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Judge Michael A. Town



Circuit Court of the First Circuit

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MEMORANDUM

TO: Joey Binard
FROM: Judge Michael A. Town
DATE: March 17, 1994
SUBJECT: Recent speech on unified family court

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I really enjoy Technical Assistance News. I thought the attached speech and copy of the overheads used might be of interest to your many readers. This talk was coordinated via Jeff Kuhn as well.

With warm regards

attachments

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THE UNIFIED FAMILY COURT: THERAPEUTIC JUSTICE FOR FAMILIES AND CHILDREN

Address by Michael A. Town, Judge
Circuit Court of the State of Hawaii

Sponsored by the Children and Family Justice Center of the Northwestern University Legal Clinic and the Justice for Youth Campaign of the Chicago Bar Association/Foundation

Chicago Bar Association Building
Chicago, Illinois
Friday, March 11, 1994

THE UNIFIED FAMILY COURT: THERAPEUTIC JUSTICE FOR FAMILIES AND CHILDREN

1. Introduction

How deeply into the domestic realm can or should government go when it intervenes in the lives of families and children? Conversely, what is government's duty to families and children who are in legal and social distress? These political and philosophical questions still bedevil public officials in America today. Yet when society chooses to intervene, it must be done well and there must be accountability.

Because of growing community concern many jurisdictions across the country are actively reforming and reinventing their juvenile and family justice systems with the goal of not only adjudicating the legal problems of families and children but providing help and accountability.¹ We are seeing the development of what might be called a "therapeutic justice movement". In this way society will hold itself accountable for the well being of families and children in legal and social distress via a unified family court which is well organized and has a defined mission. In such cases the

justice rendered will hopefully be fair to all and be helpful or therapeutic in nature rather than merely punitive or reactive.²

This movement towards therapeutic intervention by the courts first began in 1874 when a severely abused and neglected ten year old child, little Mary Ellen Cormack, was brought before the New York Supreme Court by Henry Bergh, the founder of the American Society for the Prevention of Cruelty to Animals. Men wept at the sight of poor Mary who spoke of being whipped daily, never held nor hugged by her caretakers, and never allowed out into the street. The public was legitimately outraged that society had no way to protect such children other than invoke the "cruelty to animals" statutes and utilize Mr. Bergh, who was famous for his dramatic rescue of mistreated horses in the streets of New York.³

Over one hundred years later we find the courts still questioning their roles in adjudicating and protecting children and families as evidenced by the United States Supreme Court decision of DeShaney v. Winnebago County.⁴ In that case Joshua DeShaney was refused redress in federal courts notwithstanding his suffering permanent brain damage at the hands of his caretaker and due to the inexcusable oversight of the Child Protective System in Wisconsin. Justice Brennan stated in his dissent that "inaction can be every bit as abusive of power as action (and) oppression can result when a State undertakes a vital duty and then ignores it".

If indeed the family court is the sentinel for the well being of

our families and children in distress, how well it is doing? Is the court truly committed to both due process and therapeutic justice for America's children and families? Will the justice provided protect the families and children before the court? Will it reduce emotional turmoil? Will family harmony be promoted? And will it reflect an efficient, effective justice system?

2. The Family Court Resource Center of the National Council of Juvenile and Family Court Judges (NCJFCJ).

The NCJFCJ, as the oldest and largest judicial membership organization in the United States is actively promoting the concept of a unified or closely coordinated family court. To that end the Council's Family Court Resource Center now assists jurisdictions in constructing their own versions of the unified family court.⁵

Jeff Kuhn, the Center's director, informs me that nine states now have a unified family court by statute or rule and five more are about to authorize such courts with over 27 states actively studying the concept. He has received over 100 inquiries from groups and localities across the country requesting information since the Center opened in late 1992. The Council sponsored a highly successful National Family Court Symposium in 1990 and issued a widely read report. Based on the symposium attendance and the subsequent formation of the Center, it appears that this is an idea whose time has most definitely come.⁶

What localities seem to want is good solid data or comparable experience for them to ponder and then make their own decision. We do know that each locale must come up with its own plan and there is no one perfect template for a unified court system. Each community and legal or justice culture has its own way of conducting its affairs which should be respected.⁷

3. Why A Unified Family Court?

What is broken that needs fixing? Why put the courts, attorneys and agencies through a major institutional change? One helpful technique in assessing a justice system is for each locality to identify the "iatrogenic" effects of the court system that might produce unintended harm to the families and children who come before us. "Iatrogenic" is a medical term designed to highlight how a harm can be induced unintentionally by a physician or treatment. We might coin a new term such as "jurigenic" to describe how a judicial system intended to help families and children can inadvertently harm them.

