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Robert W. Hansen

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THREE DIMENSIONS OF DIVORCE*

By

CIRCUIT JUDGE ROBERT W. HANSEN**

They tell the story of a divorce-minded husband consulting an attorney in Milwaukee about starting an action for dissolution of the marriage. "Well, we'd start with serving and filing a summons only," the lawyer explained, "then sixty days must elapse before we can file a complaint, and another sixty days before the action can be tried. There would be a referral to the Family Conciliation Department to discuss reconciliation. Because there are minor children involved, there would have to be a preliminary hearing on temporary custody and child support and the court might order a custody investigation which might take an extra ninety days. If custody is in dispute, the judge would probably appoint a guardian *ad litem* to represent the minor and dependent children and he might need some time to prepare for the trial . . ." "Forget it," said the husband, "I can't stay mad that long."

This incident may never have happened, but it certainly could have. Not only is securing a decree of absolute divorce a more time-consuming proposition in Wisconsin than it is in almost any other state, but there are more hurdles to get over between filing an action and securing a judgment of divorce. This is not so much a matter of making a divorce case an obstacle course as it is a matter of recognizing that an action involving marriage and the family is not to be decided alone by the wishes and desires of the two spouses. The public interest is involved in every divorce action and the rights of minor children are involved whenever the estranged couple have minor and dependent issue of the marriage. In Wisconsin, in a divorce action, that public interest must be taken into account always and the rights of minor children must be considered and represented at the time of trial.

Adding the dimensions of concern for the public interest and the rights of minor children in divorce actions was the principal change effected by the enactment of the statewide Wisconsin Family Code[1] by the 1959 session of the Wisconsin Legislature.[2] Wisconsin became the

*Address at American Bar Association Section of Family Law, Montreal, Canada. August 10, 1966.

**Senior Judge, Family Court of Milwaukee. Instructor in domestic relations, National College of State Trial Judges (1964-65-66). Graduate, Marquette University Law School. (1933) LL.B. magna cum laude. Editor, Marquette Law Review (1932-33).

[1] Wis. Stat. Ann. §§245.001, 248.08 (Supp. 1966).

[2] Laws of Wis. 1959, ch. 595.

first state and, until the New York State Legislature enacted its divorce reform law in 1966,[3] the only state to challenge on a statewide basis the traditional concept that a divorce action involved no more than the respective rights of two contending or agreeing spouses. Under the Code the state and the minor children became concerned and affected parties to the action even though not named as parties plaintiff or defendant.

Lest there be any doubt about what they were doing and why they were doing it, the Wisconsin legislators began their reconstruction and recodification of the domestic relations laws of the state with this declaration of intent: "It is the intent of chs. 245 to 248 to promote the stability and best interests of marriage and the family. Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always. The seriousness of marriage makes adequate premarital counseling and education for family living highly desirable and courses thereon are urged upon all persons contemplating marriage. The impairment or dissolution of the marriage relation generally results in injury to the public wholly apart from the effect upon the parties immediately concerned."[4]

The Adversary System

This firm declaration of public policy, and the changes in procedural and substantive law that accompanied it, challenged the idea that the two people who entered the marriage contract are the only parties involved in deciding whether the contract is to be dissolved. It was at least one state's counter-attack against the widespread notion that a divorce was to be granted almost always when one spouse requested it, and without exception when both spouses agreed to it. Then, as now, it was popular to attack the so-called "adversary system" of handling family relations cases. The picture is painted of two hostile opponents, donning the boxing gloves and entering the prize fight ring, ready to do battle. Each has an attorney as a second or even as a substitute gladiator. The judge is the referee and he is to raise the hand of one or the other as the winner in the courtroom battle. The Wisconsin Legislature recognized that this simply was not what was happening in divorce cases in Wisconsin or anywhere else in the land.

