

## Future Challenges in Family Law

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# INTRODUCTION: FUTURE CHALLENGES IN FAMILY LAW

Family law in the United States faces at least three major challenges in the next ten years. First is the effort to remove family law matters from the judicial system through legislation and court rule. Second is a challenge from other disciplines to provide a vehicle for resolution of family disputes through arbitration or conciliation. And third is the supervision, discipline and regulation of custody litigation in order to fully enforce the spirit and the meaning of the Uniform Child Custody Jurisdiction Act.<sup>1</sup>

## 1. Removal from the Judicial System

On November 18, 1982, Chief Justice Warren E. Burger, speaking at a dinner at New York University, asked, "Do we need judges initially to resolve the child custody cases and related domestic disputes? Do we need judges initially in divorce cases?"<sup>2</sup> The Chief Justice had previously urged that consideration be given to taking more controversies out of the adversary system, saying in an interview that: "There is no reason why adoptions of children should be in the courts."<sup>3</sup>

The Chief Justice's remarks at the midyear meeting of the American Bar Association on January 27, 1982, (where his approach for streamlining the judicial system was widely discussed) included family law as a target for para-judicial proceedings. Chief Justice Burger said: "Divorce, child custody, adoptions . . . are prime candidates for some form of administrative or arbitration processes."<sup>4</sup> As far back as De-

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1. UNIF. CHILD CUSTODY JURISDICTION ACT (1968). *See also* WIS. STAT. ch. 122 (1981-1982).

2. Address by Chief Justice Warren E. Burger, Arthur T. Vanderbilt Dinner, New York City (Nov. 18, 1982).

3. Interview with Chief Justice Warren E. Burger, *Unclogging the Courts — Chief Justice Speaks Out*, U.S. NEWS & WORLD REPORT, Feb. 22, 1982, at 36.

4. Address by Chief Justice Warren E. Burger, Annual Report on the State of the Judiciary, at the Midyear Meeting of the American Bar Association, Chicago, Ill. (Jan. 24, 1982).

ember, 1976, he suggested that adoption, divorce and child custody disputes should be handled with judicial review only if some legal problem arises.<sup>5</sup> While noting that these matters have been handled by courts for centuries, he called for less traumatic means of settlement which would unburden the judicial system, and predicted that in the future these matters of family law will be resolved in new ways.<sup>6</sup>

## 2. Extra-Judicial Resolution of Family Disputes

When analyzing alternatives to traditional family law procedures, the issue of how to protect the interests of the community and of the children in a nonadversary setting must be considered. How are the state and the children, who are real parties in interest, to be represented in an arms-length arbitration between husbands and wives? Are we considering the new roles or the lack of roles for interested parties in the proposed method of dispute resolution? The rights of all parties, particularly the children, must be preserved.

As these new procedures are evolving, some questions which should be raised are: Will the rules of evidence apply? Do we discard the tested rules established through the use of precedent? What are the characteristics of the proceeding, its finality, its binding effect? Will the procedures protect the public policy of the state as it relates to the integrity of marriage and the rights of children? How do we handle the postdecision disputes? For example, what record forms the basis for change of circumstances? And what about judicial review—will the present criteria for review be followed?

There is some precedent in courts of equity to refer matters to referees.<sup>7</sup> By statute Wisconsin has established the

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5. Address by Chief Justice Warren E. Burger, New York University School of Law Bicentennial Conference on American Law: The Third Century (Apr. 30, 1976). *See also* Address by Chief Justice Warren E. Burger, Agenda for 2000 A.D. — Need for Systematic Anticipation, at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, St. Paul, Minn. (Apr. 7, 1976).

6. Address by Chief Justice Warren E. Burger, New York University School of Law Bicentennial Conference on American Law: The Third Century (Apr. 30, 1976).

7. *See generally* 66 AM. JUR. 2D *References* §§ 1-45 (1973 & Supp. 1982). *See also* FED. R. CIV. P. 53. This rule is derived substantially from the former equity rules applicable in federal courts. *Cf.* *Killingstad v. Meigs*, 147 Wis. 511, 133 N.W.

role of a family court commissioner to hear *pendente lite* and postadjudication actions.<sup>8</sup> Some states use the traditional equitable referee for the handling of all domestic relations matters.<sup>9</sup> But this method of relieving calendar congestion has created other difficulties. Litigants fail to understand and respect the court appointed referee because of the informality of the proceedings and the lack of finality of the decision. The role of the referee in most instances merely adds a level of adjudication which is costly and time consuming.

