

## **Custody Proceedings: Battlefield or Peace Conference?**

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With the passage of the Family Law Act effective January 1, 1970, we have come through the first stages of a legal revolution in California in the area of family law. But we have really only engaged in a successful strategic first skirmish. If we go no further than eliminating the concept of fault as the basis for continuing or ending a marriage, we will, of course, have made a significant and important move. The real value of that revolution will have been lost, however, if we stop with that move. From the standpoint of enhancing family stability, the major battle lies ahead.

It is important for a husband and wife whose marriage has achieved a state of hostile conflict and perhaps morbidity that something be done either to save it, by making it work acceptably, or to end it. It is fully as important that they be able to terminate the marriage that should be terminated without requiring the salvos of calumny, hate and recrimination which characterize divorce actions under a fault concept in an adversary legal process.

The adversary process, historically effective in resolving disputes between litigants where evidentiary facts have probative significance, is not properly suited to the resolution of most family relations problems. When you add to this a generally irrelevant and frequently puritanical concept of fault as the necessary basis of legal dissolution, or of deciding questions of child custody and visitation, or of determining the right to and the amount of support, or of allocating a division of community assets, I think it not unfair to say that the mind of man could hardly have conceived any process, ostensibly concerned with the problems of marriage and the family, that would be more likely to rip husband, wife, father, mother and children apart so thoroughly and bitterly. After taking the family on this officially sadistic trip, often contributing to and even magnifying the problems already burdening the family and leaving them in an even greater state of conflict and hostility, we then, post-bellum, too often find it necessary to offer other judicial services to aid the disintegrating family in trouble. We then turn to those special courts such as the juvenile court and psychiatric courts where, in a variety of often uncoordinated and inconsistent ways, we may try to mend the pieces for those who suffer the trauma of family adversary process required to resolve questions relating to the dissolution.

The law and the judicial process in California before 1970, and in too many other states to this date, have in many respects actually been destructive of family stability. Proof of the unprovable rather than constructive aid for the assistable has been the hallmark of the judicial process in the area of domestic and family problems, including the area of child care and custody.

In 1970 we almost took the big step in California. We almost adopted a Family Law Act that not only eliminated fault as a basis for decision, but also provided machinery within the judicial branch to assist families in evaluating and understanding where they were in their marriages so that they could save those that were constructively saveable; and where not saveable, to help ease them out with a minimum amount of conflict and as

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much understanding as possible; and to assist parents in holding together an ongoing sense of family, where there were children, even though no marriage could continue. The Grunsky Bill, which almost passed, but didn't, would have augmented professional court-centered counseling assistance for parties with marital and family difficulties. At the last legislative minute this bill was opted out and the present law — the Hayes Bill — was adopted.

Happily, the Hayes Bill junked the fault concept. Happily, it removed the necessity for husband and wife to build their complaints, which became matters of public record, to such formidable proportions as "extreme cruelty" and "grievous mental suffering." Happily, it junked the battleground approach to a legal domestic war as far as the marriage itself was concerned, and for decisions relating to property division and theoretically for questions of support. It reduced the legal petition process to a level of relatively harmless platitudes and cliches, i.e., "irreconcilable differences leading to an irremediable breakdown of the marriage." Almost any husband or wife can say those things without the other's red flag going up. Hardly anyone is hurt, insulted or stimulated to anger by that kind of language filed with the court. It doesn't instill hostility nor the need to fight back to save face which was inherent in the fault accusations of the past.

So we did a great thing by the 1970 Family Law Act. Divorces, or dissolutions as we now call them, are less traumatic. Husbands and wives are settling more of their disputes sensibly and amicably. More and more are doing it even without the aid of attorneys. The climate of dissolution leaves them with less trauma and therefore with more of a basis for constructive contact and cooperation in the future. Children of these broken marriages, while suffering from the inherent trauma arising out of the separation between their parents, are not burdened with the immeasurably greater trauma of the parents' having to battle out differences they couldn't resolve on their own by resorting to the judicially sanctioned domestic warfare of name calling, fault findings, and judgmental decisions which the fault concept made necessary. In that war, the pleadings were the battle plan, the courtroom was the battlefield, the attorneys were the generals, and the parties themselves were the foot soldiers. They, not the attorneys nor the judge, were in the line of fire, and it was often brutal and bloody. Few of these foot soldiers were killed, but most of them came away with wounds, some of them deep, some which left ugly scars, and some which would never heal. The children, almost always involved in some way even though the parties may not have wanted it, suffered the trauma along with the parents. The trauma may have been more pervading for them than even that suffered by the parents. Parents might recover. They might find other spouses and perhaps even forget. Children, however, retain the same natural parents. Therefore, the potential for damage to their lives into the future may have been beyond measure.