Over ninety per cent of the divorce cases in the nation are default or uncontested cases. The practice of divorce law in the United States has become more at matter of "breaking down" contests than of trying contested actions. Even in the less than ten per cent of the cases that

[3] N.Y. Sess. Laws 1966, ch. 254.
[4] Wis. Stat. §245.001 (2) (1963).

are contested, the disagreement is far more likely to be in the areas of property division, alimony or custody placement of children than as to the divorce itself. If the concept is accepted that only the two spouses are involved in the action, once the two parties who agreed to get married agree to get unmarried—who is left to disagree? The divorce-seeking spouse or spouses get the divorce. The lawyer gets the fee. The judge gets a case quickly and casually disposed of. Whatever you want to call this practice of granting divorces by consent, the word "adversary system" hardly describes it. In nine out of ten divorce cases in the U.S.A., the courtroom "fight" is a fixed fight with the adversaries waltzing to a prearranged decision. The judge may be raising the hand of the wife or husband as the winner, but that decision was reached for him by the parties before they came to court. There isn't much satisfaction in being the referee in a series of fixed fights where a one round knockout has been arranged for in advance. This is the major reason why so few trial judges have any enthusiasm for trying domestic relations cases.

When someone observed that Christianity had been tried and found too difficult, Gilbert Keith Chesterton responded that Christianity had been found too easy and never tried at all. The adversary system in divorce actions has been found so easy to circumvent that in nine out of ten cases it isn't being used at all. "Do I have grounds for divorce?" the lady asked the lawyer. "Are you married?" the lawyer asked the lady. "Yes," answered the lady. "Then you have grounds for divorce," answered the lawyer. This not-too-funny story is made less humorous by the fact that it describes the situation existing in most divorce courts in this nation. At least where the wish of a spouse to end a marriage is not contested by the marriage partner, divorces are granted on the flimsiest of testimony in most courts. Except for the expenses involved, where both parties agree, divorce in the United States has become nearly as automatic as the "postcard divorces" once permitted in the U.S.S.R. There are exceptions. There are many judges in the United States who firmly reject this vending machine approach to handling divorce and separation cases. But they are exceptions, not the rule.

It is probable that it is this dichotomy between divorce in the books based on serious misconduct or years of separate living and divorce in practice based on consent of the parties that has led to recurrent endeavors to remove family cases from the legal discipline and have them handled by a panel of presumed experts from various fields. Presumably, such a panel would adjudge the "viability" of the marriage or the "incompatibility" of the spouses. In theory, this would substitute a finding of hopelessness of efforts to reconcile for a finding of legal grounds for dissolving the marriage. In practice, this would likely do

no more than legitimatize the granting of divorces based on consent, for the most articulate advocates of taking divorces out of courts seem not to be as concerned with promoting family stability as with making divorces easier to secure. As is so often the case, the revolutionaries are persuasive in pointing up weaknesses, but not so convincing in establishing that they would do better or even as well. If the gates have been lowered too far, it is hardly the answer to lower them even more.

In any event, while it made the process of securing a divorce somewhat more difficult and certainly more time-involving, it is clear that Wisconsin chose not to scuttle the adversary system but chose to insist that the public interest and the rights of the children be represented in the ring. The key provisions of the Wisconsin Family Code—the "cooling-off periods," the effort to reconcile the parties in every case, the protection of the rights of children and provision of legal representation for the children, the starting of an action by service of a summons only—are based on a recognition that society and the children involved are adversely affected by divorce and best served by efforts to seek reconciliations and to promote family stability.

In the Beginning

Many of the critics of the adversary approach to family law cases are primarily concerned with the hostility-engendering manner in which divorce actions are commenced. They are concerned with improving the way in which divorce cases are brought to court, not with removing family cases from the courts. Such constructive critics, including many leaders of the bar and distinguished jurists, see the traditional manner of commencing a divorce action as almost certain to lessen the chances of harmonizing the difficulties that have brought the estranged couple to court. Their primary target is the commencement of divorce proceedings by the service of a summons and complaint upon the defendant, the complaint including a detailed and usually imaginative listing of the grievances of the divorce-seeking spouse. Where the plaintiff is the wife, which happens to be the case in eight out of ten divorce actions, there is usually appended a petition or affidavit in support of a request that the husband be ordered out of the family home forthwith. This sworn statement of the dire consequences likely to attend leaving the husband live at home is usually more detailed and more imaginative than the complaint.