Another reason to remove family litigation from the judicial process is the inability of the system to handle the psychological trauma of separating a family and the decision making that is required to put the family into a new status. Even in financial matters, advocates argue, an adversary system does not facilitate a healthy ventilating of problems. Proponents say that direction should be taken from experts who are skilled in handling interpersonal relationships because courts simply are not qualified for that role. Professionals who are trained in social work and psychology could resolve disputes by arbitration, then recommend a solution to a court for entry of a final order.<sup>10</sup>

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632 (1911). In this case, which held that a compulsory reference was unauthorized and that a right to refer an equitable action must be found in the statutes, if it exists, the court said that:

When the [Wisconsin] constitution was adopted . . . it was the common if not the universal practice of courts of chancery to refer pending causes to a master in chancery to take testimony. It is quite apparent that this method of trying equity cases had proved to be unsatisfactory, as well it might, and that it was the deliberate purpose of the framers of the constitution to make a radical change in the existing practice. Accordingly, by sec. 19 of art. VII of the constitution, it was provided that "the testimony in causes in equity shall be taken in like manner as in cases at law, and the office of master in chancery is hereby prohibited."

*Id.* at 514-15, 133 N.W. at 633.

8. WIS. STAT. § 767.13 (1981-1982).

9. *See, e.g.*, W. VA. CODE § 48-2-24 (Michie Supp. 1981).

10. *See Possible 1983 Bills*, 2 WIS. J. FAM. L. 22 (Dec. 1982). This article describes a bill which may be introduced into the Wisconsin Legislature in 1983:

One proposal is based upon a concern that parties generally lack equal knowledge about the divorce, custody, visitation and support laws. The premise is that the results often times are unnecessary custody battles and litigation, which is expensive in terms of finances and a strain on the emotions of the parties and their children.

The proposal being discussed in Madison would require that in every action for divorce and legal separation, the Family Court Commissioner would

A quick glance at the telephone directory in any large metropolitan area shows a staggering number of businesses that advertise their expertise in the resolution of family matters. But there is a serious problem about the qualifications of some of these alleged professional mediators. Consequently, many communities, through family service organizations, are trying to establish panels of lawyers who are trained mediators and lawyer-therapist teams. These schemes present new ethical problems for the bar. Do we take the traditional family law procedure and relegate it to some kind of a contract relationship with a third-party mediator which would be binding on the participants and on the state? If the legal profession is going to allow lawyers to participate in a lawyer-therapist team to resolve family disputes, we must first address the possible conflict with Canon 5 of the Code of Professional Responsibility, which decrees that "a lawyer should exercise independent professional judgment on behalf of a client."<sup>11</sup>

The traditional approach to family law is meant to protect the legal rights of the parties, of the children and of society. Faced with the challenge to relieve overcrowded calendars and the need for aid from other professionals, our profession must respond by moving in a positive direction while preserving the traditional protections found in the judicial system.

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require the parties to participate in mediation with a neutral mediator over financial issues, child custody and visitation. The mediator would be the Court Commissioner in financial matters, and the Family Court Counselor in matters relating to custody and visitation.

The proposal would have the mediation occur after the parties have met with their attorneys, and specifically consider the Wisconsin Child Support Guidelines. However, attorneys would not be allowed to be present during the mediation sessions.

The sessions would supposedly facilitate compromise by educating the parties in the process and the decisions that are likely to be made by the judge based on agreements reached by the parties.

The proponents of this idea believe that individuals are more likely to cooperate in decisions that they have had a part in developing. Also, they believe that the number of unnecessary court custody battles and litigation of family law cases are likely to be reduced. This would result in less costs and more expeditious movement of cases through the courts.

*Id.*

11. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1979).