Now, in California we have a new law.

Have we gone far enough? Have we really forsaken the battlefield? Have we done as much as we know how to do to soften, if not overcome, the trauma of marriage breakdown and its effect upon the parents and their children?

I think not.

We have preserved the rules of the old game in that area where it is most damaging. Where there are children and the parties cannot or will not recognize the impact of the disintegration of the marriage upon the children, where they fail to perceive their primary responsibilities as parents — i.e., custody and visitation — we make it possible for parents to carry out that struggle by the old, adversary, fault-finding, condemnation approach. The net effect of that can be that all semblance of a continuing family, with an acceptable motherhead and fatherhead, still parents if not spouses cooperating together as parents, is shattered. This kind of battle is destructive to the welfare, best interests, and emotional health of their children.

Whipping each other back and forth, in and out of court, with their children as the most effective weapon with which to hurt the other, was one of the most common practices of past divorce procedures. We have preserved it as a tool yet today. It is a combat sport engaged in even by otherwise intelligent and informed parents. I've had lawyers, psychologists, psychiatrists, educators, physicians, clergymen, and people in almost any profession you can name in litigation before me over child care and custody, all too often using the process with almost a blind vengeance. None of their children are safely exempt from the effects of this unfortunate process. When the judicial process allows this kind of combat, although as judges we may carefully lecture parents on its evils, it visits more than transient trauma and misery on the children. We are, in fact, officially endorsing the inclination of the worst in fathers and mothers who want to get at the other parent, to use a process which places a premium on their being able to show on a public record and in a public forum how bad a parent the other one is. The process seldom proves any such thing. It does, however, create a climate of inference of such things — and the children may be led to believe or take part in proving that which may not be true. Very few parents who come before the court are as bad for the children as the allegations, declarations or evidence presented to the judge would seem to indicate.

Our legal procedures should be designed to eliminate this game. It is destructive of the parent/child relationship and *ergo* potentially damaging to the child as a growing, developing person. Every child is entitled to live with the fantasy, if not the fact, that its mother and its father both are persons to be respected and loved. They need never be burdened with the assumption that the choice of parent with whom they live is made because the other parent is bad or unfit. The choice made may in fact include such factors, but seldom is it necessary to pursue the kind of procedures we do pursue to make those factors an effective part of the choice.

The time has come, I believe, to consider the abandonment of the adversary approach to the consideration of and resolution of custody and visitation matters. We should move this sensitive area of human relationships, i.e., the integrity of the family, upon which so much of the stability of our society depends, out of the *milieu* in which we now conduct it. We should move it away from the inquisition, condemnation, decision process into the area of professional assistance toward understanding, guidance and acceptance — acceptance of the great human potential that can come from two parents who, with competent help, may be able to decide and act from a sense of parental responsibility toward their children with primary concern for the children's needs as feeling individual human entities. We should be aiding parents to comprehend that children are neither possessions merely to feed the parents' own needs nor sticks and stones to be used by one parent to attack the other. I do not say that this requires the removal of the problem entirely from the responsibility of the courts, but I do say that it is time to move it out of the courtroom and into the conference room.

Children, I believe, can accept dissolution of their parents' marriage if the parents themselves are capable of handling it. They will hurt and bleed, but they can handle it constructively if given a decent chance. They are more sensitive and resilient than we may comprehend. It is how it happens rather than the fact of its happening which throws them the most. If children observe that their parents handle the change in relationship respectfully and with a primary regard for the children's interests and welfare, dissolution of the marriage need not be that traumatic. It may, in fact, often be much more acceptable than two parents under the same roof in constant conflict with each other, with the children in the middle too often assuming the burden of guilt for what's going on.

