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### Viewing Family Court Practice Through the Prism of Purpose

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# Viewing Family Court Practice Through the Prism of Purpose

DONNA H. LEE\*

## INTRODUCTION

This Reply focuses on a fundamental question: what is the primary purpose of the Family Court when faced with intra-family disputes? I explore how competing conceptions of purpose affect our understanding of the Family Court's role in order of protection, custody and visitation, and child and spousal support cases. I recently had the privilege of co-facilitating a working group of experienced practitioners whose task was to re-imagine the work and structure of the New York Family Court and then develop recommendations for change.<sup>1</sup> While our conversation was rich and wide-ranging, what most surprised me was the difficulty we had agreeing on a vision of what the Family Court should do. A review of some of the relevant literature reveals a longstanding debate on the proper role of the Family Court and repeated reform efforts.<sup>2</sup> Upon reflection on our discussion, I

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\* Associate Professor of Law, CUNY School of Law. Many thanks to Sue Bryant, Leah Hill, Emily Rubin, and Jane Spinak for their support and for reviewing an earlier draft. Their stamina and grace in doing the difficult work of representing women and children in Family Court, and their clarity in thinking about this work are an inspiration.

1. My co-facilitator was Professor Leah Hill of Fordham Law School, and the working group participants reflected the Conference Planning Committee's hard work to gather a diverse group of stakeholders, such as attorneys and advocates for battered women and children, Family Court judges, academics, social workers, and service providers. We were also fortunate to be joined by Adam Sparks, a Columbia Law School student, who prepared the Working Group Report. Other working groups focused on the areas of delinquency, abuse and neglect, and foster care.

2. See, e.g., Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 S.M.U. L. REV. 1459, 1505-09 (2004);

have concluded that lawyers should partner with social scientists to develop controlled experiments with different court models that have clearly expressed goals, as well as detailed plans for data collection to determine whether those goals have been met.

### THE WORKING GROUP DISCUSSION

While there have been many iterations of a conceptual divide in defining the Family Court's purpose,<sup>3</sup> our group identified a binary choice between adjudicating *legal* disputes and addressing underlying problems in *family* disputes. The cohort that favored a traditional, legal dispute resolution approach focused on the need for revitalized due process protections for litigants. From their perspective, the Family Court's mandate should be to render fair, considered, and prompt decisions. Delay was a dominant concern. Other considerations included eliminating racial and class bias in decision-making, promoting civility and respect for litigants, and increasing the resources devoted to Family Court.

In contrast, those who defined the problem more broadly as a family dispute tended to reach for the more ambitious goal of improving family dynamics, which seemed often to entail the provision of social services. Adherents to this approach asked why a person comes to Family Court and what she or he hopes to gain. Their general answer was: to resolve a problem in a family relationship when other methods are unavailable or have failed. Thus, the touchstone for this cohort was not due process, but rather interdisciplinary expertise. For example, if one of the factors contributing to an intra-family dispute is domestic violence, alcoholism, or drug addiction, then an effective decision maker needs some level of expertise in these areas. From this perspective, legal rights are inextricably linked to social, psychological, and economic needs.

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Jane M. Spinak, *Adding Value to Families: The Potential of Model Family Courts*, 2002 WIS. L. REV. 331, 332–41 (2002); *Developments in the Law — The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2104–13 (2003).

3. See, e.g., MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2005) (critiquing posited opposition between children's rights and parents' rights); Clare Huntington, *Rights Myopia in Child Welfare*, 53 U.C.L.A. L. REV. 637, 640 (2006) (framing debate as between "family preservationists" and "child protectionists").

Both subgroups seemed to arrive at their conceptions of the proper role of the Family Court by drawing on their experiences with various client groups. Lawyers who represent women seeking orders of protection, custody, visitation, or support tended to view courts as institutions that should apply legal standards, conduct fact-finding through an adversarial, truth-seeking process, and enter judgments that resolve the legal problem presented by the petitioner. Lawyers who represent children tended to want courts to elevate the “best interests of the child” above all else and to perform tasks beyond fact-finding and applying the law.<sup>4</sup> These tasks include garnering resources and services for children and families and holding the agencies that provide these services accountable.

