
Family Court Falls Short

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Dina Haddad, founder of Families First Mediation
Image: courtesy photo

First of two parts.

As a family law practitioner, I am shocked by the expansive role family courts wield in family affairs at the time of divorce. Unlike an intact family, a divorcing family will be subject to a government body telling it how to parent, what jobs the parents should have, and even what therapy is needed. More problematic is the court's attempt to fulfill this role. With diminishing court budgets and 50 percent of first-time marriages ending in divorce, the courts are overwhelmed and can dedicate very little time to each family law matter. When time is spent on these matters, it is often incomplete and intrusive of the private family sphere. As a result, family law litigants are left with judicial orders which do not reflect the best interests of their family, and leave them disappointed and without real help.

Now, more than ever, alternative dispute resolution options should be the mainstream approach for family law matters and rigorously pursued by the family law community. ADR allows the parties to resolve matters through mutual agreements, which reflect the best possible solutions for their family dispute. Already participating in this movement, British Columbia introduced the new Family Law Act on Nov. 14, sweeping reform intended to encourage parties to mediate their conflicts instead of rush to court.

In this two-part series, I will address two practical problems affecting the courts, and the use of ADR to alleviate these problems to provide divorcing parties the best resolutions possible to their family disputes.

THE COURT'S BROAD POWERS

Once a dissolution, nullity or legal separation proceeding commences, the private family unit is subject to the formalities of the court system and rather broad judicial powers. In California, the court has the authority to determine the status of the parties' relationship, custody of the minor children, child support, spousal support and parties' property rights. With both parties having legal rights to their property and children, the state has developed laws to handle these issues. Although no one is better able to adjudicate these issues than the couple, when they cannot agree, it makes sense to require the court's assistance.

However, in order to resolve these issues, an intimate purview of the family home is required. For example, the court must answer questions such as: Should the family home be sold? Should the stay-at-home parent now be required to work? Should the mother stop breast-feeding so that the father has more time with his infant? Should parents be required to keep their children in private school? Has one parent's religion become a detriment to the children? To decide these issues, the courts can require that a party submit to psychological treatment and testing, and vocational evaluations; attend therapy, parenting classes, employment coaching or violence, drug and alcohol treatment; or that the family undergo psychological evaluations.

Many of these orders, rightly adjudicated, may help a family deal with the emotional, psychological and financial consequences of divorce. However, at what point does the legal process exceed its boundaries, improperly invade family privacy, and begin to harm the family it is meant to protect? Today, family court is structurally unequipped to deal with most family law disputes, resulting in more harm to the family than the use of alternative dispute resolution options.

OVERWHELMED COURTS

The family courts are overwhelmed. With recent budget cuts, it is only getting worse. In Sacramento, parties can expect to wait five to six hours to file paperwork. Presiding Judge Stephen White reported that parties are bringing lawn chairs for the wait. [In San Francisco](#), 11 courtrooms have been closed, clerk hours reduced, and some 75 employee positions eliminated. (See "What Feinstein won," Sept. 5 issue of *The Recorder*). Compare this with pressing family issues that require immediate attention; for example, whether a parent with custody is misusing drugs or if a parent who is suddenly unemployed, but still obligated to pay a support amount, can be alleviated of the

obligation. Yet it may take months before cases like these are heard. Even for true emergencies, a party may not get a court date for several weeks.

When cases finally come before family court, it is often for a short 20-minute hearing. By that time, the issue may have changed significantly. At no fault of his own, the judicial officer may not have the time to fully vet the issues. For example, if the question is whether the children are safe with a parent because of alleged negligence or drug use, the court would need to determine if the parent should attend co-parenting classes or drug treatment, and whether the children should be in therapy. However, the officer rarely has the time or the expertise to do so.

In some cases, parties may qualify for court appointed-experts. This system, however, is just as congested as the courts. Court-appointed evaluations are often limited to a few hours, resulting in misguided evaluations which can take a family years to overcome. For the few families that can afford private evaluations, this can be costly, even more intrusive and result in a useless battle of the experts.

As a solution, the judicial officer may restrict a parent's access to his child for the short term, and order more treatment than less because who can go wrong with therapy? As a result, the family may be sent on a tour of their city as they comply with a cocktail of ordered therapy, including family sessions, individual sessions, child therapy, parenting coaching and even testing. What would never happen in an intact home, for these divorcing couples, becomes a consuming reality. Now stretching the same money over two homes, these couples have to pay for and find the time to attend these sessions, which may not be needed or tailored to their specific needs.

The unfortunate consequence is that the court's rulings may cause more harm than good. In the example discussed, the parent may not have been a real danger to the children, but the court cannot take chances and restricts the parent from his children. As a result, the children's relationship with the parent is harmed. The animosity between the parents is likely intensified, and the family will still have to face further litigation to resolve the custody matter.

INCOMPLETE REVIEW OF THE FAMILY

If the judicial officer has the time to review the family's needs, the analysis, by default, will be intrusive and likely incomplete. In order to determine whether a family needs therapy or a spouse has an addiction problem, the court will need to hear testimony, and so family secrets become public record. Often, the result will only be a judicial review of a "he said, she said" battle. Step into any family court, and it may feel like an extension of the bedroom as intimate fights air out, whether it's about a party's new relationship, allegations of mental or physical problems, long-forgotten brawls, addictions, the children's report cards or parenting problems. It's not uncommon to hear wild and

colorful allegations. Garden-variety family issues are now cataclysmic episodes of violence. In an adversarial system, family issues do not fare well.

Imagine a grocery shopping outing with your 5-year-old son. While picking out the best 10 Fuji apples you can find, your curious child is taken by the snack aisle ... and off he goes. You see him from the corner of your eye, but a bystander brings him back to you. Later that night, you share this with your spouse. Your spouse laughs, and knowing the nature of your child, is not surprised.

A year later, your spouse files for divorce. Filed in public records, this incident plays central to what will be a hard-fought custody battle. The sin? You are now a negligent parent and unable to care for your child. In fact, the story goes, strangers have had to scold you in public about protecting your child from danger. Of course, this incites anger and a no-holds-barred mentality. Not only will both parents earn a right to a steep legal fees and a drawn-out custody battle, they have now invited the courts into a spousal dispute disguised as a custody battle. The court has the power to use this information, whether skewed or not, to make intimate, life-altering decisions about this family.

Unfortunately, most divorcing couples are unaware that the court system is structurally unable to handle their divorce. They fail to realize that family court is an adversarial system, despite its name. A divorce litigant can never really understand the consequences of having his private family life introduced in public court, just as it is hard to believe that a grocery store outing you laughed about with your spouse can quickly become a nightmare.

In the second part of this series, I will discuss some solutions to mend the inadequacy of family court and how the private sector must step to the helm so that family law litigants are better served.

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