What this incendiary manner of starting divorce proceedings can mean is demonstrated by a highly publicized divorce action in a southwestern state involving an astronaut. The husband and father of the couple's four children was a scientist-astronaut selected from among thousands for his intelligence, control of emotions, and stability. There was trouble at home, and the wife started a divorce action. In her

petition and pleadings she alleged that her husband was a man of "ungovernable outbursts of temper and passion." In addition, seeking an ex parte court order ordering her husband out of the house, she signed a petition stating that, unless the court order her husband to stay away from their home, she would "suffer physical bodily injury and may even lose her life." As would happen in over half of the divorce jurisdictions in the nation, the judge entered a finding, without any hearing of any kind, that the astronaut was indeed a man of ungovernable temper and ordered him not to harm his wife or approach her residence. Every newspaper in the country carried the story of that temporary injunction. Subsequently, the action was dismissed by reason of the reconciliation of the parties and the astronaut's being dropped from the Space Program.

Is it possible to defend so inflammatory and reputation-destroying a way of commencing a judicial inquiry into whether or not a divorce is to be granted? Is this sort of thing at all necessary? The Wisconsin legislature thought not and, with this situation even though not this particular case in mind, made certain changes in the procedures by which a divorce action in Wisconsin was to be started and brought to trial. Since January, 1960, a divorce action in Wisconsin is begun by serving upon the defendant, if he is within the state, a summons only.[5] Sixty days must elapse before a complaint can be served and filed.[6] Even then the complaint may state only the statutory ground upon which a divorce is sought without detailing allegations which constitute the basis for such ground.[7] (The facts relied upon as the statutory ground for the action shall be furnished upon demand in a verified bill of particulars.[8]) By court rule in most counties, if not all, any affidavit in support of a motion for temporary alimony, child support, custody and visitation, etc., may not include the accusatory allegations specifically banned from the complaint.

If the astronaut's wife's suit had been brought in any Wisconsin court, it would have started with the service of a summons only, which doesn't give the news media too much too work with. The grounds upon which the divorce was being sought would not have been known until the complaint was filed, sixty days later. Even then no more than the statutory ground would have been stated. If pendente lite orders were sought in relation to the living arrangements of the couple while the action was pending, the supporting affidavit would contain no character-defaming allegations or accusations. Certainly the Wisconsin procedure is less of a pressure cooker, less likely to inflict wounds that never completely heal. While it is true that the case of the astronaut

[5] Wis. Stat. Ann. §247.061(1) (Supp. 1966).
[6] *Ibid.*
[7] Wis. Stat. §247.085(2) (1963).
[8] *Ibid.*

resulted in a reconciliation, no credit goes to the procedure followed and unnecessary harm and humiliation was caused.

What Wisconsin has done is to soften and delay the operation of the adversary system in the crucial early days of a divorce action. The commencement of the action by service of a summons only is at least a less harsh and antagonistic beginning than the service of a summons and complaint. The sixty-day waiting period gives the plaintiff two months to decide whether or not the next step is to be taken. The delay before complaint can be served gives the defendant time to decide whether to respond in kind with a counterclaim. The bland complaint required, with no itemization of allegations as to misconduct, leaves unspoken, at least to the time of trial (unless a bill of particulars is demanded), the charges that are so easy to make and so hard to withdraw.

