>78</sup> *Id.*

resolve the underlying dysfunctions existing in the litigants and the families.<sup>79</sup> It also implies the judges know the “right” answer. As a result, the process is not about judicial discretion. In complex social relationships, the judge is charged with finding the right answers and accepts responsibility for finding those answers – keeping the parties before the court until answers are found. It is an arrogant, ambitious task.

When we listen to those who speak about family court, we realize the concept of therapeutic justice is deeply ingrained. One study has stated that “therapeutic approach to issue resolution should be at the *heart* of a family court.”<sup>80</sup> (emphasis added)

The concept of therapeutic justice carries with it great impact. While judges ought to be compassionate and understanding, therapeutic justice carries greater judicial and systemic responsibility. It is more than being understanding; it is about fundamentally changing how the litigants and families are addressed. It should be recognized that no other existing therapeutic system looks like a court.

The mixture of “justice” and “therapy” leads to difficult results. First, the introduction of mental health professionals into the court process creates difficulties:

Mental health professionals may be involved in a custody case either as therapists, custody or parent evaluators, providers of services to the family, or as witnesses in the case. Evidence indicates that when mental health professionals become a part of a custody dispute, the parties

---

<sup>79</sup> See *id.* at 442. Where the authors state “from the therapeutic justice perspective, social problems are not solved; dispute resolution seem secondary.”

<sup>80</sup> O’Neil & Schneider, *supra* note 47, at 188. *New York Times* correspondent Charlie LeDuff’s photograph of New York’s family court begins, “Family Court is the saddest place in New York.” Despite this characterization, he quotes administrative judge Joseph M. Lauria as stating, “The good part is we can help with long-term resolutions of family problems.” Mr. LeDuff’s photograph of the New York family court did not capture the hopeful results expected from Judge Lauria’s statement. CHARLIE LEDUFF, *WORK AND OTHER SINS*, 222 (Penguin Books, 2004).

may become more polarized and actually less likely to reach agreement. A therapist who sees only one of the parties and then writes recommendations or treats a child at the request of only one parent without a court order contributes to the adversarial nature of the proceedings. Some judges expect the mental health professional to give an opinion as to the ultimate issue of fact of which parents should have primary residency, even though there is no “scientific” basis for an opinion.<sup>81</sup>

Second, the role of the judge, and even the court itself, becomes confused. Presently, the family court is still viewed by the public as fundamentally a court that operates the way courts as institutions operate. When the judge behaves differently than anticipated, expectations are not met. As a court study said, “The difference is, in fact, between what can be called ‘therapeutic jurisprudence’ versus the ‘dispassionate magistrate’ model; the latter image prevails, with variations, in the public imagination despite the emerging dominance of the former.”<sup>82</sup> The judge is redefined from a neutral judge to a “healer” or “participant in the process”<sup>83</sup> or a “sensitive, emphatic counselor.”<sup>84</sup>

Redefining the role of the judge leads to a more fundamental attack on the court. The relevance of judges and lawyers in the family court process is attacked. Three statements make the point:

---

<sup>81</sup> Elrod, *supra* note 67, at 502. See also Leslie Eaton, *For Arbiters in Custody Battles, Wide Power and Little Security*, N.Y. TIMES, May 23, 2004, at 1. Eaton states:

When warring parents head to court to fight over child custody in New York their lawyers often let them in on a little secret: The most powerful person in the process is not the judge. It is not the other parent, not one of the lawyers, not even a child. No, the most important person in determining who gets custody, and in what terms, is frequently a court-appointed forensic evaluator.

<sup>82</sup> Domitrovich, *supra* note 59, at 49.

<sup>83</sup> Babb, *supra* note 71, at 511.

<sup>84</sup> Rottman, *supra* note 69, at 25.

It is unclear that legal training is the best preparation for judging in specialized courts. Research on the attributes of attorneys suggest that they rely disproportionately on analytic, rational thought to make decisions and are not 'interpersonally sensitive, meaning not attuned to the emotions, needs, and concerns of other people and not concerned with interpersonal issues or harmony.' ... Such attributes suggest that the supply of judges for non-adversarial forums may be limited.<sup>85</sup>

Law school does not necessarily train court personnel to address the medical, social, child development, and psychological issues that often occur in cases involving families. As cases become more complex and more reliant on social services, judges handling family issues must develop the expertise to provide effective resolutions of family cases ... Indeed, judges require training to know which questions to ask professionals from other specialized fields and how to interpret the responses.<sup>86</sup>

Attorneys and judges who focus on these areas should have dual degrees, focusing on children and families.<sup>87</sup>

Each statement devalues the traditional role of attorney and judges in the family court process.

By reducing the relevance of the traditional role of the judge and the attorney, the mental health community achieves greater importance. In a family court it has been assumed that legal process, lawyers, and judges would maintain at least a co-role with mental health professionals. However, the concept of therapeutic justice envisions that the process, the

---

<sup>85</sup> See *id.* at 25-6.

<sup>86</sup> Victor Eugene Flango, *Creating Family Friendly Courts: Lessons From Two Oregon Counties*, 34 FAM. L.Q. 115, 126 (2000).

<sup>87</sup> Weinstein, *supra* note 8, at 156.

lawyers, and the judges are subservient to the mental health process. The real question to be asked is whether legal process has any reasonable relevance whatsoever in the context of therapeutic justice.

This question is not as dramatic as it seems. With the complete rejection of what is fundamentally court-like, what purpose is there for placing child custody matters before a court at all? If family courts do not decide cases but problem-solve, and if judges are not trained to be problem-solvers, should courts do the work expected? Are courts handling these matters only because courts have traditionally decided divorce issues? It is fair to assert that courts, judges, and lawyers have little value in the resolution of family issues, but those making such assertion should propose a system that accomplishes the goals set. They ought not call it a court when the implication of what they do is to destroy the fundamental definition of what a court has been understood to be.<sup>88</sup>

c. The case processing and management system function

Judge Page asserts the third function of a family court is its case processing and management system. While he does not define a particular type of case processing and

---

<sup>88</sup> The AUSTRALIAN LAW REFORM COMM'N, *supra* note 7, at 2.6:

The Family Court is a specialized court ... It has similar powers of decision-making and enforcement to [other courts]. However, the Family Court was intended to be less intimidating and less formal than other courts. It was originally proposed that the Family Court would be a helping court that would assist separating families to resolve disputes with a minimum of acrimony. It was intended that the Court should avoid the problems associated with the traditional adversarial system ... The Court was to be user friendly with as much informality as possible. Judges and counsel were not to be wigged or robed.

