Position Paper on Effective Management of Family Law Cases

Conference of State Court Administrators

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The Conference of State Court Administrators (COSCA) was organized in 1953 and is composed of the principal court administrative officer in each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the Territories of American Samoa, Guam, and the Virgin Islands.

White Paper on Effective Management of Family Law Cases

I.

Much consideration in recent years has been placed on the importance of courts adopting a problem-solving, restorative approach to case management and judicial decision-making. Part of the impetus for this emerging approach is the recognition that the adversarial process of American jurisprudence may not produce the best results in some cases because it can accentuate differences and amplify the conflict. Thus, throughout the nation we see judiciaries creating drug courts and mental health courts, using restorative justice principles, increasing the use of alternative dispute resolution, and implementing a host of other innovative judicial interventions aimed at helping people solve their problems and resolve their differences, not simply settle a legal dispute.

Underlying many of these innovative problem-solving approaches is an ethic of care and restoration; that is, an approach to judicial decision-making that emphasizes treating litigants with a high degree of civility, dignity and patience, aiding them in taking responsibility for resolving their difficulties, and providing them with access to restorative services. Yet, today many courts have failed to adopt a problem-solving, restorative approach in helping families in crisis. In too many circumstances, the system continues to view family disputes through the adversarial lens of legal cases to be decided, not as emotionally charged, conflict-laden cases composed of multiple issues needing resolution. Consequently, courts contribute to the "revolving door" that so many families experience, whereby the parties return to the courthouse repeatedly to revisit and attempt to re-settle the issues between them.

To aid litigants in reaching acceptable outcomes to these very personal disputes, court leaders must examine the management of family cases and the underlying system used to resolve these cases. If courts are to help families fashion outcomes that are both legally appropriate and practically workable, court leaders must de-emphasize the adversarial model of dispute resolution and place greater weight on a "problem-solving" approach to family cases. Court leaders must ask what the current system does – through its processes,

procedures, attitudes, and lack of resources and services – to aggravate the problems seen in family cases. Today, several critical questions confront courts in managing family cases:

- Are the underlying values, standards and resources of our courts aligned to address the complex dynamics and frequent personal crises seen in many family cases?

- Do courts and legislatures create and maintain systems that, in the name of independence and impartiality, amplify the damage that family cases frequently spur by preventing courts from initiating, coordinating and providing needed services and support to families in crisis?

- Do our courts view family cases as purely adversarial battles laced with legal questions to be resolved rather than as high-level emotional conflicts that can cause wide-ranging damage and sometimes even physical injury or death?

- Do courts have sufficient resources to address the broad emotional, personal, and social issues arising in family cases? And does this lack of resources magnify the harm that can come from these cases by forcing courts to focus more on case disposition than family case management?

- Do traditional understandings of law and the role of the courts in the United States interfere with developing and implementing innovative programs designed specifically to assist families in crisis?

- How can courts balance the need for impartiality with the considerable needs of families and the increasingly pro se nature of family-related litigation?

The willingness to confront these questions is critical to any meaningful assessment by a court of its effectiveness in managing family disputes.

II.

Historically our nation has used an adversarial system as the preferred means of judicial dispute resolution. The system is "outcome-focused" in that it is designed to reach *legally appropriate and final decisions to what are viewed as purely legal disputes*. The success of the system is predicated on the ability of the court and the parties to engage in a

rational fact-finding process. The role of the judge is narrowly defined to promote neutral and independent judgment throughout the process. Court rules and procedures aid the process by encouraging opposing parties to make their respective "case" to the court so that an impartial judgment can be issued settling the legal dispute with *finality*.

In many contexts, the system works well. However, in family cases a rational fact-finding process promoting a "final" resolution is difficult to attain. Unlike traditional civil disputes, family cases involve issues not so much about monetary compensation for injury (although this issue is frequently used to obscure deeper matters), but about broken relationships, emotional trauma, and misplaced trust. More than in any other type of case, the "truth" in family cases is defined less by rational and empirical fact-finding and more by perception, emotion, conflict, anger and anxiety. As courts and litigants repeatedly experience, few family cases – particularly those involving children – are resolved with "finality" the first or even second time around. In addition, as the percentage of pro se litigants involved in family cases grows, approaches traditionally used by courts to promote rational fact-finding become even more difficult to apply. Thus, in far too many cases "finality" is eventually reached through the operation of law (emancipation of a minor) or the exhaustion of personal funds, not by a court aiding the parties in reaching a just resolution.