It is interesting to note that during the first six years of operating under the Family Code, in the Family Court of Milwaukee County, forty-seven out of every one hundred divorce actions commenced were dropped before trial by reason of the reconcilation of the parties or failure to proceed. It is even more interesting to note that two out of three of such dismissals before trial were actions in which a summons had been served but in which no complaint was ever filed. For example, of the 1178 dismissals during 1965, 760 were cases in which a summons was filed, the action started but no complaint ever filed. In addition, during 1965 there were 106 cases in which a summons was served upon the defendant and the Family Court Commissioner but the action never filed in court. Of course, not all such dismissals represented full and complete reconciliations, and, of course, not all reconciliations last. In medical circles that is known as the factor of reoccurrence. It would seem more than likely that the improvements in the manner of commencing divorce actions—the summons only, the sixty-day interval between summons and complaint, the ban on itemized allegations of misconduct in the complaint—were helpful factors in keeping high the percentage of cases never brought to trial. Equally helpful, however, must have been the time and counselling requirements of the Code.

Time and Counselling

The two most basic changes effected by the Wisconsin Family Code were: 1) the requirement that there be two sixty-day "cooling off" periods between the starting of a divorce action and its trial;[9] and 2), the requirement that an effort to reconcile the parties be made in every case.[10] These corollary requirements not only challenged the traditional legal-only approach which viewed the social consequences

[9] Wis. Stat. Ann. §247.081 (2) (Supp. 1966).
[10] *Id.* at (1).

of divorce as irrelevant, but went beyond the conciliation court concept which had led to establishing court-related conciliation services in various jurisdictions. What the traditionalist did not want to do at all and what the conciliation court advocate wanted to do in selected cases only was under the Wisconsin plan to be attempted in every case. Wisconsin, which had pioneered in establishing a socio-legal approach to family cases through court conciliation services on a voluntary basis, now led the way in requiring both a slow-down and an effort to reconcile in every case.

While practice lagged behind preachments, it is clear that "during the last thirty years there has been increasing recognition that courts have the opportunity, if not the duty, to render affirmative and constructive assistance to families in difficulty."[11] For the most part, this recognition has taken the form of agitation for and establishment of conciliation court services, almost entirely in large metropolitan communities, directly connected to and operating in connection with divorce or domestic relations courts. The common denominator of such court-related conciliation service is that the attempt to reconcile the parties is limited to couples who desire assistance with their problems or at least exhibit some motivation toward reconciliation. The best and most complete analysis of the conciliation court concept is made in an article by Prof. Henry Foster of New York University, a national authority on family law.[12] Prof. Foster summarizes the strengths and shortcomings of the conciliation courts in action, and compares it with the socio-legal approach to all cases set up in the Wisconsin Family Code. In a nutshell, the strength is that efforts are concentrated on the cases where counselling has the best chance of success, while the weakness is that it fails to reach most divorce cases filed in court.

It is interesting that Wisconsin went to the statewide socio-legal approach in all cases after twenty-five years of experience with the conciliation court approach. In the year 1935, the Wisconsin legislature authorized the establishment of the Family Court of Milwaukee with a Family Conciliation Department, then termed the Domestic Conciliation Department.[13] For twenty-five years, until the enactment of the Code, this court and this department operated under the conciliation court concept, with selected cases referred to the conciliators by the judge, by the attorneys, or by the parties themselves. So Milwaukee is the only community in the United States that has had experience with the three major systems being used or proposed; the traditional legal only concept up until 1935; the conciliation court service concept from 1935 to 1960; the socio-legal family court since 1960.

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[11] Foster, *Conciliation and Counseling in the Courts in Family Law Cases*, 41 N.Y.U. L. Rev. 353 (1966).
[12] *Ibid.*
[13] Laws of Wis. 1935, ch. 213. Wis. Stat. Ann. §252.016 (Supp. 1966).