Accepting those standards, the issue is how is the work of the court to be accomplished. What rules of evidence and procedure should be modified or discarded? Does the Commission really believe that taking away robes adds to the quality of the result? Why bother to do it at those impressive but intimidating courthouses?

management system, he says the most effective system is one that “propel(s) [cases] to comprehensive resolution.”<sup>89</sup> He states: “The adage: Justice delayed is justice denied has its most serious impact in the family court. ... The need for timely decisions of issues involving children must be considered at all times by the court systems determining family disputes.”<sup>90</sup>

Judge Page’s language reflects a commitment to the role of the family court as deciding disputes versus “problem-solving.” But he also notes:

The goal of the court dealing with [family] disputes should be more than simply resolving the particular issues before them. Rather, such resolution should leave the family with the skills and access to support services necessary to enable them to resolve subsequent disputes constructively with a minimum need for legal intervention.<sup>91</sup>

His statements note the tension concerning the role of family courts in the therapeutic process. First, it is one thing to make a decision and encourage the parties to get along in the future. It is another to be responsible for the interpersonal wellness of the parties. The mass introduction of mental health and social welfare services into court proceedings cannot be justified if the role of the court is to make a decision and encourage the litigants to resolve their own future issues.

The issue is, exactly how far is the family court expected to go in “therapeutically” dealing with families? Second, there is clear tension between advocating that decisions be timely made and that courts serve a therapeutic treatment purpose. Therapy is rarely a speedy process even in court time.

---

<sup>89</sup> Page, *supra* note 62, at 12.

<sup>90</sup> See *id.* at 12-13.

<sup>91</sup> See *id.* at 20, citing the *Committee on Family Court and Family Services, Governor’s Task Force on Family Law*, Final Report, October 1992 (Maryland).

Judge Page is fundamentally right when he notes what litigants want, and what is best, is a timely decision. Litigants and their families are people in transition and like all persons in transition, they suffer from the uncertainty transitions cause. Transitions are inherently unstable and unsettling. When Judge Page asserts there is a need for timely decisions, he means litigants and families want the transition process to end.<sup>92</sup>

But does it matter how the process ends? For extreme degrees, it matters. But disputes can end across a broad range of possibilities. This broad area is called “judicial discretion.” While litigants may not be entirely satisfied if they do not get the decision they desire, they can be expected to learn to live with a decision made within permissible judicial discretion. They now understand the new rules of their lives and of their interpersonal relationships with the other litigants. They can move on. They have survived the transition.<sup>93</sup>

d. The organization and administration function

Judge Page asserts the “most important component[s]” of the family court system are organization and

---

<sup>92</sup> A microscopic example of how upset litigants can get at transitions concerns motions to rehear or reconsider. A motion to rehear or reconsider is inevitably viewed by the responding party with disgust and outrage. They thought the court had resolved the issue and to revisit any issue thought resolved creates those emotions. People do not like to go back or stand still; they want to move forward.

<sup>93</sup> As a young prosecutor, I was handling a preliminary hearing involving a defendant charged with murder. The public defender involved was notorious for saturating prosecutors with objections and questioning witnesses in infinite detail. For example, “Did you leave the car with your right or left foot leading?” As a former public defender, the magistrate was known for allowing defense attorneys great latitude. As a result, the preliminary hearing was protracted over several days - often being fitted by bits and pieces into the rest of his court calendar. This process was going on for several weeks. The issue was whether the defendant was the person who shot the victim. The preliminary hearing came to a dramatic end when during a court break the defendant told a court services officer that if had he known the preliminary hearing would have taken this long, “never would have shot the guy.”

administration.<sup>94</sup> He believes family court judges should be assigned from the highest trial level, and the judges should be supported with sufficient funding and staffing to meet the needs of the court. Further, he asserts the court administrator must be given authority to achieve the goals of the family court.<sup>95</sup>

It is very easy to accept that family courts, or any court for that matter, should have the benefit of good resources and good administration. Courts should be supported in their mission. However, when the mission of the family court is not clearly defined, administration offers no hope of salvation. It is not possible to define successful implementation and administration of a system until the mission of the system is clearly defined.

Court administrators may very well understand the goals of a traditional court system. They can fairly argue over whether the administration is better done by a strong chief judge or a strong court administrator system. They can argue over whether a master calendaring system is better or worse than assigning judges individual calendars. But, we should agree the fundamental mission is to make decisions and to make the court more efficient and less costly. What the family court and its related concept of therapeutic justice add is an unclear element to the concept of the court's mission. The social service delivery component has a dramatic impact on the organization and administration function of the courts.

Let us assume a court administrator reads the following:

Unifying principles, although new to the courts, are not new to business. Streamlining monetary and time resources are goals of effective business management. It is plain old "good economics" to bring together many convenient opportunities for the consumers to shop, for instance. Big business means that supermarkets

---

<sup>94</sup> Page, *supra* note 62, at 13.

<sup>95</sup> *Id.*

now must include more than food specialty departments; they must also have pharmacies, flower stands, greeting cards, laundries, bestselling books, and video stands. “One-stop convenience shopping” are the buzzwords for success. Courts may need to follow the lead of successful supermarkets and fulfill the need for more convenient and more consistent services in family court.<sup>96</sup>

But, of course, the court administrator knows he is not expected to compete with the national supermarkets. But what service is he expected to administer? The Oregon Court Commission noted that the components of a integrated family court by the year 2020 was to consist of the following:

- Statewide thinktank.
- Community resource center.
- Strong front-end educational component.
- Local family law advisory board.
- Court-connected services.
- Other components consisting of community courts, legal guidance centers, management, conciliation services, non-adversarial parenting plans and custody evaluations, special training for family law judges, efforts to promote early judicial settlement, ability to respond and shape federal mandates and legislative input, ability to perform outcome analysis for court and service functions, and expertise in use of technology.<sup>97</sup>

Aside from the issue of whether government is willing to adequately fund the structure to support the family court mission required by those advocating for the family court “supermarket,” the definition of administration and

---

<sup>96</sup> Domitrovich, *supra* note 59, at 2.

<sup>97</sup> Oregon Judicial Dep’t, Statewide Family Law Advisory Comm., *supra* note 53, at 478-79.

organization remain.<sup>98</sup> Court administrators seem unprepared to operate the “supermarket” of services sought by therapeutic family courts.

## 2. *The Future*

It is fair to assert the family courts are in transition. The issue is where are the family courts headed? What is the ideal? Prof. Elrod states:

Florida is the most recent state to move toward “a fully integrated, comprehensive approach to handling all cases involving children and families” in order to avoid causing additional emotional harm to children and families and to resolve disputes in a fair, timely, efficient, and cost effective manner. The stated goals are to: (1) reduce the impact of inconsistent orders on law enforcement, witnesses and the parties; (2) encourage agreed-upon resolution of issues; (3) reduce the need for future modification or enforcement proceedings; (4) reduce the overall time that a family is in court, thereby minimizing the disruption to litigants and their employment; and (5) reduce the duplication of services.<sup>99</sup>

These goals are laudable and should be a part of any court effort, but the statement also contains an unstressed element of therapeutic justice. Babb notes the extensive, bureaucratic family court has three elements: (1) managerial judges, (2) specialization, and (3) a philosophy of therapeutic justice.<sup>100</sup> The result is Prof. Elrod’s ideal family court which:

[W]ould have its own building with an information center, court services, mediation

---

<sup>98</sup> Doubt exists regarding whether government will fund the family court adequately to address the social services needs of those coming before the court. This issue is whether it is better to pretend to do good than to pay the price of actually doing good when the pretence erodes a legal institution.