In a judicial setting such negative or "jurigenic" effects could consist of:

- * Forcing children to testify when they do not have to, thereby further traumatizing them;
- * Requiring multiple interviews of children by different interviewers causing them greater emotional distress⁸;
- * Failing to identify, report and protect children, women and other victims at risk of domestic violence resulting in

further injury or even death; 9

- * Allowing excessive attorney fees thereby financially harming the families;
- * Allowing unnecessary delays in adjudication and services causing them to suffer unnecessarily;
- * Issuing conflicting or duplicative court orders; and
- * Ordering inappropriate services.

Judges, attorneys and community leaders have a key role to play in promoting therapeutic justice and preventing these jurigenic effects. There are a multitude of seemingly impossible tasks which confront the judge and justice system. Judges have to be many things: legal experts, collegial in nature yet firm and authoritative in court, conversant in social work, psychology, child development, group dynamics, mediation, taxation, science and more. Perhaps Mark Twain said it best about what a judge goes through when he spoke of what it took to be a river boat pilot. He observed that:

"there are two things about a pilot. In order to be a pilot a man has to learn a lot more than any one ought to be allowed to know and the other is that he must learn it all over again in a different way every 24 hours."

4. The Hawaii Family Court

Consider the hypothetical example I have handed out (attached). I am told by many judges that it is not an exotic example but all too real for those of us who sit in a unified court system. Please

think about how your judicial system would respond to this all too typical family legal problem.

- * Would all of these cases come to one courthouse?
- * Would one court or one judge be able to hear all of these cases?
- * Would one judge (or the judge's staff), have the training and skills to deal with all of the legal and social issues presented?
- * Would there be family court staff available to conduct assessments, divert or mediate all or part of the case and protect the litigants from further harm?
- * Would the children be the focus of the proceeding at some point?
- * would the children be adequately represented by a CASA or attorney GAL?

Let me discuss the Hawaii Family Court from the perspective of the example.

a. Authority: The Hawaii Family Court was established by statute (1965) and has a separate set of procedural rules promulgated by the Hawaii Supreme Court.

b. Jurisdiction: The Court has four divisions:

(1) Juvenile division: the traditional juvenile court jurisdiction (delinquency, dependency, termination of parental rights, waivers, detention);

(2) Domestic division: domestic relations court jurisdiction (divorce, paternity, UCCJA and other custody matters);

(3) Criminal division: criminal actions among family members such as misdemeanors between spouses and felonies between parents and children (including murder and sexual assault).

(4) Special division: This is a "catch all" including guardianships of children and adults, civil protection orders in domestic violence cases, mental commitments, adoptions, and adult abuse cases.

This is the widest jurisdictional reach of any family court in the United States. Missing are the criminal trials in adult court of juveniles waived, probate and guardianships of the property, felonies between spouses and intrafamilial tort cases.

c. Judges: Hawaii's judges apply for and are appointed directly to the Family Court. They are trained by the NCJFCJ and within the Family Court. There are 10 full time and 5 part time judges who sit in the same courthouse, meet regularly enjoy healthy collegiality. A yearly two day statewide symposium is held to discuss procedural and substantive issues and proposed systemic improvements. Consistency and uniformity are attempted where proper and the judges rotate among 4 divisions: juvenile, domestic, criminal and special. There are benchbooks and courtroom "scripts" for each calendar. A "court observer" program has been instituted to allow for some judicial evaluation as to temperament, fairness and effectiveness.