It is not easy to compare the three approaches or concepts as they were used in Milwaukee. The passing years seem to blur, not sharpen, the recollections of those who practiced as attorneys or served as judges under all three approaches. Probably nothing can be added to Prof. Foster's summarization that under the legal only system the courts did little or nothing to effect reconciliations; that under the conciliation court service plan the court agencies often effect reconciliations in that percentage of cases in which reconciliations seemed likely; that under the socio-logical approach more reconciliations are or can be effected although the batting average of successes is bound to be lower. It is worth noting that during the last five years under the conciliation court policy of selected referrals, 37% of divorce cases filed in Milwaukee County Circuit Court were dropped before trial. During the first six years of operating under the conciliation referrals in every case pursuant to the Code, the percentage of cases dismissed before trial rose to 47%. However, the required referral is not the only factor involved, and accounts only for some of the improved showing.

The arguments for an effort being made to reconcile the parties in every case line in other directions. To begin with, it is consistent with the public interest in promoting reconciliations wherever possible. What is involved is not so much an effort to conciliate in every case as an insistence upon a diagnostic or screening interview in every case to discuss the problems that have brought the parties to court. Even if a divorce proves to be unavoidable, such interview helps develop self-insight on the part of the spouses, directs attention to the impact of divorce on their children, indicates an interest and concern of the court in the litigants as individuals instead of as case numbers. To have the litigants decide for themselves whether they are to talk matters over with a trained marriage counsellor often will mean that the parties, either or both, will view a willingness to discuss reconciliation as a sign of weakness or matter of losing face. It can be definitely stated that many of the reconciliations effected in the Family Court of Milwaukee involved couples who initially were certain that any reconciliation was out of the question. You can't always tell a book by the cover. The most violently upset and bitterly estranged come back to court later on, arm in arm. "We decided to put up with our incompatibilities," one such once-warring couple cheerfully reported.

Rights of Children

One dramatic result of the enactment of the Family Code has been the upgrading of the status of children in divorce cases. Where the traditional view prevails that a divorce action involves no more than the rights (or wishes and desires) of the two spouses, the minor children of the divorce-seekers become hardly more than products of the marriage to be divided or dealt with in terms of the rights of their

parents. Particularly where there is no dispute between the spouses as to custody arrangements or child support, it is what the parties suggest to the court that is routinely incorporated in the judgment. Actually, it is expected that the stipulation or advance agreement of the parties is to include, not only what is to happen to the house, bank accounts, furniture, and family automobile, but also what is to be done with or about the children.

Even in those jurisdictions where divorces by consent are granted without much fuss or feathers, the judges involved would protest that acceptance of the recommendations of the litigants does not reduce the children to mere chattels or possessions of the parties to be disposed of along with the hi-fi set. Trial courts do base their decisions, where the parties cannot agree, on what is uniformly termed "concern for the welfare" of the children. Where there is an actual contest as to custody placement, visitation privileges, or support payments, the polestar is concern for the welfare of the child. But since in most cases there is an agreement in advance of trial as to provisions of the judgment affecting the children and since most trial courts quickly, almost casually, dispose of uncontested cases, it is hard to escape the conclusion that it is the wishes of the parents that in fact control. Since such advance agreements so often are a matter of bargaining, jockeying for advantage, and making compromises to facilitate the securing of an uncontested divorce decree, it is equally hard to escape the even more frightening conclusions that the children are no more than pawns in a chess game played by their parents and their counsel.

In this field of what is the exact status and what are the rights of the children of litigants in a divorce action, the Wisconsin Supreme Court implemented the obvious intent of the legislature and spelled out the affirmative steps that a trial judge in Wisconsin must take to determine and to protect and to provide legal representation for the rights of the minor children of the parties. Two decisions stand out as landmarks in the post-Code appellate court decisions relating to the rights and welfare of such victims of marital break ups.