While our working group maintained an excellent *esprit de corps* throughout the two-day conference, each subgroup implicitly and explicitly critiqued the other.<sup>5</sup> The due process subgroup referred to mandatory services as “disservices,”<sup>6</sup> and posited that the multifaceted “best interests of the child” standard provides no real guidance to litigants or decision makers. They placed a high value on parent autonomy and expressed concern about the potential unintended effects of ordering parents to participate — personally and with their children — in programs.<sup>7</sup> Intuitively,

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4. Some of the complexities embedded in representing children in intra-family disputes include being haled into court involuntarily, potential questions of substituted judgment, and, in custody and visitation cases, physically embodying the legal remedy sought by the other litigants.

5. I interpreted the working group conversations through my own lens as a professor in a law school clinical program that represents battered women in Family Court on matters involving intrafamily disputes. For purposes of drawing a contrast, I have crystallized and pushed to the edges comments that were more nuanced and balanced at the time they were made. My hope is that sharpening some of the edges will lead to greater analytical clarity.

6. They recognized the potential value of social services, but maintained that accessing services should be voluntary and not tied to a court proceeding. One potential model is the work of the federally-funded “Family Justice Centers,” which enable local district attorneys’ offices to vigorously prosecute domestic violence crimes while providing a wide range of services to victims. See, e.g., Press Release, Dep’t of Justice, First Family Justice Center Opens in Brooklyn, New York (July 20, 2005), available at [http://www.usdoj.gov/opa/pr/2005/July/05\\_ojp\\_382.htm](http://www.usdoj.gov/opa/pr/2005/July/05_ojp_382.htm).

7. One such effect is to create additional hurdles for parents and children, whose resources are already stretched thin by economic and social pressures, without providing any real benefit in return. This concern is implicitly predicated on an assumption that a particular mandated program will not actually help a family and thus imposes transactional costs without any counterbalancing gains.

defining the court's role narrowly and trying to cabin its power through procedural rules would have the effect of maximizing individual autonomy.

The interdisciplinary expertise subgroup, however, pointed out that children and respondents do not opt into Family Court litigation. The proceedings are, in this sense, already coercive for one segment of participants. This group focused more on a child's need for stability and finality than parental autonomy. It linked the phenomenon of "frequent filers" with a failure to reach a multidisciplinary, fully considered decision in the first instance<sup>8</sup> and maintained that it is imperative to involve other disciplines and embed them in the governing legal framework. This is a theoretically optimistic view of the Family Court as an institution that can generate multiple solutions, including legal and non-legal remedies.<sup>9</sup> Attempting to meet both the legal and social needs of families, however, would require implementation of an explicit analytic process for evaluating multidisciplinary inputs.<sup>10</sup>

After two days of discussion, our working group came to consensus and drafted recommendations to present to all conference participants. We posited: "The Family Court's principal focus should be on the adjudication of disputes, in addition to providing access to appropriate resources when necessary to effect a court-ordered remedy." This language represents a compromise between the two subgroups. It allows for the provision of services when those services are tightly linked to the court's legal conclusion. In other words, the proposed remedy must have a sufficient nexus with the court's legal conclusion.<sup>11</sup>

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8. The phrase "frequent filers" refers derogatorily to litigants who initiate multiple court actions. While commonly used to refer to prisoners' cases, it may also apply to those who repeatedly litigate child custody, visitation, and support matters. The fact that a parent may file a second or third petition in Family Court, however, does not necessarily mean that the first adjudication failed or that re-filing is a bad decision. Family issues are obviously not static; they evolve over time and thus may legitimately require re-adjudication.

9. Cf. Spinak, *supra* note 2, at 352-53 (describing National Council of Juvenile and Family Court Judges' effort to encourage judges to play a more proactive leadership role).

10. One working group participant analogized to the special education process under the federal Individuals with Disabilities Education Act by which an interdisciplinary committee, including a child's parents and teachers, develops a tailored Individualized Educational Program for each child. See 20 U.S.C.A. § 1414 (West 2007).

11. The group intended to discourage courts from ordering participation in social services programs by default or habit. Cf. Casey, *supra* note 2, at 1489-504 (discussing

## MY THOUGHTS AND PROPOSAL

I agree with our consensus conceptualization of the Family Court's proper role. The traditional role of courts is to decide individual disputes, and I am reluctant to give courts a more broadly defined mandate to *fix* family dynamics. This reluctance stems from both legitimacy and competency concerns. The specific mention of *resources*, however, highlights the important role that courts must play to ensure that legal remedies are enforced. The prototypical example of a resource "necessary to effect a court-ordered remedy" is participation in a supervised visitation program. As a practical matter, when a Family Court judge permits visitation, but rules that it must be supervised, litigants frequently have difficulty finding a program that works with their schedules, locations, and daily lives. Consequently, suboptimal, informal arrangements relying on relatives or friends to play the role of supervisor are common. Our working group seemed to unanimously recognize the legitimacy of supervised visitation as a court-ordered remedy and the need for programs and services to effectuate this remedy. It did not, however, accept mandated participation in parenting classes, job training, or an anger management program in the same way. Explaining this differential response sheds some light on our working group's difficulty in answering the initial question about the Family Court's primary purpose, and points towards an approach to mediating between due process and interdisciplinary expertise.