<sup>99</sup> Elrod, *supra* note 67, at 520.

<sup>100</sup> Babb, *supra* note 71, at 477.

rooms, childcare facilities and secure conditions. The system would utilize a single judge, one social services team per family, centralized physical facilities, comprehensive support services, time standards, integrated information systems, adequate training, intake services, and community advisory counsel.<sup>101</sup>

Prof. Elrod's description of the ideal family court may not be shocking. The physical facilities described by her exist. Many other courts are headed there. But what is not resolved is the interconnection between the ideological therapeutic foundation of family court and the adversarial process. Unless it can be concluded family law matters really do not have much to do with real law, (and there are many who reject the adversarial process in a wholesale fashion), the issue of the relationship between therapeutic justice and the adversarial process in family courts must be more reasonably addressed.

### **III. THE RELATIONSHIP BETWEEN THE ADVERSARIAL PROCESS AND FAMILY COURT**

In determining whether the adversarial process has any appropriate application to the modern family court, the issue previously raised is whether matters involving families ought to continue to be handled in courts at all. Presently, lawyers and judges in family courts are taking a beating.<sup>102</sup> Fundamental role changes are demanded. For example, attorneys are demanded to shift their roles from zealous

---

<sup>101</sup> Elrod, *supra* note 67, at 520.

<sup>102</sup> Weinstein, *supra* note 8, at 98. "Lawyers, judges and the law in general, have no appreciation for the ecological perspective of family dynamics."

*See also* Katz, *supra* note 21, at 45-6:

On another level, there was a private understanding between lawyers and litigants that there would be a certain amount of perjury. Because of this mutual pretense, divorce practice was considered to be low level, and judges assigned to hear divorce cases were often thought to be part of the legal charade. Thus, they were not very competent and had little respect for the legal system.

advocate to “counselor,” from “guard dog” to “guide dog.”<sup>103</sup> In spite of the fact the vast majority of cases under the adversarial system settle, the effort is to paint attorneys as advocates who care only for the heat of the courtroom battle.<sup>104</sup>

The issue is, why must the courts remain involved in domestic cases at all? If our intention is to establish a family social services agency, there are certainly many of those existing in any substantial city. I argue that the reason to keep the court involved is that for some litigants, there comes a time when a neutral judge must make a decision. Not everyone will ultimately agree on how to resolve their circumstances

---

<sup>103</sup> McIsaac, *supra* note 52, at 164. The confusion about where divorce is headed is expressed by McIsaac in his statement:

“As is true of all changes, time will be the best judge of the value of these statutes [regarding language neutrality and custody]. We have left land’s end and we are sailing to a different, and we trust, better shore.”

While this statement may reflect how we discover continents, courts ought to be better planned.

Weinstein notes lawyers ought to be “peacemakers,” not advocates. *See Weinstein, supra* note 8, at 83.

<sup>104</sup> Weinstein, *supra* note 8, at 166. The author also criticizes the lack of professional training for judges, lawyers, and mental health professionals. He asserts that “all professionals” suffer from this “training defect.” *See also* Martha Fineman, *Dominant Disclosure, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 730-31 (1988). Fineman goes even further stating:

I criticize social workers and other members of the helping professions in part because they present themselves as neutral, nonadversarial decisionmakers in contrast to attorneys, whom they characterize as both adversarial and combative. Yet social workers are not neutral; they have a professional bias in favor of a specific substantive result. That result benefits their profession by creating the need for mediation and counseling. It is this bias and self-interest that makes the process one for political consideration. The bias inherent in mediation is different from, but no less suspect than, the bias that can result from overt favoritism of one party over another. It is understood from this perspective that if no mutual, objective professional decisionmaker exists, we must confront moral, political and legal questions from which the “experts” cannot save us.

regardless of the number of ADR, mediation, education, or other programs implemented. Operating in the “shadow of the law” has full application. But there remains a powerful current seeking to undermine the institution of courts in the process of divorce.

Rather than excluding the courts from the process altogether, the process is shifting toward the inquisitorial model. The Australian Law Reform Commission has noted precisely that result in stating:

The trend towards managerial judging and case management has been changing the role of judges. One option for reform would be to encourage a more radical shift in the existing model of judicial adjudication towards an inquisitorial model. In this model, judges would require litigants to present their dispute in a certain matter with an emphasis on what the judge has decided are the central issues. Judges would not only be able to call and question witnesses but would frequently do so where the interests of fairness and establishing the truth require greater judicial intervention. Judges would consult court expert advisers... The litigation process would resemble much more of a continuous series of meetings, hearings and written communications during which evidence is introduced, witnesses heard and motions made, rather than focussed (sic) on a trial.<sup>105</sup>

This explanation of the inquisitorial process as applied to family court raises many questions. The foremost question, and one inherent in a problem-solving versus decisionmaking dilemma is when is the case over? The second clear issue concerns the research that supports litigants’ preference for party control over legal process.

---

<sup>105</sup> AUSTRALIAN LAW REFORM COMM’N *supra* note 7, at 18.25-.26.

Court institutions are often undermined because of the ill-defined nature of “problem solving.” While courts are able to make decisions and enforce those decisions, problem-solving is another matter. Family courts are designed as specialized courts. Inherently, the purpose of court changes. Instead of focusing on resolving “cases” or measuring outputs, family courts focus on outcomes. The judge is done only when the persons involved in or affected by the court have reached the desired “outcome.”<sup>106</sup>

Courts are not prepared to accept responsibility for solving complex issues involving human nature and human conditions. Babb states:

Particularly in the area of family law, one must acknowledge that courts cannot resolve all the problems that families bring to the court system, especially when those problems may have their genesis in the community, workplace, church, school, or other social institution, etc. The court system can provide more assistance to effectively resolve cases and to enhance the quality of families’ lives than it presently offers.<sup>107</sup>

Mlyniec also notes truthfully, “Poor education,

---

<sup>106</sup> Rottman, *supra* note 69, at 22.

<sup>107</sup> Babb, *supra* note 71, at 493-94. More precisely, ROTTMAN, *supra* note 69 at 22, states:

A problem-solving orientation is the most fundamental characteristic of the new specialized courts. Problem solving requires a shift in what is valued in the adjudication process: outcomes (rather than outputs), flexibility in decision-making, listening to peoples’ concerns, participation by community organizations, and consideration of what is best for communities as well as for individual defendants or victims. Problem solving also places greater emphasis on post-disposition events, a significant change in focus from traditional models. Traditional caseload management, for example, is based on cases rather than persons, which effective management of post-disposition matters may require much more attention to persons involved in cases.

dwindling housing stock, mental illness, drug use, crime, and crumbling neighborhoods are all beyond the reach of the court.”<sup>108</sup>

Not only does the inability of the court to problem-solve these difficult issues adversely affect the litigants who must participate in this unsuccessful process, but also the institution of the courts is itself adversely impacted:

Judges are asked to remedy the failure of community organizations in solving their problems. Judges are then seen as failures when they are unable to fashion a result to everyone’s liking. The modern drama of judges curing the ills of society while at the same time being isolated from the support and resources of the community is tantamount to judges being cast out of the community.<sup>109</sup>

While there are those that believe family courts can reach the lofty goals of making parents and children better,<sup>110</sup> courts are

---

<sup>108</sup> Geraghty & Mlyniec, *supra* note 46, at 445.