d. Nature of Cases, Volume and Location: The unified family court is in some way the judicial equivalent of a hospital emergency room. Of the 30,000 filings per year a quick judicial response is often needed to obtain domestic violence restraining orders, temporary custody orders, removals of abused children from unsafe homes, detention hearings, emergency mental commitments, and arraignments and bail hearings for adults within 48 hours of arrest. The location of the Family Court downtown maintains its position as fairly accessible to the parties, their counsel and agency personnel as a court of equal status with other courts, and encouraging a healthy cross section of the bar to practice there.

e. Staffing: Training social workers provide intake probation and case monitoring to our families in the area of delinquency and dependency. They perform social studies in contest custody matters be it divorce, paternity, guardianship or adoption. The court also utilizes highly trained bailiffs, court clerks, program specialist, law clerks and others who are cognizant of the complex and often emotional nature of the cases before it.

f. Bar: The Family Law Section of the bar is the largest section among our entire unified bar. The juvenile law section (called the Child and Parent Advocates Section) is quite active. Both sections meet monthly with informational and educational programs with the judges attending and participating.

WHAT BENEFITS IN A FAMILY COURT?

a. Systematic improvements of substance and form: Because virtually every family related legal problem comes to one courthouse, some remarkable similarities among cases can be identified. Once identified we try to apply generally recognized social work and case management principles to all cases across all the calendars. These include:

- * early assessment and intervention
- * diversion
- * alternative dispute resolution
- * family preservation
- * a sensitivity to domestic violence
- * consistent child representation
- * case coordination before one judge or one division

b. Standardizing roles: The Hawaii Family Court promulgated a uniform GAL job description which is driven by the child's needs and not the specific docket or calendar in which the case is heard. Hence the child should get the same representation regardless of whether it is a custody in divorce, child protection, adoption or paternity case and regardless of whether the GAL is a CASA volunteer or attorney.

c. Standardizing orders and procedures: As one example there were about 10 different kinds of restraining orders in domestic violence cases so the court standardized the restraining order in concert

with the bar and police so it is both recognizable and enforceable.

d. Auditing all cases for Alternative Dispute Resolution: On ADR/mediation was considered across the calendars or dockets to see where it might work. Divorce, paternity, juvenile restitution, child protection disposition and service plans are in place or in process. How mediation fits with domestic violence is one of the big issues nationally and locally as you no doubt are aware.

e. Therapeutic Diversion: For example, the courts is considering diverting the real difficult divorce and paternity custody cases into a "custody commissioner" model where "guided mediation" can hopefully keep these very adversarial couples out of court and in counselling. This is another facet of a commitment to "therapeutic jurisprudence".

f. Review regarding Public Access and Confidentiality: Confidentiality was and still is closely scrutinized with an eye towards opening up the courtrooms and the files except where the legislature mandated closure or in exceptional cases. In this circumstance accountability and therapeutic jurisprudence may collide. Confidentiality may be as harmful as it is helpful and that professional crisis management techniques may require divulging a great deal of information necessary to ensure public confidence and accountability.

g. Accountability via Death Reviews: Where the children or adults are killed or seriously injured and already known to the court via a divorce, dependency, delinquency, civil protective order or other proceeding, the judges or staff may conduct an informal "death review" to see if the situation could have been differently handled. This is similarly to a calamity conference in a medical setting where system and staff improvement is the mission. In my view this procedure needs to be standardized and its essential for system improvement and to preserve public confidence. Unfortunately such deaths take place all too often and must be deliberately dealt with. These deaths cannot simply be seen as an unavoidable by product of the system thereby leaving it to the media and grand jury to investigate.

