

## FAMILY LAW COURTS—A BETTER WAY

Justice Donald B. King (Ret.)

I approach the topic of how to make our family law court system better from an unusual perspective. As a lawyer, I was a user of the system. As a Superior Court judge, I served six years in the family law assignment and I now work in a parallel, but voluntary, system where we make our own procedural rules. To me the question to ask is, what should a family law judge be? The answer is simple—a helper, one who helps divorcing couples reach their own solutions, not one who imposes those solutions upon them as a first resort, only as a last resort. Our present system is not only impersonal, inhumane, production line justice, it fails to help people at one of the most critical points in their lives. Indeed, all too often, those who the law requires to go through the system are worse off at the end than they were when they entered it.

We all know what our system is like, but no one ever stated it better than San Mateo Judge Rosemary Pfeiffer did 15 years ago when she wrote:

“If one were to use situation comedies as an analogy for our work with families, then the long running show M.A.S.H. would be my choice. Like that legendary M.A.S.H. unit, our lives in our professional and often personal sense are marked by drama, comedy and tragedy. We live our lives in a frontline, emergency situation in which we are called upon without adequate preparation or sufficient notice to diagnose injuries and to treat traumas. We bandage them, we supply them with IVs, we give them the support and rehabilitation that we can call up based on our own resources, and we send them on their way.”

“The difference, of course, is that the injuries and trauma which we deal with are those injuries and traumas to the heart. What we attempt to salvage and rehabilitate are relationships and the dysfunction that we treat is an emotional one rather than a physical one.”

“Like a M.A.S.H. unit, the conditions under which we operate are seldom optimum. We rarely have the resources or the support that we feel we need to do the job that needs to be done. And when our patients/clients walk away from us, the sight is rarely a pretty one. The scars are deep, often enduring and sometimes permanent. There are those that don't survive. For them, the estrangement, the anger and the depression caused by a marital separation is a permanent condition and they cannot be rescued from that condition even with our help.”

"It is not the dollars and cents issues which occupy our time and energies. It is the hidden agenda of anger, of rejection, of loss. It is the unspoken fear of loneliness and panic that one will never be loved again. It is the sound of a dream shattering, the dying gasp of hope, that we confront on a daily basis."

"It is the demilitarized zone where the battle of the sexes is played out with emotional weapons from a never ending arsenal. It is where warring hearts meet and joust with an energy and dedication which flows from the energy of a love misbegotten. This is the battleground on which we come to work every day in an attempt to apply bandages to the most needy." Unquote.

And what is the process we make divorcing parties go through? I submit it is not a process in which the judge is a helper, he or she is a parent who imposes decisions on the parties as if they were children. Worst of all, it is an adversary system that not only allows people to fight, it encourages it, even for most of those divorcing these days who I find do not want to fight. It is a system in which we require every case to fit the system, not one where the system is flexible enough to fit the case. How else is our system deficient? It is far too expensive, especially in requiring numerous wasteful and unnecessary hoops to jump thru. There is too much delay. There is virtually no early intervention to help reach rapid resolution. These cases too often are out of control because no one is in charge, and only a judge can be in charge, but judges do not have the time to do case management or mediation. The length of judge's service in the family law assignment is too short, in many courts only one year in a field of law that has gotten so complex it takes much more than one year to master the assignment. The calendars are extremely high volume with too few judges assigned (most of whom do not really want to be in the assignment) and with no support staff. It is no wonder the assignment leads to burnout. Surveys of California judges show that family law, by a wide margin, is their least favored assignment.

Lets face it there is a bias against family law in the court system. It is too often the newest judge with no prior family law experience who is placed in the family law assignment, and who leaves the assignment as quickly as possible. There is a bias in the allocation of judicial resources. In the last Superior Court statistics I could find prior to court consolidation, 23% of all filings were civil cases, yet over 35% of all judges were assigned to civil departments. 22% of all filings were criminal cases, and over 38% of judges had criminal assignments. 35% of all filings were family law, yet less than 10% of California's judges were in family law assignments. In 2003, while we can expect to continue the same high volume of family law filings, in our eight largest courts today, only about 6% of their authorized judges are currently in family law assignments. With very rare exceptions, family law judges have no support help, only normal courtroom staff.