In the first, the *Kritzik* case,[14] the Supreme Court clearly set forth the approach that state trial courts are to take toward matters affecting the children of divorcing parents, stating, "In making his determinations as to what conditions of a divorce judgment would best serve the interests of the children involved, the trial court does not function solely as an arbiter between two private parties. Rather, in his role as a family court, the trial court represents the interests of society in promoting the stability and best interests of the family. It is his task to determine what provisions and terms would best guarantee an opportunity for the children involved to grow to mature and responsible

[14] Kritzik v. Kritzik, 21 Wis. 2d 442, 124 N.W. 2d 581 (1963).

citizens, regardless of the desires of the respective parties. This power, vested in the family court, reflects a recognition that children involved in a divorce are always disadvantaged parties and that the law must take affirmative steps to protect their welfare."[15]

If there ever was any doubt about it, the Wisconsin high court clearly gave its approval to the family court judge conducting an independent investigation to determine the needs and to evaluate the alternatives as to custody placement. The court stated, "The trial court may, on his own initiative, gather information on the question of whether a proposed change enhances the welfare of the children. This information may be in addition to the evidence produced by either party as to whether the proposed modification will serve the best interests of the children. Thus, the trial court is not a passive agent bound by the information supplied by the parties on this issue. When a trial court does exercise his initiative and does obtain information on which he wishes to rely in reaching a determination concerning the best interests of the children, he should not act on such information until he has informed the parties about the information and given each party an opportunity to be heard and to make a record opposing or amplifying such information."[16]

In a more recent decision,[17] the state's highest court dealt with the matter of legal representation for the children in their role as concerned and affected parties to the action pending between their parents. At least in the Family Court of Milwaukee, judges in the family division, relying upon the inherent power of the court to protect the rights of the children, had been appointing attorneys as guardians *ad litem* for the children in cases where custody was in dispute or where there was reason for grave concern as to the wellbeing of the children. In the *Wendland* case, the Supreme Court endorsed the idea of appointing guardians *ad litem* for the children in sharply contested cases and went further to require that a legal representative, either the Family Court Commissioner or a special guardian *ad litem,* be present at the time of trial to speak up for the rights and welfare of the minor children. The court ruled, "In an uncontested divorce the family court commissioner will make a recommendation on the question of custody. Where there is a hotly contested custody dispute, and the court is satisfied that the procedures of relying on the two parties and the investigation of a welfare agency may not produce all the important evidence that the court should consider in looking after the best interests of the children, a guardian *ad litem* should be appointed. Inevitably this will add to the expense of the divorce proceedings. But such expense will be rewarding if the interests of the children are better served. This

[15] *Id.* at 448, 124 N.W. 2d at 585.
[16] *Id.* at 449, 124 N.W. 2d at 585-86.
[17] Wendland v. Wendland, 29 Wis. 2d 145, 138 N.W. 2d 185 (1965).

extra consideration is due the children who are not to be buffeted around as mere chattels in a divorce controversy, but rather are to be treated as interested and affected parties whose welfare should be the prime concern of the court in its custody determinations."[18]

As a guideline to attorneys who serve as guardians *ad litem* for children in divorce actions, as well as to the trial judges who appoint them, the court, in this case, commented, "If a guardian *ad litem* is appointed by the court, he should be allowed adequate opportunity to make such further investigation as he deems advisable after becoming familiar with the record herein; if he should request the taking of testimony of additional witnesses he should be granted the privilege of calling such witnesses."[19] In actual practice, the attorney appointed by the court to represent the children participates in the trial with the same right to call witnesses, cross-examine witnesses, and argue to the court as accorded counsel for the wife or husband. An initial fear that there might be duplication or conflict in the respective roles of the court-appointed social investigator and court-appointed legal representative has proved groundless. Particularly where the social investigator is recommending a custody ruling favored by neither of the parents, the guardian serves as a friend in court for the investigator as well as a lawyer in fact for the best interests of the children.

Read together, these two decisions clarify the right and imply the responsibility of a trial judge to do two things: 1) direct that an investigtion be made by a court-appointed social investigator whenever there is reason for concern as to the welfare of the children involved in a divorce action; and 2), provide a legal representative, either the family court commissioner or a guardian *ad litem,* to represent the rights and protect the interests of the children at the time of trial. No one can say that these two affirmative steps to protect the welfare of children save them from the shattering impact of the family coming apart at the seams. No one would claim that these two steps are all that could or should be done to lessen the disadvantage that comes to the "half-orphans" created by divorce. They are, however, a beginning and a dimension-expanding recognition that children are concerned and affected parties to the divorce action of their parents.