A part of this distinction is what some group members characterized as the difference between providing *resources* and a *meaningful remedy* for families as opposed to mandating participation in *untested programs*. If the opportunity to have visitation is predicated on participation by a third-party supervisor, then programs that supply this service, almost regardless of content, are welcome. Although one might think that an anger management program could be substituted for supervised visitation as the condition precedent for visitation, this analogy fails. Supervised

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legitimacy concerns based on the expanded role of judges and loosening of procedural protections in problem-solving courts).

visitation has legitimacy as a court-ordered remedy that other programs do not share.<sup>12</sup>

In a sense, a supervised visitation program always “works” if the goal is abstractly defined as enabling the visitation to occur. A program need only exist in order to show quantifiable results in the form of hours of visitation that actually occur.<sup>13</sup> A program like anger management, on the other hand, whether structured through classes, individual therapy, or group therapy, does not occur simultaneously with visitation. The success of such programs is also more difficult to quantify because they unavoidably require a more qualitative assessment of an individual’s progress. For example, one measure of success might be a participant’s ability to manage his or her anger in the context of an intra-family dispute.<sup>14</sup> Finally, participation in any program external to the actual visitation represents an additional burden.

Some innovative programming and experimentation is already in place, and the Family Court has been taking on more broadly defined responsibilities, including some traditionally held by social services agencies. Problem-solving courts such as the Integrated Domestic Violence (IDV) Courts have, by design, one judge addressing the various legal issues affecting one family. The IDV Courts’ express goals include ensuring enhanced services for victims and holding offenders accountable.<sup>15</sup> Family courts in general have also been drawn into the role of a social service agency, with the power to penalize litigants for noncompliance, and some

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12. One reason may be that visitation in any form is the long-recognized, accepted remedy for a meritorious petition for visitation. *Cf.* ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 139–53 (2003) (criticizing imposition of broadly drawn injunctive relief against government defendants where the remedy is not closely tied to the proven legal claim).

13. I do not intend to disparage those high quality supervised visitation programs that strive to make a real difference in the dynamics between parents and their children and to nurture healthy relationships. I mean only to emphasize the significant overlap, if not congruence, between the legal remedy of visitation and the service of providing “supervision” for the visitation.

14. Theoretically, participation in a supervised visitation program also requires a qualitative evaluation of the parent-child interaction, and graduating from supervised to unsupervised visitation requires a qualitative improvement in that interaction as assessed by a psychiatric, psychological, or social work professional. In practice, however, many individuals are unable to access such programs and must rely on informal supervised visitation arrangements.

15. *See* Problem Solving Courts, <http://www.courts.state.ny.us/ip/domesticviolence/index.shtml> (last visited Mar. 7, 2007) (providing an overview of IDV Courts).

have called for judges to play more of a leadership role in maintaining and promoting healthy, functional families.<sup>16</sup> I support these reform efforts, but think that establishing performance criteria and collecting the data necessary to assess performance is essential to effecting lasting reform.

I wholeheartedly agree with our working group's recommendation that the Family Court develop a research component to collect, evaluate, and communicate data about its own performance. Such research should examine how well or poorly the system is working for all stakeholders. It also should be transparent, meaning the data should be made available to the general public. The information generated could be used in a myriad of ways, such as by putative petitioners in deciding whether to initiate an action, by respondents in deciding whether to settle, by courts, and potentially by legislators to better inform future decisions.<sup>17</sup>

I propose that lawyers who have expertise with the Family Court process in intra-family disputes partner with social scientists to create a proactive, goal-setting culture on a systems level.<sup>18</sup> While individual judges and advocates continue to litigate and adjudicate individual cases, others could take a step back and, in a manner that provides for and values community input, develop controlled experiments to examine whether specifically identified problems could be solved through some combination of

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16. See, e.g., Spinak, *supra* note 2, at 353–55 (describing belief of Progressive era reformers in judges' supervisory role and more current conceptualization of judges' leadership role by Chief Judge Judith Kaye in the New York State court system).