<sup>109</sup> Domitrovich, *supra* note 59, at 28.

<sup>110</sup> Elrod, *supra* note 67, at 545. Prof. Elrod’s conclusion reflects a commitment to the problem-solving role of family court while noting the substantial barriers:

Protecting children from the devastating efforts of their parents’ conflicts requires a focus on the welfare of the child and a proactive approach by all parties, including the court system. We may want to borrow a page from the English system which places the “welfare of the child” the highest priority and allows judges to go beyond the evidence and agreements presented. No one solution is going to reduce conflict. State legislatures, courts, lawyers and mental health professionals are just beginning to experiment with programs to deal with high conflict cases. Several legislatures have replaced the terms “custody” and “visitation” with “parenting time” that more accurately describes parenting responsibilities. But the system requires more than simply substituting terminology - the system needs more judges, more services of all kinds from mental health to parent education to parenting supervisors. There must be a concerted effort among all of the professionals who work

not generally able to meet those goals because the judiciary rarely has control over resources. Courts can be imaginative, but realistically courts have always operated in a resource vacuum – relying on others to fund service efforts.

To truly problem-solve requires more than a case-by-case approach. Society has not made a full commitment to designing, establishing, and funding a full service system for any needy segment of its population, whether it be drug users, the mentally ill, those needing social services, or those lacking education, to name a few. What reasonable hope is there that society will do so now just because a judge is involved?<sup>111</sup> Equally important, what will become of the family court once people realize the solutions promised by the courts are unfulfilled?

And what of the status of social science research? As previously noted, the research of Thibalt and Walker and their successors indicate the adversarial process has attraction over the inquisitorial process for dispute resolution. In spite of this research, Weinstein concludes, “There is clear evidence that the adversarial system is inappropriate for dealing with the best interests of children in the context of child protection and family law matters.”<sup>112</sup> Others disagree.<sup>113</sup> Mlyniec states: “No

---

with and care for children to work together for solutions. Specialized training for all professionals, collaboration and case management are crucial elements of any plan to ease the negative impact of divorce on children.

Problem-solving, however, is doing more than protecting children from the devastating effort of their parents’ conflicts. Problem-solving means that the greater societal issues of employment, education, drug use, etc. need to be addressed. Problem solving means that not only does the court need jurisdiction over the parties but must also be able to exercise authority over community resources, recognizing that those resources are limited and that others in the community may need access to those resources along with divorcing families.

<sup>111</sup> Rottman, *supra* note 69, at 24. Rottman notes that specialized forums proliferated “in an era of particularly generous funding for criminal justice and an extraordinary robust economy. The (usually) higher costs associated with specialized courts may prove fatal during an economic slowdown.”

<sup>112</sup> Weinstein, *supra* note 8, at 80.

<sup>113</sup> Geraghty and Mlyniec, *supra* note 46, at 435. The authors state:

Our goal in this article is not to condemn the notion of a

studies have been conducted to date that compare the effectiveness or the quality of justice unified family courts provide with the systems they are designed to replace.”<sup>114</sup>

Melton goes further and states the view that the adversarial process is harmful to children is “misguided or at least premature.”<sup>115</sup> He gives three reasons:

1. There has been no systemic evaluation of the alternative projects in place. He essentially makes the argument previously noted that there has been no evaluation of existing and innovative programs.
2. The present system is not as adversarial as the commentary implies. Because 90 percent of all cases settle without trial, attorneys may actually decrease contentiousness.
3. There is little hard evidence supporting the assertion that the adversarial process heightens children’s distress. Melton asserts children might actually benefit from more involvement in proceedings to protect their interests. He further asserts this gives them value and a sense of control.<sup>116</sup>

The simple point to be made is that, all rhetoric aside, the adversarial process has a solid ideological foundation in this country. It is not a perfect process, but it is the process chosen by Americans for resolution of disputes. It is then fair

---

unified family court but to suggest that there is scant evidence to show that it can produce better results than current functioning courts of general jurisdiction.

*See also*, Rottman, *supra* note 69, at 23.

More generally, Rottman states:

A third characteristic of the new specialized court is that they have tended to develop by trial and error as the experience of one court is passed on to other courts. Specialized courts thus grew into a movement without the underlying legal theory to justify and guide, for example, the relaxation of the adversarial process.

<sup>114</sup>*Id.* at 436. *See also* Melton and Lind, *supra* note 35, at 77, where Melton states, “Novel programs in the justice system as elsewhere, have too often been instituted either without any evaluation or with evaluation that lacks sufficient rigor for a meaningful comparison of traditional and innovative programs.”

<sup>115</sup> Melton & Lind, *supra* note 36, at 73.

<sup>116</sup> *See id.* at 73-6.

to ask those who seek to change the process to demonstrate that the changes are beneficial. Or is it enough to set sail and hope for a better shore?

#### IV. SPECIAL ISSUES

Distrust of the adversarial process and acceptance of therapeutic justice have also created areas of concern in family court. This article will conclude by discussing three of these areas: (1) mandatory mediation, (2) the role of the judge, (3) proper person litigants.

##### *A. Mandatory Mediation*

One presumption behind the establishment of family courts relative to the adversarial process that litigants and their children are better served by alternative dispute resolution techniques than by litigation. Ellen E. Sward notes, "In family law, it is thought that adversarial procedure merely increases the contentious behavior of people who must ultimately work together, and that adversarial dispute resolution is therefore not appropriate."<sup>117</sup> The reasoning goes that if the parties agree, they have had input into the decision and will more likely comply with the agreement made.<sup>118</sup> Weinstein bluntly states, "The law is not the appropriate forum for assisting dysfunctional families to function better. Resolution of the legal case does little to resolve the underlying family dynamics which will haunt the parents and children into the future."<sup>119</sup> The goal of family court is, therefore, to make divorce as conflict-free as possible or at least to manage the conflict appropriately.<sup>120</sup>

---

<sup>117</sup> Sward, *supra* note 4, at 327.

<sup>118</sup> Katz, *supra* note 21, at 45-6.

<sup>119</sup> Weinstein, *supra* note 8, at 108. Presuming that "the law" gets out of the divorce business, what is it that will accomplish this resolution of family dynamics to the degree suggested by Weinstein? Much like the decision to divorce, the purpose of courts is not to totally heal the harm of divorce but to redefine the relationships so the parties can go on with their lives in the manner *they choose*.

<sup>120</sup> Martha Fineman, *Dominant Disclosure, Professional Language, and*

While American courts generally favor a policy of private ordering or settlement, family courts extend settlement management to situations in which the parties have not expressed an interest in settling.<sup>121</sup> It is one thing to appreciate and enforce private settlements but another to put litigants through formal settlement processes when they have indicated no desire to settle.