The most heart-warming experience that this writer has had in over a decade of judicial work has been to see the zeal and dedication with which both social workers and attorneys have responded to this interdisciplinary approach to helping children of divorce. The court-appointed social investigators, often including workers in private agencies, psychiatrists, and educators, bring in reports and recommendations that reflect countless hours of checking, interviewing, investi-

[18] *Id.* at 156-57, 138 N.W. 2d at 191.
[19] *Id.* at 157, 138 N.W. 2d at 191.

gating and evaluating. The court-appointed guardians *ad litem,* some young attorneys and many older practitioners, give time and energy to the assignment of representing the minor children far beyond what the court had a right to expect. Since the only fee that can be ordered paid out is out of the costs of the action, the lawyer for the children in some cases is not paid at all for his services. Instead of the grumbling or grousing that one might expect and excuse, there has been a measuring up to the highest standards of the profession. There have been scores of cases where guardians *ad litem* have driven hundreds of miles to talk with grandparents on a farm to be able to compare all available alternatives as to custody placement. There have been cases where, long after the judgment has been entered, a guardian moved to reopen the custody order because of a deterioration in the home environment that he had once considered adequate. There has been no case in which the children's lawyer has treated lightly or casually his responsibility to be their friend in court. Those who despair of effective interdisciplinary cooperation ought to come to Milwaukee's family court to see this partnership of social investigators-legal guardians in action.

Family Court Commissioners

The emphasis in this article on separation of summons and complaint, elimination of detailed allegations in the complaint, protection of rights of children, and the requirements as to the time and counselling should not be interpreted as meaning that these were the only changes made. A variety of provisions, some unique or nearly so among the states of the nation, were enacted into law. These included giving the judge the right to grant either a limited or absolute divorce, regardless of the prayer of the complaint based on the best interests of the children;[20] requiring court permission to remarry where a parent is under court order to support children of a previous marriage;[21] granting the court authority to make orders in the field of child support even where a divorce is denied.[22] The temptation to discuss all of the changes made must be resisted.

However, one all-important aspect of the Family Code is not to be ignored: the duties and responsibilities of the Family Court Commissioner. The key to the success of the Code in any Wisconsin county is the Family Court Commissioner. To read the Wisconsin Family Code is to realize that a major share of the responsibility for: 1.), seeing that an attempt to reconcile the parties is made; 2.), protecting the rights of children and enforcing child support orders; and 3.), representing the public interest and public policy at the trial of divorce actions—is placed upon the shoulders of the Family Court Commissioner.

[20] Wis. Stat. §247.09 (1963).
[21] Wis. Stat. Ann. §245.10 (Supp. 1966).
[22] Wis. Stat. §247.28 (1963).

It is not too much to say that, unless the Family Court Commissioner tackles his many assignments with dedication, determination and enthusiasm, the expectations of the Code drafters are not likely to be realized. This is particularly true because, as often happens in any new endeavor, people are quick to delegate responsibilities and slow to provide adequate remuneration, adequate staff, and adequate support to get the jobs assigned done. The most successful Family Courts in Wisconsin are those in which the judges were fortunate in securing a dedicated Family Court Commissioner who was determined to meet the challenge and responsibilities of the position.