### 3. Enforcing the Uniform Child Custody Jurisdiction Act

So far the legal system is not responding to the problem created by interstate enforcement of custody disputes. The Uniform Child Custody Jurisdiction Act (U.C.C.J.A.),<sup>12</sup> adopted by forty-eight states,<sup>13</sup> is meant to bring a measure of discipline to diverse child custody proceedings. Yet lawyers and judges of many jurisdictions have failed to respond to the purpose and intent of the Act. Unbridled reliance on the rule of "change of circumstances" available in the enforcement forum<sup>14</sup> and the abuse of discretion by trial judges who do not follow the dictates of the U.C.C.J.A. create chaos.

Recently, in *Steele v. Steele*<sup>15</sup> the Supreme Court of Georgia admonished the trial judge for failing to recognize the dictates of the U.C.C.J.A. adopted in Georgia.<sup>16</sup> The court said that:

Because a child custody proceeding in this case was properly pending in Wisconsin, it was improper for a Georgia court to exercise its jurisdiction. This promotes the purposes of our Act in Code Ann. § 74-502 by ensuring an orderly system for child custody determinations while protecting the best interest of the children before the court.<sup>17</sup>

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12. UNIF. CHILD CUSTODY JURISDICTION ACT (1968). See also WIS. STAT. ch. 122 (1981-1982).

13. Dullea, *Wide Changes in Family Life Are Altering the Family Law*, N.Y. Times, Feb. 7, 1983, at A14, col. 5 (reporting that all states except Massachusetts and Texas have adopted the U.C.C.J.A.). See generally Coombs, *Interstate Child Custody: Jurisdiction, Recognition and Enforcement*, 66 MINN. L. REV. 711 (1982).

14. See *Halvey v. Halvey*, 330 U.S. 610 (1947). In this case Justice Frankfurter in a concurring opinion explained that:

If there were no question as to the power of Florida to provide for the custody of this child in the manner in which the Florida decree of divorce did, I think New York would have to respect what Florida decreed, unless changed conditions affecting the welfare of the child called for a change in custodial care. New York could respond to such changed circumstances. The child's welfare must be the controlling consideration whenever a court which can actually lay hold of a child is appealed to on behalf of the child. Short of that, a valid custodial decree by Florida could not be set aside simply because a New York court, on independent consideration, has its own view of what custody would be appropriate.

*Id.* at 617 (Frankfurter, J., concurring).

15. 250 Ga. 101, 296 S.E.2d 570 (1982).

16. GA. CODE ANN. ch. 74-5 (1981).

17. *Steele*, 250 Ga. at —, 296 S.E.2d at 373.

In 1979 Mr. Steele filed for divorce in Wisconsin whereupon Mrs. Steele was awarded temporary custody of their son.<sup>18</sup> The next year Mrs. Steele took the child to Alabama without the written approval of either Mr. Steele or the court.<sup>19</sup> Mr. Steele then initiated a contempt action which Mrs. Steele succeeded in postponing until the final divorce adjudication. She then moved to Georgia and started a suit for relief in that state.<sup>20</sup> In 1981 the courts of Wisconsin and Georgia issued conflicting orders — Wisconsin awarding the child to Mr. Steele and Georgia permitting the child to remain with Mrs. Steele in that state.<sup>21</sup> The Georgia Supreme Court then heard the case to resolve the jurisdictional issue and decided that under the U.C.C.J.A. Wisconsin had proper jurisdiction.<sup>22</sup>

Judicial tolerance of these activities encourages kidnapping by parents, forum shopping and disrespect for the judicial process. In family law matters lawyers should be aware of their responsibilities as advocates. We have, however, ethical responsibilities to follow the rule of law.

#### 4. Conclusion

Extra-judicial proceedings, arbitration and uniform child custody jurisdiction are emerging themes which will confront the bench and bar in the years to come. These are but three issues which will challenge established patterns of family law. The articles which follow in these Family Law issues of the *Marquette Law Review* will examine still other problems such as termination of parental rights, joint custody, valuation of an advanced degree, the plight of the displaced homemaker, continuation of maintenance during cohabitation and liability for family debts with which the legal profession will continue to grapple.

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18. *Id.* at \_\_\_, 296 S.E.2d at 570.

19. *Id.*

20. *Id.* at \_\_\_, 296 S.E.2d at 571.

21. *Id.*

22. *Id.* at \_\_\_, 296 S.E.2d at 573.