*Mandating* settlement processes raises significant policy and process issues. Deborah R. Hensler states the issue well:

A decade ago, decision-makers justified mandating mediation of lawsuits for money damages on the grounds that mediation would save courts and litigants time and money. Now that empirical evidence to support this claim has failed to materialize, decision-makers justify mandating mediation on the grounds that litigants prefer it to traditional litigation.

*Suppose that that's not true.*<sup>122</sup>

---

*Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 744 (1988).

<sup>121</sup> Bundy, *supra* note 17, at 3.

<sup>122</sup> Deborah R. Hensler, *Symposium: Suppose It's Not True: Challenging Mediation Ideology* 2002 J. DISP. RESOL. 81 (2002). In her article, Hensler surprisingly states:

I applaud efforts to mediate intractable group-based conflicts, where the alternative to talk is violence. I do not question the wisdom of courts providing mediation - or even insisting on it - in family law custody disputes, where there is a public policy interest in helping divorcing parents maintain a sufficiently positive relationship to enable them to adequately care for their children. I do, however, think courts should take more responsibility than they have to date for determining whether the programs they mandate actually improve outcomes for children. (emphasis added)

It is surprising Ms. Hensler is so willing to challenge the presumptions behind mandatory mediation in some contexts but not as applied to divorce and custody cases where she *assumes* the notion of benefit is obvious. Suppose that's not true.

She concludes that the “notion” that American litigants prefer to have their claim resolved through mediation rather than adversarial litigation “seems to be based on questionable assumptions and debatable extrapolations from other social conflict contexts.”<sup>123</sup> Bundy agrees there has not been a systematic account of the possible grounds for favoring settlement in mandated cases.<sup>124</sup>

The unjustified commitment to mandatory mediation seems to be based on competing stereotypes. The stereotypes picture all settlement as better than all litigation. John Eekelaar describes the situation:

In one corner, there is the traditional, contentious legal proceeding in which lawyers force their clients into the most adversarial position imaginable and then batter each other to the profit of nobody ... In the other corner, we have the sensitive, non-contentious mediator who discovers the common ground between two parties who do not really hate each other and do not really want to fight the matter out. This is the ADR model. The world is more complicated ... A recent study of divorce lawyer-client interaction indicates that most divorce lawyers advised their clients to try to settle the full range of issues in the case ... Indeed, it may be that divorce lawyers ... are readier than their clients to define the ultimate goal ... as the resolution of property and monetary issues and to exclude the emotional focus that clients bring to ... marital dissolutions.<sup>125</sup>

Bundy notes the policy favoring mandatory settlement appears to conflict with assumptions of the adversary process. Bundy notes the policy favoring mandatory settlement appears

---

<sup>123</sup> See *id.* at 85.

<sup>124</sup> Bundy, *supra* note 17, at 3.

<sup>125</sup> JOHN EEKELAAR, AND MAVIS MACLEAN, EDS., A READER ON FAMILY LAW 383 (1994).

to conflict with assumptions of the adversarial process. Those assumptions, of party competence and judicial impartiality, normally imply that when parties request a ruling from a court, the court should in fact provide a ruling. But as Bundy points out, settlement proponents maintain that the decision to continue litigation is "self-destructive," perhaps a result of "misplaced idealism, wishful thinking, or failure to consider the costs of contentiousness."<sup>126</sup> Continued litigation, he adds, is also attributed to lawyers' bad advice, inability to understand the client's case, or desire to pad fees.

Those familiar with the family court and its present processes are aware of the saturation that mandatory mediation and other settlement processes have produced in family courts. What suffers is legal process. Legal process meaning not only the adversarial process but also that core of processes we call "due process."<sup>127</sup> It takes a great deal of courage for a litigant to seek a trial when his request is viewed as a failure on his part as well as a failure of the system. But failure is how such a request must be viewed if the assumption is that settlements are always the best solution.

Mandatory settlement techniques, however, involve more than simply encouraging or even overly encouraging settlement of cases. Fineman asserts that what is occurring by this settlement process is a shift in the decisionmaking process

---

<sup>126</sup> Bundy, *supra* note 17, at 11-12.

<sup>127</sup> Fineman, *supra* note 120, at 769-70 states:

A legal model that relies on both legislative and judicial institutional roles in formulating custody rules would have to give some credence to traditional legal values such as procedural due process: the right to a hearing, the right to cross-examine witnesses, and so on. Mediators are free to criticize or ignore these aspects of the adversary system. Yet these legalisms are not vestiges of an arcane system; they embody a consensus about important values in our society. In fact, because there seems to be greater consensus about the importance of due process values than about what constitutes an ideal or even acceptable family, shouldn't custody decisionmaking rules comport with *these* values?

from the court to the helping professions.<sup>128</sup> Her conclusion may seem radical, but her justification is based in the language of family courts:

Language has played a critical role in the reform process that has shifted decisionmaking authority to mediators and the helping professions. The rhetoric employed criticized the traditional systems and established an alternative that called for skills possessed by the helping professionals. Yet the rhetoric has occasioned more than a transfer, formal or informal, of responsibility for making the ultimate decision in contested cases. More importantly, it has invoked changes in the substantive rules by which cases are resolved. The domination of social worker ideology and rhetoric now appears complete. It is inconceivable that one would seriously consider custody policy and practice without using the rhetoric and addressing the concepts and values of the helping profession.<sup>129</sup>

The advent of therapeutic justice and the introduction of mandatory mediation has not only impacted the decisionmaking authority of the courts but has had an impact on substantive law. The clearest example is the radical change from sole to joint custody preference – a change Fineman views as leaving custodial mothers as a group disadvantaged.<sup>130</sup>

---

<sup>128</sup> See *id.* at 729, where the author concluded, “I do not think the solution to the undeniable problems associated with the adversarial model is simply to turn over the decisionmaking to another professional group.”

<sup>129</sup> See *id.* at 753.

This also ties back to the criticism of judicial training for family court judges. It is argued that judges lack the training and education that social workers have received. Thus, judges are less capable of making good decisions than are the mediators, evaluators, and numerous other experts trained in family law. Of course, no discussion is made of due process.

<sup>130</sup> See *id.* at 729-30, 732-33. See also Eekelaar, *supra* note 125, at 367,

Whether mandatory mediation is better than traditional litigation processes is not clear. One of the manifest benefits of mandatory mediation would seem to be a savings in cost for the litigants. But the Australian Law Reform Commission states one must remember family courts blend adversarial and non-adversarial approaches and that such blended systems may actually increase costs if the process (1) predisposes parties to litigate rather than settle, (2) delays the time in which matters settle, (3) increases delays through the complexity of proceedings, or (4) maximizes the issues and complexity of proceedings.<sup>131</sup> Eekelaar notes a Denver project concluded the costliness of divorce proceedings was only modestly affected by clients whose cases were resolved by mediation.<sup>132</sup> Recognizing most cases settle without trial or are uncontested regardless, the issue of whether mandatory mediation results in cost savings is unknown.<sup>133</sup>

The arguments over which process, mediation or litigation, is better will continue. Mediation is said to have the following advantages:

1. The parties will be more likely to comply with a mediated agreement.
2. The process promotes decision-making by consent.
3. The process is informal.
4. The process is more expeditious.
5. The process is less expensive.
6. The process is better able to discover and address underlying emotional issues.