6. What Drawbacks In A Family Court?

a. Burnout (Shelflife) of Staff and System: There is a real risk of judicial and staff and system burnout by compacting these cases into one system. A unified family court can be very overpopulated with cases, staff and litigants as well as emotions. It represents the frontline of the judiciary and it is not unlike an emergency room or field hospital mentality at times. Such a situation must be met with training, encouraging collegiality, rotation within and without family court and providing for down time where needed to prepare decisions. The annual symposium is a quality professional experience which should be replicated elsewhere.

b. One Court/One Family is not the norm in a metropolitan area:

Complex or multiple related cases are nettlesome as they require coordination which is hard in a high volume, multiple jurisdiction court. We try to consolidate these cases for hearing once a case is identified and designate the case "complex" so one judge can follow it. My impression is rural or smaller courts would have an easier time than a large urban court. They are family courts by coincidence rather than design and are more amenable to the one judge one family concept.

e. Maintaining quality: High volume yields an impulse to move the case load without spending sufficient time on the merits and dynamics involved. We pay great attention to emergencies and complex cases, but some of the more generic cases require greater attention in my view.

4. Conclusion

A well organized and unified family court will provide a prompt and fair resolution of the unique legal problems of children and families. In doing so it will:

- (a) help save lives
- (b) reduce emotional turmoil
- (c) promote family harmony as much as possible
- (d) enhance efficiency and effectiveness¹⁰

It is an idea that will truly "count for the future". It will build in a commitment to therapeutic justice based on the very work

you do.

I do not think that a unified family court will necessarily make your job a whole lot easier. You will still have to learn more than any one man ought to be allowed to know and learn it over again in a different way every 24 hours. But, you will hopefully find it immeasurably more rewarding, more beneficial to the families you serve and reduce dramatically the negative effects now built into the system. I believe the work you do is critical to the well being of our society and truly makes a difference.

Endnotes:

1. See D. OSBORNE and T. GAEBLER REINVENTING GOVERNMENT (Addison-Wesley, 1992). The authors urge a rethinking of government by encouraging public officials to steer rather than row, to inject competition into service delivery, to replace rule driven organizations with mission driven organizations, to prevent rather than cure, and to meet the customers' needs, not the bureaucrats' needs. The book has received wide critical acclaim and is particularly applicable to the entire justice system including the family and juvenile system.

2. Much has been written about therapeutic jurisprudence which is the study of law as a therapeutic agent. Professor David Wexler of the University of Arizona College of Law has pioneered in this area. See e.g. DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS THERAPEUTIC AGENT (1990); DAVID B. WEXLER 7 BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE (1991); David B. Wexler, "Therapeutic Jurisprudence and the Criminal Courts", 35 William & Mary Law Review 279 (1993); David B. Wexler, "Justice, Mental Health, and Therapeutic Jurisprudence", 40 Cleveland State Law Review 517 (1992); David B. Wexler, "Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship", 11 Behavioral Sciences and the Law 17 (1993).

3. For some history and discussion of the Mary Ellen case see: Stevens and Eide, "The First Chapter of Children's Rights", American Heritage p. 84 (July/August 1990); Watkins, "The Mary Ellen Myth: Correcting Child Welfare History?", 35 Social Work No 6 pp. 500-503 (November 1990).

4. 489 U.S. 189 (1989).

5. For information regarding the unified family court, contact Jeffrey A. Kuhn, Director, Family court Resource Center, National Council of Juvenile and Family Court Judges, P.O. box 8970, Reno, Nevada 89507 (Telephone: 702-784-6967). At present fifteen states and the District of Columbia have a version of a closely coordinated or unified family court in place by statute, court rule or agreement. Several other states and the Territory of Puerto Rico are actively studying a unified or closely coordinated family court. Letter on file from Jeffrey A. Kuhn, Director, Family Court Resource Center, dated November 5, 1993.

6. S. Katz and J. Kuhn, Recommendations for a Model Family Court: A Report from the National Family Court Symposium (May, 1991, National Council of Juvenile and Family Court Judges).

7. See generally L. Edwards, the Juvenile Court and the role of the Juvenile Court Judge, 43 Juvenile and Family Court Journal No. 2 (NCJFCJ 1992). R. Page, Family Courts: an Effective Judicial Approach to the Resolution of Family Disputes, 44 Juvenile and Family Court Journal No. 1 (NCJFCJ 1993). Children and Families First: A Mandate for America's Courts, (NCJFCJ, 1993). This is a statement of basic principles and a vision regarding how the justice system should treat families and children. It contains a strong endorsement of a unified family court, a proactive role for the judge and the need for adequate resources. See also Szymanski, Homisak and Hurst, Policy Alternatives and Current Court Practice in the Special Problem Areas of Jurisdiction Over the Family, (National Center for Juvenile Justice, 701 Forbes Ave., Pittsburgh, PA, 15219, 1993).