There is a Family Court Commissioner, sometimes with an assistant, in every county in the state. He is a practicing attorney, selected by the circuit and county judges in and for such county, a "reputable attorney of recognized ability and standing at the bar."[23] In Milwaukee County there are five full-time family court commissioners, appointed and serving under the civil service system. All pleadings and motions in a divorce action must be served upon the family court commissioner. In every action for divorce or legal separation, the family court commissioner shall cause an effort to be made to effect a reconciliation between the parties. This shall be done either by his own efforts and the efforts of a family court conciliation department if it exists, or by referring such parties and having them voluntarily consult the director of the local public welfare department, the county mental health or guidance clinic, a clergyman, or the child welfare agency.[24] While this in practice is usually a referral proposition, the attitude of the family court commissioner and the rapport established at the initial interview is an important predisposing factor in the whole process of reconciliation. In addition, the Code provides that no judgment in any action for divorce in which the commissioner is required to appear may be granted until such commissioner in behalf of the public has made a fair and impartial investigation of the case and advised the court, not only as to such investigation, but as to reconciliation attempts having been made.[25] The commissioner is entitled to subpoena witnesses, participate in the trial, and make a statement to the court as the representative of the public interest.[26]

The Family Court in Wisconsin is a partnership of two disciplines —the legal and the therapeutic. In deciding the cause of action and dividing the property of the parties, it is a court of legal procedures. In seeking to reconcile the parties and protect the rights of children, it is a court of therapy, seeking to utilize modern marriage counselling and social service techniques. Any such partnership rests upon

[23] Wis. Stat. §247.13 (1963).
[24] Wis. Stat. Ann. §247.081 (Supp. 1966).
[25] Wis. Stat. Ann. §247.15 (Supp. 1966).
[26] Wis. Stat. §247.14 (1963), Wis. Stat. Ann. §247.15 (Supp. 1966).

clear allocation of roles, clear understanding of responsibilities, and shared determination to make the partnership work. It is the not always easy responsibility of the Family Court Commissioner to be the linchpin between the legal and therapeutic phases of family court operations in Wisconsin. He must do several jobs and do them well—and that is no easy assignment.

Questions and Answers

It is too early to bring in a final verdict on the success of the Wisconsin Family Code. In fact, any such law is no finished product. Changes are made at each session of the state legislature. At the 1966 session the state lawmakers granted to family court judges the right to order wage assignments to be made by non-custodian parents to insure payment of child support grants and provided that a non-custodian mother could be ordered to contribute to the support of children not in her custody.[27] It is too early to predict whether the Wisconsin approach will remain an isolated experiment or become a pattern for similar statewide family codes in other states. The recent adoption in New York State of a new Divorce Reform Law that contains many features of the Wisconsin law[28] may be the start of a trend. For the present, it at least can be concluded that some improvements have been made, some progress achieved, and some interesting questions raised by six years of operation of the Wisconsin Family Code.

When Gertrude Stein lay on her deathbed, she is said to have asked her companion for many years, Alice Toklas, "Well, Alice, what is the answer?" Her friend for a near lifetime answered, "Gertrude, we do not know the answer." "Well, then, Alice," countered Gertrude Stein, "What is the question?" We do not know and far from agree to the answers in this whole field of family law. But, at least in Wisconsin, people are recognizing and struggling with the questions of policy and procedure presented, including:

> How can we more effectively promote family stability by helping divorce-bound couples reconcile their differences?
> How can we more effectively protect the rights and welfare of the children involved in family cases?
> How can we expand the dimensions of a divorce case to include concern of the interests and well-being of spouses, their children and the public?

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[27] Wis. Stat. Ann. §§247.235, .265 (Supp. 1966).

[28] Parallel provisions of the New York Divorce Reform Law and the Wisconsin Family Code include the following: (1). commencement of divorce actions by service of a summons only; (2). requirement of 120 days waiting period between commencement of action and trial of action; (3). appointment of qualified attorney to serve as representative of public interest and to insure that reconciliation efforts are made; (4). requirement of an effort to reconcile the parties in all cases; (5). authorization (by statute in New York State; by court decision in Wisconsin) of appointment of legal guardian to represent rights of children in divorce cases. The Wisconsin and New York laws seek a statewide approach to handling family cases in court as opposed to authorizing special courts and approaches on a big city or county option basis.