---

where Eekelaar notes there is ample evidence that mediators prefer joint custody arrangements and encourage those involved in the mediation process to adopt such an arrangement.

<sup>131</sup> AUSTRALIAN LAW REFORM COMM’N, *supra* note 7, at 14.5.

<sup>132</sup> EEKELAAR, *supra* note 125, at 369. For a more general response to the claim the adversarial process is more harmful to litigation, *see id.* at 377.

<sup>133</sup> *Id.*

7. The process is not bound by legal rules and technicalities.<sup>134</sup>

Those benefits are subject to challenge. Savings have not been demonstrated and the disregard for process comes at a cost. "Technicalities" and legal rules exist for reasons, one of which is the protection of the disadvantaged. Most of the complaints about the mediation process relate to its inability to protect the weaker person involved. The primary disadvantage of the mediation process generally is that where there is unequal bargaining power between the parties, unfair agreements result.<sup>135</sup> The process may involve parties who have unreasonable expectations and who are not rational.<sup>136</sup> Further, mediation prefers harmony to substantive issues. Next, court decisions tend "to bring a psychological end to the ambiguity of relationships in which the child" and family find themselves.<sup>137</sup>

Finally, there are circumstances where mandatory mediation may not only be unproductive but may produce harmful results. This is the case involving highly conflicted couples. Prof. Elrod concludes, "Court-mandated mediation may be inappropriate, and even dangerous, in high conflict cases, especially for women."<sup>138</sup> Not only is mediation not productive in high conflict cases, but also the disputants in high conflict cases prefer procedures that call for binding decisions.<sup>139</sup>

#### *B. Role of the Judge*

Returning more directly to the components of the adversarial process, the role of the judge in family court

---

<sup>134</sup> Katz, *supra* note 21, at 53-54.

<sup>135</sup> See *id.* at 54.

<sup>136</sup> Bundy, *supra* note 19, at 11.

<sup>137</sup> Melton & Lind, *supra* note 36, at 76.

<sup>138</sup> Elrod, *supra* note 67, at 527-28.

<sup>139</sup> Melton & Lind, *supra* note 36, at 71. The issue raised is if 90 percent of all cases settle before trial and mandatory mediation is ineffective or inappropriate for high conflict cases, does the emphasis on mandatory mediation justify the effort. The issue is especially appropriate in view of the impact that mandatory mediation is having on the resources of family courts.

presents a dramatic challenge. There is no identity crisis greater than that of a family court judge. On the one hand, the judge is expected to be neutral. The process is left to the parties, and the court intervenes only to resolve disputes necessary to keep the process moving fairly to conclusion. Due process matters very much. Procedures and rules matter less. Decisions are subject to review by higher authority, and those reviews fully apply well-established rules of law and procedure, including rules of evidence.

On the other hand, with the specialized family court comes specialized training and expertise. Family court judges live in the world of child custody disputes and other divorce issues. They are involved in more cases, hear more experts, and receive more training than all others involved in the jurisdiction. The temptation, and the reality, is that the judge becomes a force in family court. Further, with the advent of therapeutic justice and its emphasis on problem-solving, procedures and rules become tools (to help solve the perceived problem) or barriers (standing in the way of doing what is therapeutically right). And it is difficult for the judge/expert to remain idle and leave the important issues regarding children to others. The judge is morally compelled to begin to "manage" the cases. Of course, the greater good of children overrules and justifies such interference. Conversely, any judge who defers to procedure and rules opens himself to criticism that he/she does not care about children.

Questions about the role of the managerial judge are not limited to family court. Given the present emphasis on outcomes, judges are expected to do more and more managing. And there is no doubt management decisions can impact the substantive result of a given case. The issue is how far can or should judges in any court go in managing cases?

I make no challenge to the judicial management of court calendars or efforts to decide pretrial procedure or substantive law issues required by statute or court rule. But since settlement is preferred over trial, especially in family court, the issue is how far should the judge go in seeking to help litigants settle matters without trial?

Initially it must be emphasized that judicial activism in promoting settlement is probably a flawed policy. Prof. Peterson summarizes recent criticism of judicial settlement efforts:

First, many scholars question the practical usefulness of judicial involvement in the settlement process. For example, Professor Resnik has argued that “most researchers have concluded that intensive judicial settlement efforts do not lead to more dispositions than would otherwise have occurred.” ... More fundamentally, several commentators have argued that settlement pressure may result in second-class justice for the poor or the powerless. As Professor Owen Fiss has argued: “Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done.”<sup>140</sup>

The difficulty is the family court judge is committed to the concept of therapeutic justice and desires early intervention in the case. In fact, it is difficult to argue with the premise that if your committed goal is to solve problems, the sooner the better. The only competing philosophy is that because cases are likely to settle without judicial intervention in most cases anyway, judicial intervention is not justified.

Bundy asserts there are three models of judicial intervention in settlement efforts: facilitator, counselor, and optimizer. He defines each as follows: “The facilitator aims to prevent bargaining breakdowns. The counselor seeks to ensure

---

<sup>140</sup> Todd D. Peterson, Article: *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging* 29 U.C. DAVIS L. REV. 41, 75 (1995). Prof. Peterson’s article primarily concerns the rise of the concept of the managerial judge and the lack of checks that presently exist on the activities of such judges.

prudent party decisionmaking. The optimizer seeks to attain the result that best serves the public interest.”<sup>141</sup> In summarizing his position regarding the types of judicial intervention, he concludes:

Of the three approaches, only facilitative intervention appears clearly justified. Continued litigation resulting from bargaining breakdowns is unlikely to serve either private or public interests … The costs of facilitative intervention also seem relatively low. The overall case for facilitation seems sufficiently strong to justify granting judges some authority to require limited participation by lawyers or parties … Judicial participation as a counselor or optimizer, however, seems likely to do more harm than good. The private and public benefits of such interventions are far less clear and the costs far higher. *Parties should not be compelled to participate in such mediation, and it is doubtful whether judges should provide counseling or optimizing mediation even to parties that seek it.*<sup>142</sup> (emphasis added)

### C. Proper Person Litigants

Part of the difficulty in returning to an adversarial court is litigants no longer bear the responsibility for process under the present family court system. The adversarial process presumes the assistance of competent legal counsel to assist litigants in both meeting the legal requirements of their cases, such as protecting process, and preparing and presenting their version of the case to the neutral, passive trier of fact. Under the inquisitorial process, the judge bears responsibility for the process and attorneys largely protect the process for their clients. The inquisitorial process makes no presumption of legal representation.

The challenge of legal representation for all litigants

---

<sup>141</sup> Bundy, *supra* note 17, at 6.

