Commentary: A Rose of a Different Color

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My goal in this essay is to provide some information on the legal system which is the subject of the Pruett and Jackson report, along with some analysis from the perspective of an attorney who practices in the Connecticut court system.[1] I think that the insights provided in the principal article are both relevant and important in developing the policies and structures that will guide and support the divorce process in the coming decades. Given the extent of the population that the divorce system affects, there is a need to make it more family sensitive. The data provided in the report suggests some of the issues that need to be addressed.

A Brief History of the Legal Aspects of the Divorce Process

Until the 1970s, a divorce could not be obtained unless the petitioning party (the plaintiff) could prove that the defendant was "guilty" of some offense inimical to the marital relationship.[2] This was characterized as a fault-based system. Whatever the underlying social theories of the system might have been, the legal rules significantly determined the outcome. For example, a guilty wife did not receive alimony[3] and a guilty husband was unlikely to be the custodian of the children.[4]

Beginning in 1973, it was possible to obtain a "dissolution" of a marriage on a "no-fault" basis. However, this development simply added two no-fault grounds to the statutes, while leaving all of the fault grounds in place.[5] The statutes also retained the "cause of the breakdown" as an element relevant to the division of assets and alimony.[6] The net effect is that participants enter the legal system knowing or learning that it still allows some leeway for the assertion and litigation of the hurts and bruises that took them into the process in the first place. This also carries over to child custody and visitation in two respects: first, the "cause of the breakdown" is relevant to custodial decision-making[7]; second, the broad parameters of the "best interests" standards allow for criticism of each partner's parenting skills.[8]

Also, it is important to bear in mind that legal education does not really prepare lawyers to handle the full range of issues, both legal and nonlegal, that can arise in any divorce case. The principal focus in law school is on the substantive law or legal procedures, and law professors, as nonpracticing lawyers, may be particularly unsuited to address the psychological elements that lawyers need to learn to handle divorce cases adequately.

The Results Reviewed

Perceptions of the Process

Parents often voice several criticisms: they feel left out of the process; their attorneys did not have a grasp of the details of their cases; and they did not have adequate communication with their attorneys. Such comments are all related to the tensions generally existing in the system. Aspects of the client's observations also implicate the issue of costs.

Until the 1960s and 1970s, lawyers charged for their services on a "reasonable fee" basis, which basically relied on the lawyer's being able to gauge honestly the value of the services provided. In the 1960s and 1970s, the accountability advanced by the development of consumerism pressured lawyers into using

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an hourly basis for billing. However, that approach presents its own problems for accuracy and reliability.[9] At the least, it means that clients will be charged for every contact with their attorney. Thus, from the lawyer's perspective, minimizing contact with a client is a way of keeping the costs down.

In the attorney-client relationship, there is constant tension related to how much information a client wants and/or can absorb and use. As a general matter, it is not clear if clients hear and process everything their lawyers tell them; so many lawyers think constant contact to provide information is undesirable because as well as educating a client, it may also confuse him/her.[10]

Lawyers have not been trained to deal with the psychodynamics of their relationship with their clients, particularly the consequences of transference. Therefore, limiting contacts with clients is a way of avoiding some of the stress for most lawyers.[11]

The lack of psychological training also affects negotiations. It is less emotionally involving for lawyers to negotiate financial issues than custody; so finances receive more attention. In addition, the conventional wisdom is that custody and visitation should be left to the parties as parents to deal with; therefore, lawyers refrain from addressing those issues as much as possible.[12]

Similarly, experience teaches that client-to-client or four-party (both lawyers and clients) negotiations often can turn into client versus client arguments.[13, 14] Lawyers avoid this by handling the negotiations. Further, most clients want the lawyers solely to bear the burden of the negotiations; consequently, lawyers tend to follow the general model of negotiating without clients, leaving the client to provide information about the general goals they want to reach.[15]

To the extent that blame and guilt still persist in the system and clients express such feelings about each other, their lawyers inject that into their advocacy. This plays a role in the perception that lawyers heighten the tensions in divorce cases. In fact, the lawyers' conduct that results in the heightened dispute generally derives from the lawyers' belief that clients want that kind of advocacy.[16]