Courts and the bar can exacerbate the parties' conflict by ignoring the human dynamics inherent in these cases as they focus on the process of reaching legally appropriate outcomes. Yet, what is legally workable often can only be attained after appreciating the human dynamics at play in each particular case. This requires a great deal of time, patience and civility, a luxury many courts do not have because of the imbalance between caseloads and available resource. Consequently, the legal outcomes reached in court often fall far short of the litigants' expectations and needs, contributing to the "revolving door" of family cases that is so often the subject of complaint by judges, litigants, lawyers and the public.

III.

While the adversarial system can frustrate the parties' ability to reach workable solutions to their disputes, the lack of a coordinated or integrated approach to resolving family cases plays an equally significant role. In a recent study by the National Center for Juvenile Justice (Hurst & Halemba, 2002), at least half of the 1,654 family cases examined showed prior court involvement by one or more of the parties in a criminal, criminal domestic violence, or driving under the influence or suspended drivers license matter. Additionally, in 60% of the civil protection cases sampled, one or more adult family members had prior involvement with a criminal, criminal domestic violence, or DUI/SDL complaint. Fifty-two percent of families coming to court on a child abuse and neglect matter had prior court involvement in one or more of three criminal case categories. Experts advise that well over half of child abuse and neglect cases include allegations of substance abuse. Thus, both empirical and anecdotal evidence indicates that many families in crisis access court services multiple times through a variety of avenues, often simultaneously.

Notwithstanding the evidence, however, it is a routine experience in many courts that the resolution of family cases requires the family and its members to appear before a number of judges or other court officers multiple times over many years. Parents and relatives miss work and children miss school to attend separate hearings. Depending on the number of cases involving individual members, the family may have to attend different hearings scheduled at the same time in different locations. Decision-makers may not know of parallel hearings or have information that will help them understand how different matters or different litigants interrelate. One judge may order visitation while another issues a restraining order barring contact with a child. Conflicting support orders lead to confusion and delay in receipt of payments. Restraining orders are routinely issued against each party by separate judges creating confusion as to which order – or both – is enforceable.

Additionally, many family cases require intense judicial involvement for years, putting tremendous pressure on judges, court personnel, and court resources. As judges and

court personnel rotate through family law assignments – often viewed as undesirable "apprenticeships" for new judges – families are bounced around the system, creating further frustration, delay and confusion. With the process structured this way, no one – from judges to court personnel to even the attorneys – develops a full picture of the family, its members, or the breadth of issues at play.[1] Rather than helping families in crisis, courts at times seem designed to frustrate attempts to resolve issues and manage difficult situations to achieve just ends.

If medical cases were managed similarly, the emergency room would be on one side of town, x-ray services downtown, and surgery on the other side of town. The family would see a number of different doctors, each of whom would have absolute authority over the handling of their case at that moment in time, regardless of prior directions or treatment provided by other physicians. Each family would be at the mercy of the current care provider, who may or may not understand the history of the case or even the existence of related cases. A physician would not act from an ethic of care and restoration, but from a decisional ethic based on an "impartial" hearing often conducted with little prior study of the underlying issues.

Courts handling family cases, much like a hospital trauma center, need to be structured to respond to families in crisis. In family cases the role of the judge – and therefore the court system – as adjudicator is compatible with being a convener, mediator, facilitator, service provider, and case manager. None of these roles is at odds with the compelling importance of judges making appropriate decisions under the law. Indeed, these other roles should complement the underlying principles of family law, which include preserving the family when possible, and minimizing the personal and social fallout when it is not. All actions should comport with a set of values that requires that a court act with an ethic of care and restoration in addressing each family case.

[1] Many rural jurisdictions may actually be better at coordinating family cases and services than large urban jurisdictions. Often the same judge deals with all family members over time regardless of the underlying case type and thus is familiar with the family's history and prior court actions. Unfortunately, most rural jurisdictions lack the resources necessary to provide the broad range of services that families in crisis frequently need.

Implementing a problem-solving approach to family cases grounded in an ethic of care and restoration necessarily involves greatly enhanced resources targeted at addressing the often-considerable needs of the family. Yet this approach involves more; it is not merely being a broker of social services wrapped in a black robe. Rather, it is an approach to problem solving through which judges and court personnel view their roles and actions as defined by both the law *and* the unique needs of each family. When courts act in this manner, the focus is on resolving problems and restoring family members where possible by maintaining the wholeness of relationships. It is not simply a focus on deciding cases quickly. Clearly, in the end, courts must make decisions for this is the constitutional role of the judiciary. However, courts also need to manage family cases through a restorative, problem-solving approach that helps the parties focus on what happened to create the problems, what can be salvaged, how the family can justly resolve the differences, and what is in the long-term best interests of the family and its members.