<sup>142</sup> *Id.* at 6-7.

has always been difficult in divorce litigation. The goal has been to encourage attorneys to provide *pro bono* representation for those who cannot afford legal services. Legal aid services are also available to assist some divorcing litigants. Furthermore, if one spouse was disadvantaged by lack of funds, the other spouse could be expected under a court order to contribute to the legal costs of the opposing spouse.

Before the advent of family court there was a clear understanding that legal representation was preferable, if not compulsory. But this changed, Katz notes, "Because, as with other civil matters, the legal costs of divorce have increased . . . there has been a consumer demand both to simplify the divorce procedure and to make divorce available without a lawyer.<sup>143</sup> The result has been summary proceedings, simplified divorce procedures, and mediation.<sup>144</sup> Another result is more people choose to represent themselves, called *pro se*.

While the increase in self-representation was initially believed to be the result of lack of money,<sup>145</sup> as time passed it became clear that those choosing to represent themselves were doing so regardless of their ability to pay for legal services.<sup>146</sup>

---

<sup>143</sup> Katz, *supra* note 21, at 53. The advent of therapeutic justice must also be considered as a factor increasing the cost of divorce.

<sup>144</sup> *Id.*

<sup>145</sup> Babb, *supra* note 71, at 472-73. Babb states:

Complicating this situation is the fact that almost half of all family law litigants are not represented by attorneys, primarily due to the litigants' inability to afford private counsel or to secure free legal services.

<sup>146</sup> While the scientific validity of the sample could be clearly challenged, a survey by the Clark County, Nev., Self-Help Center demonstrates a point. The funding for the Self-Help Center for divorcing litigants was premised upon the lack of available legal services for poor parents. It was presumed the Self-Help Center was being accessed by those who financially needed the service; after all, significant governmental expenditure was being committed to the operation of the center.

The poll asked the question of where else those accessing the center had sought information about their divorce or custody matter. The vast majority first sought information from the Self-Help Center, having made no inquiry from an attorney regarding whether they could afford the

In a straightforward statement of the situation, Robert A. Miller explains:

For many years, the assumption has been that it is primarily the poor who represent themselves in court because they do not have the resources to hire attorneys. If that ever was the case, it seems that the landscape had changed dramatically. The participants' responses to a pre-conference survey revealed that the typical pro se litigant is a woman with at least a high school diploma who is seeking assistance for the first time in matters related to divorce ... [T]he reasons that she and other litigants are choosing to represent themselves in court extend well beyond personal finances. One reason ... is a general distrust of attorneys. Another is that there is now so much information available from a variety of sources ... that the courts have become less mysterious, and the public has become more comfortable interacting with them.<sup>147</sup>

The two reasons given by Mr. Miller for the disinclination to use attorneys is interesting. The first relates to the devaluation of attorneys. The participants viewed the services of attorneys as not being worth much. In fact, there is a perception that attorneys might actually be harmful to a client's cause. The difficult question is whether the basis for this attitude exists in fact or whether it is the product of a transmuting family court system that is shifting to a inquisitorial process that values legal representation less. Andrew Shepard makes the case that it is the way attorneys practice that devalues what they do:

Many pro se litigants can afford lawyers. They do not seek the legal representation they need

---

services of an attorney. Clark County Family Law Self-Help Center, *Clark County Family Law Self-Help Center Survey* 70 (July 2004).

<sup>147</sup> Robert A. Miller, *In Re Pro Se Litigants*, 10.3 STATE JUST. INST. 4 (1999).

because they fear ... getting sucked into the vortex of conflict ...

A recent empirical study reported an ‘overall consensus that the attorney’s roles and responsibilities in the divorce process are not translating into actual practice. The parents and children did not feel that they had adequate representation ...’ Parents in the survey felt that the process was too long and never formalized, too costly, too inefficient, and was taking control of their lives. ‘Many of the parents did recognize that they were already feeling angry and hostile, but 71 percent of them maintained the legal process pushed those feelings to a further extreme.’<sup>148</sup>

Miller’s second reason why disputants did not seek legal counsel relates to the availability of information in “user-friendly” formats. Clearly, he is referring to education classes, self-help centers, and paralegal services. In other words, litigants are being *encouraged* not to obtain legal counsel but rather to represent themselves. They are *invited* into the court process.<sup>149</sup> The implication is attorneys have no value because those services can be done by anyone *and* private and public institutions will assist *including the family court itself*.

The court’s role in the encouraging of *pro se* litigation

---

<sup>148</sup> Andrew Schepard, *Special Issue: Family Court Reform: Law Schools and Family Court Reform*, 40 FAM. CT. REV. 460, 462 (2002). It is easy to conclude that the clients’ complaints reflect on the quality of legal representation. But it might be that the failures of the system as a whole are being projected onto attorneys. Further, the transitional process of divorce also impacts how clients view their experience. Perhaps the lesson to be learned is that it is the prudent speed through which the process is completed that is fundamentally important.

<sup>149</sup> John A. Goerdt, *Divorce Courts: Case Management, Case Characteristics, and the Pace of Litigation*, 16 URB. JURISDICTIONS 43 (1992). In his analysis of the pace of litigation in divorce cases, Goerdt found the difference between representation and non-representation in divorce cases was explained primarily by “whether courts provide ‘do-it-yourself’ divorce information or an expedited process for uncontested divorces.”

cannot be minimized. On the one hand, by adopting the concept of therapeutic justice, the court accepts responsibility for solving the problems of the family. Those who enter, and many are encouraged, are delivered to the hands of the therapeutic process and the lack of party control that comes with the process. Attorneys are devalued because the court bears responsibility to make sure certain cases are appropriately resolved. On the other hand, now the judge is faced with confusion over the proper process: two litigants before him, one represented, one not. He/she may be faced with two litigants on the date of trial – neither of whom speak English.

The blunt fact remains that family courts, as courts, operate under rules and procedures. When parties are allowed access to the present court system, they are done a disservice. Self-help centers provide help with forms but do not provide legal representation before the court. Helping a person only halfway across the river is not a service. The issue is, who or what is going to get the person across the river? If attorney services are devalued and if the court encourages litigants to enter in a “user-friendly” fashion, the judge at trial must give up the cloak of neutrality. The court must assist the weaker party. The court must be prepared to be responsible for the process. The court must also be prepared for some criticism by those who understand legal process, including due process, and who complain that rules are important.

But the court cannot complain. It was the court that invited the litigants to forego attorneys services for the cheaper services of the court. The courts do not set income guidelines on access to self-help centers; they encourage everyone. What the courts have not done is define what happens after the forms are complete and the litigants, having been through an unsuccessful mandatory mediation process, now face the judge. More critically, no one has told judges what is to be done. Appellate courts probably believe the family trial courts are following the rules of evidence and procedure attached to the adversarial process.