8. See Hawaii Revised Statutes Chapter 588 creating a court-based Child Advocacy Center to coordinate child interviews fairly and expeditiously in a child friendly fashion. Note the center videotapes all such interviews which reduces or eliminates the need to reinterview needlessly. This court based model is to be recommended.

9. See Herrell and Hofford, Family Violence: Improving Court Practice (National Council of Juvenile and Family Court 1990). See also Model Code on Domestic and Family Violence (National Council of Juvenile and Family Court Judges 1994).

10. See also America's Children at Risk: A National Agenda for Legal Action: Report of the ABA Presidential Working Group on the Unmet Legal Needs of Children and Their Families, 27 Family Law Quarterly 433 (1993).

JURIGENIC EFFECTS

- * FORCING CHILDREN TO TESTIFY WHEN THEY DO NOT HAVE TO, THEREBY FURTHER TRAUMATIZING THEM;
- * REQUIRING MULTIPLE INTERVIEWS OF CHILDREN BY DIFFERENT INTERVIEWERS CAUSING THEM GREATER EMOTIONAL DISTRESS;
- * FAILING TO IDENTIFY, REPORT AND PROTECT CHILDREN, WOMEN AND OTHER VICTIMS AT RISK OF DOMESTIC VIOLENCE RESULTING IN FURTHER INJURY OR EVEN DEATH;
- * ALLOWING UNNECESSARY DELAYS IN ADJUDICATION AND SERVICES CAUSING FAMILIES AND CHILDREN TO SUFFER UNNECESSARILY OR NOT RECEIVE SERVICES;
- * ISSUING CONFLICTING OR DUPLICATIVE COURT ORDER GREATLY INCREASING RISK OR CONFUSION; AND
- * ORDERING INAPPROPRIATE SERVICES TO CHILDREN AND FAMILIES.

THERAPEUTIC JUSTICE

- * IS THERE A PROMPT RESOLUTION OF THE LEGAL PROBLEMS PRESENTED?
- * DOES THE PROCESS PROTECT AND HELP THOSE AT RISK?
- * ARE FUTURE HARMS SOUGHT TO BE PREVENTED?
- * IS FAMILY PRESERVATION PROMOTED CONSISTENT WITH PROTECTION?
- * ARE LEAST DRASTIC MEANS OF STATE INTERVENTION EMPLOYED?
- * IS AN INDIVIDUALIZED RESPONSE MADE TO EACH FAMILIES OR CHILD'S PROBLEM?
- * ARE ALTERNATIVE DISPUTE RESOLUTION OPTIONS AVAILABLE IN ALL CASES?
- * IS AN EFFORT MADE TO CONTROL THE FINANCIAL COSTS AND EMOTIONAL STRESS ON THE FAMILIES AND CHILDREN?
- * IS THE SYSTEM RESPONSIVE TO "MISTAKES"?
- * IS CIVILITY AND COURTESY BY ALL ENCOURAGED?

SYSTEM IMPROVEMENTS

- * EARLY ASSESSMENT AND INTERVENTION
- * DIVERSION
- * ALTERNATIVE DISPUTE RESOLUTION
- * FAMILY PRESERVATION
- * A SENSITIVITY TO DOMESTIC VIOLENCE AND INCREASED RISK FACTORS
- * CONSISTENT CHILD REPRESENTATION
- * CASE COORDINATION BEFORE ONE JUDGE OR ONE DIVISION

HYPOTHETICAL CASE EXAMPLE

Marie and Frank have been married 15 years, but separated for the past 3 years. Marie and Frank's 14 year old daughter, Danielle, has been living with her mother, Marie, since her parents' separation. Marie also has a two year old son, Sam, by her current male friend, Ben.