Some or all of these problems may be solved by eliminating lawyers, as suggested by some of the Pruett and Jackson subjects. However, the absence of lawyers could exacerbate some problems and create others. For example, leaving the parties to handle things themselves can move their interpersonal arguments from the privacy of their failed marriage to the public arena of the courtroom, which often is the case in which one party or both appear as their own attorneys.[17]

Similar issues appear in the criticism of lawyers appointed to represent children. In Connecticut practice, an attorney will be appointed when the court believes there is a meaningful contest over custody or visitation arrangements.[18] Usually, the attorney is appointed to serve as the child's attorney rather than as an independent evaluator (guardian *ad litem*).[19] Most lawyers will approach the role cautiously, believing that it is more important to shield their clients from the litigation and minimize their involvement as children's counsel than to exacerbate the conflict. Similarly, the children's attorneys carry the view of most lawyers that the resolution of the custody and visitation issues is better left to the parents' good sense than entrusted to lawyers who are strangers to the family.[20] This approach tends to produce complaints that children's lawyers "do nothing." Also, it is well known that most complaints against children's lawyers come from the parents who wanted to use the children's lawyer to attain their own ends and were unsuccessful in their efforts to manipulate that cooperation.[21–23]

Perceptions of Enhanced Conflict

Parties entering into a divorce want it over "yesterday." The look that regularly appears when a client is told that Connecticut has a 90-day waiting period from the start of the case before a divorce may be granted is distressing for most attorneys, but it also emphasizes the tension that will persist throughout the case. Basically, the client's "emotional clock" races far ahead of "legal time," which is slower than "real time," and the frustrations this creates affect the "tone" of the case: the client is upset that the case cannot move faster; the client is annoyed because the lawyer has to devote time to other cases; the client is angered because the other party is not cooperating and is "delaying" the case.

Further tension is introduced into the system by the fact that "reasonableness," "fairness," and the "best interests" of a child usually are defined differently by the parties. She thinks joint custody is a good idea, as long as the kids live with her and she makes all the important decisions. However, he thinks joint custody means equal time and equal authority; he

agrees that she should get half of everything, except for his pension because she did nothing to earn it. The clash of these views is not simply a difference of opinion, because it goes to the heart of the case and the parties' perceptions about how demanding and conflictual the other party and his/her lawyer is being. Thus, because lawyers both help define the issues and help convey the messages, they become the scapegoats for complaints and the messengers of bad tidings.

Added to this is a perception among divorce lawyers (and judges) that a settlement (or decision) that makes both parties unhappy is a "good" one, because it means that neither party "won" and that both had to face reality. As an approach to cases, it undoubtedly affects the participant's perception of how helpful their lawyers were ("she did nothing for me, because I didn't get what I wanted") and how much conflict there was ("after all the fighting, this was all I got!"). Thus, it is possible that a third party monitoring a divorce would not see the level of conflict that the parties internally perceive.

Perceptions of Parenting

There is at least one aspect of how the legal system approaches "parenting" that probably influences the parties' perceptions of how their parenting was affected and how much conflict was introduced into the case, and that is simply the psychological impact of the relevant language. Having to "resolve custody and visitation issues" or cooperating to "avoid a custody fight" clearly are concepts fraught with psychological fears about the loss of relationships with children. Indeed, many popular-press books addressed to helping parents deal with "custody issues" present themselves with aggressive titles, although their content may be quite reasonable and helpful.[24, 25]

This is not a problem that can be addressed by simply changing labels. For example, it may be necessary to alter the legal and ethics obligations of the parties' lawyers to require them to give more consideration to the interests of the children than they are obligated to do now.[26] Further, as recently pointed out in the third volume of Wallerstein's trilogy on the impact of divorce on children, "parenting ed" programs may have to teach parents how to talk to their children and how to cooperate, rather than merely urging them to do both.[27] This will require more time and money, but it may be more necessary than is really yet appreciated.

Conclusions

As a human construct, the legal system is quite easy to critique and as difficult (or easy) to change as any other. The principal problem with the divorce process is that it was relegated to the shadows for much of our legal history[28]; however, now that serious social science researchers are examining its components and analyzing its operation, the ability to redesign it to meet the needs of its consumers is enhanced.

References

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