The fundamental conflict between the adversarial and inquisitorial processes in family court is most evident when litigants are standing in the presence of the judge. An Australian court stated it simply: "In this regard there is very little a court can do. Its role is to decide cases as between litigants and it cannot perform that role and retain the confidence of litigants if it is proffering advice to one side or the other."<sup>150</sup>

The Australian Law Reform Commission asked some critical questions not yet answered by the proponents of the family courts in the United States. The questions are:

- How are *pro se* litigants under the present system to gain help understanding the procedures during a hearing, presenting and closing a case, testing by cross-examination the evidence of an opponent, and preparing for and presenting an appeal?
- In what type of proceedings before the family court should legal representation be considered essential?
- Should *pro se* litigants be encouraged, discouraged or accommodated?
- Should representation by non-lawyers be encouraged or accommodated?<sup>151</sup>

The family court has invited the *pro se* litigant. The *pro se* litigant has accepted the invitation in droves.<sup>152</sup> The

---

<sup>150</sup> AUSTRALIAN LAW REFORM COMM'N, *supra* note 7, at 11.20. See also Katz, *supra* note 21, at 55, where Katz notes that in addition to the problems created by courtroom situations, *pro se* cases also cause difficulty by the fact that *pro se* litigants are unable to understand how to process the cases in an orderly fashion.

<sup>151</sup> AUSTRALIAN LAW REFORM COMM'N, *supra* note 7, at 11.6-7.

<sup>152</sup> Goerdt, *supra* note 149, at 43. The author found that in 72 percent of the cases he studied at least one or both of the parties were in *pro se*; see also Judicial Dep't., Statewide Family Law Advisory Committee, *supra* note 53, at 484. More conservatively, the Oregon Task Force in Family Law found that in at least 42 percent of all family law filings in Oregon, *neither* side had an attorney.

dramatic increase in *pro se* litigants causes special challenges. Some of those challenges are fundamental to the structure of the adversarial process, so fundamental that the continuance of that process is in jeopardy. Research indicates there is an adversarial preference by litigants in the dispute resolution process. Only by casually setting aside the process and ignoring the research of Thibault, Walker, and their students can therapeutic justice proponents in family court get where they are headed. Are we really prepared to give up the concepts of justice and fairness that the adversarial process brings for the sake of consumer-friendliness?

### **Conclusion**

Where does all this take us relative to the adversarial process in family court? The most fundamental issue to consider is whether courts are going to continue to resolve divorce and related issues. While there is little movement to make divorce an administrative procedure of some sort, continuing court involvement in therapeutic proceedings means the integrity of the court as an institution will be damaged. If the policies and procedures advancing therapeutic justice are to continue, changes to existing processes and procedures must take into consideration that the court as an institution is being changed. Changes should be made responsibly, maintaining the integrity and image of courts.

Next, if courts handle family matters, how is the process to look? As noted, absent some imaginative distortion, it can be expected that if the adversarial process dissipates, a hierarchical or inquisitorial process will result. This shift not only envisions a change in simple process but a fundamental change in the role of government. Instead of the American tradition of limited governmental involvement, government will accept a much more active role. Instead of letting individuals make their own way within a broad, acceptable spectrum, government will define the better life and seek to impose that definition on divorcing families. Government will dictate custody preferences, child support amounts, and other

rules that in its opinion benefits its citizens; citizen discretion is restricted.<sup>153</sup> The therapeutic process begins.

Under the inquisitorial process, lawyers become protectors of process, not advocates. The process becomes a hearing, not a trial. The process becomes bureaucratic. By bringing the case, the disputants deliver their cause to the bureaucratic system.

But for some reason, disputants do not prefer the inquisitorial process even though it is understandable that governments and those involved in instituting and continuing the process might. Disputants do not think it is fair or just. Disputants want to control the process and want their day in court. They want a neutral, fair judge. They want a decision by that judge, but they do not want him or her involved in the process that lets them present their case. So why can they not have their adversarial trial? Why do we have family courts that seek to dramatically change the process if the change is not needed?

The answer is that prior to the existence of family courts, general jurisdiction judges were assigned civil, criminal and family law cases. For whatever reason, family law cases seemed to fall to the bottom of the trial calendars. In spite of the child custody issues and what should have been a shortened time to resolution,<sup>154</sup> domestic cases fell behind other types of proceedings. The Pennsylvania Court Commission concluded the slow processing of family court cases was based on the theory "families were best equipped to

---

<sup>153</sup> It is obvious that with joint custody preference and child support guidelines, this process has already begun.

<sup>154</sup> JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 42-43 (1973).

The courts, social agencies, and all the adults concerned with child placement must greatly reduce the time they take for decision. While the taking of time often correctly equated with care, reasoned judgment, and the assurance of fairness, it often also reflects too large and burdensome caseloads or inefficiently deployed resources. Whatever the cause of the time-taking, the costs as well as the benefits of the delay to the child must be weighed.

handle their own situations and given enough time, would find their own solutions without the court interference.”<sup>155</sup> I suggest another reason for the failure is the nature of divorce trials. While the expression, “I don’t know how you do what you do” is not unique to family court judges and attorneys, it is certainly more common to them. Regardless, we now have a court system that must try domestic cases because that is essentially all the courts are assigned to do. There is no choice between a good fender-bender and volatile domestic case. The domestic case must be resolved.

Mlyniec and Geraghty offers seven observations about the unified family courts:

1. The idea isn’t new. Juvenile court proponents proposed similar reforms years. Because those reforms became more and more oppressive, the Supreme Court intervened and required more legal protection for children;
2. The “one-judge, one-family model” may increase efficiency but creates due process problems when judges become too familiar with cases;
3. The court’s role as a forum for dispute resolution is weakened when judges must focus on other issues;
4. Unified family courts mix civil and criminal jurisdictions, which gives rise to complicated legal issues;
5. The cost of implementing such courts might be better used to fix systemic problems or to offer families in the legal system better treatment options;
6. The term “unified family courts” may simply be applied to weak reforms that do not really “unify” family courts at all.

---

<sup>155</sup> Domitrovich, *supra* note 59, at 9. The Commission noted the cases did not fade away, “rather, situations get worse if left to linger.”

7. No studies have been done to show that unified family courts are more effective than the previous systems; therefore claims of success cannot be substantiated.<sup>156</sup>

In spite of Mlyniec's observations, the therapeutic process of family courts continues with strength and vigor.

Have we gone too far to turn back? Probably not. However, it is clear that a return to an adversarial model will require the same commitment and vision about the propriety of adversarialism as the commitment that has been made to therapeutic justice. Recognizing the value and nature of our courts as institutions will be necessary. We will need to understand that substantive and procedural law matters, that rules of procedure and rules of evidence matter, and that how those both inside and outside the process view the workings of the court matter. We need to commit to a clear understanding of what judges are expected to do and whether attorneys have relevance beyond casually protecting "process."

Alternatively, are we prepared to give up judicial neutrality and passivity for a process that reflects government's view of the better divorce? If so, let's say so and then plan how to enact this goal. To date we have allowed the rhetoric to carry the family courts from shore to the open sea. Perhaps we should return to familiar shores and address the concerns raised there.

---

<sup>156</sup> Geraghty & Mlyniec, *supra* note 46, at 436