IV.

There is much that a court can do to reduce the level of conflict, stress, and emotional trauma inherent in family cases, and provide for a more civil and conciliatory resolution process for everyone involved. We all understand that when families fail, the impact stretches far beyond the immediate litigants to include children, extended family members, schools, and society as a whole. Particular emphasis must be placed on creating a judicial environment that identifies and minimizes the wide-ranging negative effect that these cases can have on the parties, both during the court process and afterwards. To the extent that courts can soften the adversarial nature of family proceedings by encouraging restorative, problem-solving resolution processes, they will help the litigants reach outcomes that are more acceptable to everyone. To assist the courts in resolving more effectively the problems families bring to the courthouse – and not simply decide their disputes – COSCA calls for the following:

- Funding to conduct an in depth, empirical study of family law programs through out the nation to determine what programs actually

work in helping families resolve their conflicts more quickly and with better long-term results for both the families and the courts. [2]

- Adoption of a core set of values and principles that manifest thoughtful care and services for families, and focus on balancing the impartiality of the adjudicatory process with the restorative needs of the family.

- The development of state and national case management and service standards for family law cases to assist courts and families in expeditiously reaching legally appropriate and practically workable resolutions to such cases. This would include implementing case intake standards so that families are promptly provided appropriate care and services by the court, or directed to agencies providing such services under the auspices of the court. Such services should include adequate representation, mental health, family counseling and drug abuse programs, interpreters, and emergency financial and housing assistance.

- A judicial system empowered to coordinate therapeutic care for families and provide protection for family members in need of such services.

- Implementation of enhanced alternative dispute resolution opportunities under the auspices of the court so that the courthouse is less a battleground and more a center for family conflict and dispute resolution. Courts would provide a "menu" of dispute resolution services to families so that the "one size fits all approach" is replaced by the recognition that each family brings with it a unique history and personality that calls for a unique approach to resolving the issues in dispute.

- Development of case processing and service requirements fashioned around the unique circumstances of each family and each case. Case processing and service requirements should focus on the defined needs of the family, not the scheduling needs or time standards of the court.

[2] Over the last twenty-five years courts have invested significant time and resources in developing programs that attempt to address many of the legitimate criticisms leveled at the management of family law cases. However, there is scant empirical evidence available as to what actually works. Thus, such a study would assist courts in identifying the critical elements of successful family law programs and in developing baseline standards for measuring new programs.

- Development and execution of adequate staffing standards to ensure effective coordination of services, family assessment, and case oversight. Sufficient resources must be provided to courts so that judges and court personnel can devote appropriate time to each case. Absent adequate staffing, courts will continue to be overwhelmed by the sheer number of cases and the cumulative emotional drain of dealing constantly with families in crisis. Courts must pay closer attention to judge and court personnel assignments to ensure that families are not served by those who either perceive or feel they have been "sentenced" to the family docket, but rather by those who are committed to helping families resolve problems.

- Implementation of integrated case management practices that include tracking and coordination of all family-related cases to ensure that, to the greatest extent possible, the same intake team works with the judge presiding over matters affecting one family.

- In concert with the legislature and the bar, implementation of laws and court procedures that de-emphasize the adversarial process and give greater flexibility and latitude to judges to resolve family disputes and provide needed services to families in crisis.

- Implementation of additional, adequate, and mandatory training for judges, attorneys and court personnel on the dynamics of family disputes, the psychological and sociological factors operative in such disputes, the effects of family trauma on children and family members, and methods for dealing with these dynamics in a creative, ethical, and restorative manner.

REFERENCES

Flango, C., Flango, V. E. & Rubin, H. T. (1999). *How are Courts Coordinating Family Cases?* National Center for State Courts.

Hurst, H. & Halemba, G. (2002). *Ohio Family Court Feasibility Study Phase II Final Report: Assessment of Family Court Pilot Initiatives*. Pittsburgh, Pennsylvania: National Center for Juvenile Justice.

Page, R. (1998, May). *"Family Courts" A Model for an Effective Judicial Approach to the Resolution of Family Disputes*. Paper presented at the ABA Summit on Unified Family Courts: Exploring Solutions for Families, Women and Children in Crisis, Philadelphia, PA.

Ross, C. J. (1999). *Unified Family Courts: Good Sense, Good Justice*. Association of Trial Lawyers of America.

Town, M. A. (2001, November). *The Unified Family Court: Preventive Therapeutic and Restorative Justice for America's Families*. Paper presented at the National Center for Preventive Law Symposium 2000, San Diego, CA.