What makes this bias against families so disgraceful is that all of our political leadership from the President to the Governor to our Chief Justice speak of families as our society's most important resource. But I conclude this is just rhetoric. Priority in our court system is given to insurance companies from Hartford or someone who burglarizes a home, not

to California families. Who are the families who go through our family courts? They are ordinary folks, our neighbors from down the street. They are the ones who pay the taxes that support our judicial system. They have done nothing wrong, but we require them to go through overburdened family courts to end their marriages. Too often they do not even get to appear before a judge, because so many courts use court commissioners in place of judges in family court. Maybe they are better off appearing before a commissioner, since many of our most knowledgeable and longest serving family law judicial officers are court commissioners. Nevertheless, the fact so many court commissioners and so few judges serve in this judicial role is further evidence of bias against families in the judicial system.

Twenty-six years ago Justice Robert Gardner in *In re Marriage of Brantner* wrote: "Domestic relations litigation, one of the most important and sensitive tasks a judge faces too often is given the low-man-on-the-totem-pole treatment, quite often being fobbed off on a commissioner... [W]e begrudge the judicial resources necessary for careful and reasoned judgments in this most delicate field—the breakup of a marriage with its resulting trauma and troublesome fiscal aftermath. The courts should not begrudge the time necessary to carefully go over the wreckage of a marriage in order to effect substantial justice to all parties involved." Earlier this year in *In re Marriage of Settlemire*, Justice Arthur Gilbert quoted Justice Gardner and then wrote: "...some judges view a family law assignment as a banishment to the lower circles of judicial inferno". Prior to modification of the opinion on rehearing, Justice Gilbert had also written: "It is a fact of judicial life that commissioners are often given assignments that judges do not want to perform. Some stalwart judges embrace the demands of a family law assignment. But to others, family law tops the list of assignments to eschew." Two recent Judicial Council Advisory Committee reports have both recommended that, aside from some limited family support matters, adjudication of family law cases is a core judicial duty and should be performed by judges, not court commissioners. But this does not happen and will never happen until the rhetoric ceases and action occurs.

So what do I propose as a better way? Our Constitution should be amended to create a separate Family Law Division in every court with 10 or more judges consisting of a number of family law judges equal to 15% of the number of judges presently authorized for each court. Judges in this Division would serve as a family law judge as a career position. Substantial professional experience in family law would be required to be eligible for appointment. Each judge, in addition to normal courtroom staff would have a second courtroom clerk and a law clerk. Additionally, each judge would have an administrative assistant or paralegal who serves at the pleasure of the judge. There would also be subordinate judicial officers for more limited family law duties. In this new Family Law Division, the process should fit the case, not vice versa, and should include a greatly simplified process for less complex cases. As authorized by Family Code section 2451, the process in this Division would be a mediative one helping the parties to resolve their own disputes, providing for hearings only when an impasse occurs. (This is a process I use, and it is truly remarkable how rare it is that I ever have to make a decision.) This fits my concept of the family law judge whose primary role is as a helper, not a decision maker. It is time to stop giving lip service about how important families are in

put our money where our mouth is for divorcing families required to go through our court system.

Is this a pipe dream? Maybe it is during the present budget crisis. Is it impossible? No, Does it already exist anywhere? Yes. We do not have to look far, just across the state line. About ten years ago the voters in Nevada passed a constitutional amendment creating a separate Family Law Division in the courts in that state's two largest counties, Washoe and Clark. These judges serve in that role as a career and each has the additional staff I propose including a second courtroom clerk, a law clerk and an administrative assistant. In Washoe County, with a population of about 200,000 people, the Family Law Division of the Court consists of six Judges, and seven subordinate judicial officers. In Clark County with a population of about one and one-half million people, out of a total of 33 judges, the Family Law Division of the Court consists of 12 judges as well as nine or ten subordinate judicial officers.

For the benefit of California's families we must improve our family law court system to one that helps them at a time in their lives when they need help the most. Those within our family law court system must lead. There is an old Alaskan saying, and they are not talking about dog sleds. "Unless you are the lead dog, the view never changes." Unless the Judicial Council, the bench and the bar take the lead to find a better way for our family law court system, nothing will change and 25 years from now some future appellate justice will once again be quoting Justice Gardiner decrying a court system that "...begrudge(s) the time necessary to carefully go over the wreckage of a marriage in order to effect substantial justice."

*Address to Family Law Judges Institute, 2003*