We cannot expect most parents to act to the proper heights of their parental role without help. Since, as a culture, we have never adequately prepared ourselves for the institution of marriage nor for an understanding of the significance of our roles as parents, it is logical neither to expect the institution of marriage to be sound and stable

nor to expect people to have the inherent qualities of good parents. Our culture deludes us from the cradle to the altar about marriage. It never truly prepares us for what can be expected from marriage, nor does it prepare us in any realistic sense for the role of parenthood. It is inevitable, therefore, that an inordinately high percentage of marriages come to an end, and also that an uncomfortable number of those that continue do so uncomfortably. If the institution is going to be unstable, as we must now realize that it is and will be for some time, then its members will suffer from trying to function within it. Marriage and the family as institutions are in trouble. We have not yet begun to properly treat with the causes of divorce because the main problem is the nature and quality of marriage itself. Until we commit ourselves to understanding the available potentials and limitations of marriage for its members, and then work for the generations it will take to live that understanding, we shall continue to have failing marriages and disintegrating families. So long as we have marriages and families in trouble, wives, husbands, parents and children will need help. They will need that help whether the marriages go on or end. And that's where we are today.

I see no panaceas for cutting down divorce rates. Approaching the problems of marriage by dealing with the statistics of its failure is jousting with windmills. Certainly, we shall never reduce those statistics by the divorce laws we pass unless we decide to force people to remain married. There never was a divorce law that made a good marriage. I do see some bases, however, for making the experiences of the institutions of marriage and the family less traumatic for husband, wife, parent and child through laws that have that as their primary goal. This is why I say, "Let's move marriage and family considerations from the hostile battleground to the conference table." There, via professionally trained and competent assistance, we may help parents and children to a future relationship of a modicum of conciliation and a little better understanding, not only of their individual needs but of those of all concerned family members.

I do not subscribe to the philosophy that a divorce must be followed by family disintegration. Ending a marriage need not be the end of the family. The mature family may still exist if the post-dissolution relationships between both parents and their children are maintained on a cooperative, understanding and open basis. We should have fewer closed doors and more open pathways between child and non-custodial parent. Everything we do in the area of divorce and custody ought to be directed toward achieving that quality of relationship between parent and parent and parent and child. I believe it can be done. It is not now being offered by society in the quality and magnitude needed, whether in the courts or anywhere else.

It is a sad fact that, while we have knowledge, know-how, skill and professional competence to deal with many of the problems facing the family and its members much more effectively than we have been doing, we have done woefully little to make these arts and sciences an effective part of our legal institutions. Family problems are susceptible to help, treatment and even resolution. We have evidence of this from the work of a conciliation court staffed with professionally trained and skilled marriage and family counselors working together with the other disciplines in the community. By and large, however, we have not concerned ourselves so much with the human problems of the family through the broad spectrum of our judicial system as we have with processing them, and doing it by anachronistic laws and antiquated procedures.

I see something different ahead. Perhaps my brothers in the law will not agree with me. They may call it heresy for me, a member of the legal profession, to say these things. If the interest of achieving greater stability in the institution of the family, I think that they must be said, and that we must begin to act. I see the roles of the lawyer and the judge taking on different and lesser dimensions. Once we get over the age-old hang-up that the right to dissolve a marriage and the making of decisions about it and the family must always require judicial sanction, we may begin to make the progress that is required. We may then abandon much of the procedural, legalistic mumbo-jumbo we now insist

upon in order to wind up the marriage, to work out the parent-child relationships, and to budget the financial needs of the split entity. The end product from a less legally structured approach may, I think, be more likely to meet the actual needs and desires of the parties individually and of the family as an institution, and to do it on a higher level of human maturity.

The family as we have known it is in trouble. It is one of society's most vulnerable spots. The effect of family disintegration is greater than the effect upon the family members. It pervades all of the institutions of society. It is time we looked realistically at where we want to go. Then we should compare that with where we are actually heading. What we will see is less than encouraging. Perhaps, having opened our minds to really see, we can be motivated toward the reality that yet escapes us.