17. If, for example, a Support Magistrate orders several respondents to participate in a particular job training program, and none of them are subsequently able to secure employment, then the next time the judge might decide to use a different program or decline to require participation in any program. Conversely, if litigants were consistently satisfied with a particular parenting program, then a decision-maker could decide to use that program exclusively.

18. The literature discussing the benefits and dangers of problem-solving courts could help to inform this institutional, cultural shift. See Casey, *supra* note 2, at 1489–504 (discussing impending legitimacy crisis); Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1503–06 (2003) (surveying some potential dangers of problem-solving courts); Eric Lane, *Due Process and Problem-Solving Courts*, 30 FORDHAM URB. L.J. 955, 960–61 (2003) (analyzing and critiquing potential due process problems with problem-solving judging and lawyering); Lisa Lightman & Francine Byrne, *Addressing the Co-Occurrence of Domestic Violence and Substance Abuse: Lessons from Problem-Solving Courts*, 6 J. CENTER FOR FAM., CHILD. & CTS. 53, 55–57, 59–66 (2005) (discussing potential benefits and challenges of linking judicial intervention with service programs).



additional resources and restructuring. Looking through the prism of purpose, our working group framed a dichotomy between legal and family disputes. In a system that handled well over 200,000 filings per year from January 2000 through June 2005,<sup>19</sup> however, it is not necessary to choose between strict adherence to historical understandings of due process or an interdisciplinary approach. We can do both.

The overwhelming concerns about delay could be addressed by experimenting in one courthouse with a trial part.<sup>20</sup> The trial part judge would be relieved of all the pre-trial work in the numerous cases that end up settling. Other judges in the Family Court would refer trial-ready cases to this judge who could preside, for example, over a custody case every day, all day, and on consecutive days, until that trial is done. He or she could then preside over the next trial. This model would present a sharp contrast with the current system in which a trial may take months to conclude because the judge's calendar only allows for conducting a trial for a few hours on one day and then requires waiting another six to eight weeks until another several hour block of time becomes available.

At the same time, in another courthouse, we could require half the judges who adjudicate custody cases to participate in intensive interdisciplinary training. The other half could serve as the control group. The judges in the training group could learn from psychiatrists, psychologists, and social work professionals about domestic violence, child psychology, alcoholism, and chemical dependency. They could visit and tour various program sites and potentially participate in a session or two to gain personal experience with a program to which they may routinely refer litigants. These judges could be tested by the trainers on the information they are being asked to master. The newly created research and development arm of the Family Court could gather feedback from parents and their lawyers, children and law guardians, forensic experts, and the judges themselves before and after the training to try to measure its value added. Social scientists could also conduct surveys and focus groups of stakeholders throughout the

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19. N.Y. STATE UNIFIED CT. SYS., FAM. CT. N.Y.C., REPORT OF CASELOAD ACTIVITY BY TYPE OF PROCEEDING (2005) (on file with the *Journal*).

20. Our working group considered but ultimately decided against recommending the creation of trial parts.

courthouse to have a basis for comparing the performance of the judges who participated in the training with those who did not.

Measurement of performance outcomes is obviously critical to advancing reform goals. I envision experimentation that entails: developing a hypothesis and performance criteria; communicating with stakeholders who could inform, advise and help shape the innovations; trying something new for a set period of time; collecting the relevant data; and then evaluating that data to confirm or disprove the hypothesis. With the example of trial parts, the hypothesis could be that a trial part would reduce overall caseloads levels by X percent, cut the average time from case filing to case closing by Y months, and increase litigants' confidence in the Family Court process. A courthouse without a trial part, but with similar numbers of judges and cases filed could serve as the control. After the designated period for experimentation had elapsed, the research and development arm of the court could analyze and publicize the comparative results.

### CONCLUSION

Our working group characterized the Family Court's adjudication of intra-family disputes as a system in crisis and spent a fair amount of time focusing on the resource question. My proposal for differently configured model courts that operate as experiments frames the question differently. I would not focus narrowly on whether we need more judges and courthouse support staff. From my perspective, the obvious answer to that question is yes. Increasing the number of judges and support staff, however, is a finger-in-the-dyke solution. Rather than accepting the current paradigm and simply trying to do the business of the Family Court faster and better, I propose that we seek to develop a culture of innovation and accountability. Having started with the question of purpose, I am now convinced that controlled experimentation that marshals data and builds a persuasive case for what does and does not work in Family Court is the necessary foundation for sustaining the political will to implement change.