Danielle has been allegedly neglected by Marie. Marie regularly stays out late at night (until 2:00 a.m.) leaving Danielle alone with her two year old brother, Sam. In addition, runaway and shoplifting charges are pending against Danielle. The question of placement has arisen and child protective services is considering placement of Danielle in Frank's home.

Sam may be developmentally delayed, possibly due to fetal drug or alcohol exposure.

Ben files a paternity action and seeks custody of Sam. Marie files for divorce and seeks custody of, and support for, both children. Frank cross-claims for divorce and seeks custody of Danielle but denies he is the father of Sam. Marie further requests a restraining order against Frank based on an incident at a visitation pick up and drop off. Frank was arrested and charged with misdemeanor assault on Marie; a charge he vehemently denies. Danielle witnessed the incident and she is subpoenaed for the criminal trial.

How would the divorce, paternity, child protective (or dependency) case, juvenile delinquency (or status offense), civil protective order, and criminal cases proceed in your jurisdiction?

How would these cases proceed in a unified or closely coordinated family court?

What, if anything, could the court or a Guardian Ad Litem (GAL) do to help the children, Danielle and Sam, through the process?

Schematic of family members

Frank	Marie	Ben
married		unmarried
Danielle	Sam	
Age 14	Age 2	

Issues:

1. Unified or coordinated court.
2. Family preservation services
3. Domestic violence procedures
4. Child representation
5. Child witnesses

HYPOTHETICAL

- * WOULD ALL OF THESE CASES COME TO ONE COURTHOUSE?
- * WOULD ONE COURT OR ONE JUDGE BE ABLE TO HEAR ALL OF THESE CASES?
- * WOULD ONE JUDGE (OR THE JUDGE'S STAFF) HAVE THE TRAINING AND SKILLS TO DEAL WITH ALL OF THE LEGAL AND SOCIAL ISSUES PRESENTED?
- * WOULD THERE BE FAMILY COURT STAFF AVAILABLE TO CONDUCT ASSESSMENTS, DIVERT OR MEDIATE ALL OR PART OF THE CASE AND PROTECT THE LITIGANTS FROM FURTHER HARM?
- * WOULD THE CHILDREN BE THE FOCUS OF THE PROCEEDING AT SOME POINT?
- * WOULD THE CHILDREN HAVE INDEPENDENT STANDING (FULL PARTY STATUS) AND BE ADEQUATELY REPRESENTED BY A CASA OR ATTORNEY GUARDIAN AD LITEM?

JURISDICTION

THE COURT HAS FOUR DIVISIONS:

(1) JUVENILE DIVISION -- THE TRADITIONAL JUVENILE COURT JURISDICTION:

- * DELINQUENCY,
- * WAIVER/CERTIFICATION,
- * STATUS OFFENDERS,
- * CHILD ABUSE AND NEGLECT,
- * TERMINATION OF PARENTAL RIGHTS; AND
- * DETENTION.

(2) DOMESTIC DIVISION -- TRADITIONAL DOMESTIC RELATIONS COURT JURISDICTION:

- * DIVORCE,
- * PATERNITY,
- * UCCJA; AND
- * OTHER CUSTODY MATTERS.

(3) CRIMINAL DIVISION -- CRIMINAL ACTIONS AMONG FAMILY MEMBERS:

- * MISDEMEANORS BETWEEN SPOUSES; AND
- * FELONIES BETWEEN PARENTS AND CHILDREN (INCLUDING MURDER AND SEXUAL ASSAULT).

(4) SPECIAL DIVISION -- THIS IS A "CATCH ALL" INCLUDING:

- * GUARDIANSHIPS OF CHILDREN AND ADULTS,
- * CIVIL PROTECTION ORDERS IN DOMESTIC VIOLENCE CASES,
- * MENTAL COMMITMENTS OF ADULTS AND MINORS,
- * ADOPTIONS,
- * NONSUPPORT/URES; AND
- * ADULT ABUSE CASES (ELDER ABUSE).

JURISDICTION

(5) NOT INCLUDED:

- * INTRA FAMILY TORT MATTERS,
- * CHILDREN ALREADY WAIVED,
- * PROBATE; AND
- * FELONIES BETWEEN SPOUSES.