



ESSENTIAL COMPONENTS OF
A MODEL FAMILY COURT

Law & Justice Advisory Board
Two Wishes Foundation

Discussion Paper, 2023

[Two Wishes](#) is an international foundation dedicated to transforming how the world views and deals with family separation and divorce.

A significant part of our work is to review existing systems and arrangements, highlight examples of world's best practices, and propose systems that are better for children and families. This is especially important where current systems are not contributing to the wellbeing of children whose parents separate and divorce, or where they may even be detracting from a child's healthy development.

Introduction

We are deeply concerned by the harm done to children and families as a result of many of today's family law and court systems around the globe. For this reason, Two Wishes formed its Law & Justice Advisory Board, currently consisting of active and former family court judges from six very different jurisdictions: Scotland, India, Belgium, South Africa, Portugal and Israel.

This Advisory Board is an essential component of the Foundation's development and promotion of a fresh approach to family separation and divorce – one based on education and earlier, accessible interventions rather than on too-late, law-based interventions.

This includes the development and promotion of a suite of educational programs for children, young people and parents that can help families prior to any family breakup and, where families are experiencing difficulties, ensure the accessibility of earlier, health-focused interventions, including counselling, mediation and collaborative divorce. We believe that the proper implementation of such programs and support will result in far fewer families applying to courts. Ultimately, one option might be for family courts to transition into forums for problem-solving and restorative work with the family, with harmful, adversarial proceedings becoming increasingly rare.

Transforming our well-established attitudes and approaches to family separation and divorce will not happen overnight. In the meantime, the members of the Advisory Board have made use of our broad, collective knowledge to bring together some of the best recommendations for local or universal improvements to current family law and family court systems around the world.

Our objective is to help create and promote a fresh approach that gives all children the brightest possible futures. Among other things, this requires that states and courts should encourage and enable parents to take responsibility for answering the needs of their children, especially their emotional and psychological needs, without having recourse to judicial proceedings; but, if they have not managed to do so, the court needs, alongside its traditional role of making decisions when parties disagree, to have a strong therapeutic approach. This implies a reconsideration of the role of the Family Court such that it

includes not only the process of arriving at a final judgment, but also social work support for children and parents and a judicial approach that takes account of the short- and long-term ramifications of the proceedings themselves.

In the course of our work, we have highlighted a number of areas in which improvements are needed and achievable. In this discussion paper, we describe these areas and suggest directions for changes. Some of the proposals are based on existing arrangements or examples of world's best practices in various jurisdictions.

We do not presume to dictate how these improvements should be instituted in a specific jurisdiction nor in what order. Changes need to take account of cultural and other differences. In some places, it will be sufficient for a chief judge or a senior court administrator to issue instructions or procedural rules. Many of the proposals require training, which can be carried out at different levels – across a single court or an entire county or state, or at levels in-between. Some of the changes will require amended, or even new legislation.

However, we suggest that the following should form the basis for discussions, at all levels, with a view to preparing a plan for adaptation of Family Courts, so as to make them better suited to the needs of children. Such a plan should include designating a specific senior person to oversee changes, and setting target dates for the achievement of each part of what follows.

Members of the Advisory Board

(in alphabetical order)

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The views and recommendations in this document represent those of the members of the Advisory Board, and not those of any official body in the jurisdictions in which they serve.

Executive Summary

The following are areas in which the Advisory Board recommends action:

- Diversion, so that parents who are separating should obtain help in ensuring that their separation should take full account of the effect on each child, and make arrangements which will protect the children and ensure their healthy development;
- Triage, meaning the assignment of cases which are brought before the court to judicial officers by establishing the urgency and intensity of judicial activity which might be required;
- Multidisciplinary processes, so as to ensure collaboration and coordination between the court and the psycho-social and dispute resolution services being used by the family;
- Specialization of Judges and training for lawyers and court staff, so that all concerned will be aware of the possible effects and results of adversarial litigation and the need for therapeutically oriented handling of cases involving children;
- One Family - One Judge, meaning that so far as possible all matters relating to a particular family should be handled by a single judicial officer, who is familiar with all aspects of each of the matters requiring resolution, thereby ensuring continuity and efficient use of court time;
- Swift handling by the court, since a child's perception of time is different from that of adults, and failure to deal promptly with cases involving children exacerbates the effects of stress and contact failure;
- Experts: Care needs to be taken in appointing experts to assist the court, as only professionals with appropriate knowledge and experience, appointed by the court in consultation with the parents, are likely to give impartial assessments and recommendations;
- Child involvement: A child should be given an opportunity to express him- or herself about issues which may affect that child's upbringing, but the methods whereby the child's voice is brought before the court must be carefully considered;
- Enforcement: Without effective methods of ensuring compliance with the court's orders and judgments, the court is deprived of credibility, and the time spent in reaching conclusions is wasted.

Recommendations

Diversion

As a result of lack of awareness, caused by the absence of exposure to the true difficulties experienced by children when their parents separate and divorce, together with the inappropriate ways in which relationships and the end of relationships are depicted in movies, novels, television, and paper and electronic social media, it is obvious to the vast majority of parents that when a couple separate, they have to start proceedings in court immediately.

This is simply not true. The legal system was never intended to be the place where couples and other family members go when there are difficulties with relationships; the courts are there primarily to decide on disputed issues of fact or to apply the law.

Not only that: the filing of documents in court inevitably places the parties in an adversarial frame of mind, thereby undermining the likelihood of agreement relating to the needs of their children.

So courts, and indeed society as a whole, need diversion, in three forms, away from adversarial litigation. This includes:

- encouraging couples to try to resolve their issues without coming to court at all;
- arranging that, as soon as proceedings are opened, the parties are required to attend meetings at which they receive information and assistance to try to reach agreement on as many issues as possible, before they start to make allegations against each other;
- at the first hearing before a judicial officer, the parties are asked what they have done to reach a resolution, and encouraged to resume efforts, with the assistance of court personnel as needed.

Triage

There are strong similarities between a situation in which an application or claim is made to a court by a family member against a parent, partner, child, or other relative, and the situation where a person appears in the emergency room of a hospital. In both situations, there is a need to assess whether the matter needs urgent attention, what is the level of urgency, who is the most appropriate person to give assistance, and which procedures should be used; all these against the background of limited resources, of time and manpower.

The family court secretariat may be staffed by officials who may have no specialized knowledge about families in crisis; they may receive little or no orientation in the intense psychological and emotional feelings which characterize family cases but are usually absent in other areas of law.

In order both to prevent avoidable harm to the parties and their children, and

also to prevent waste of important resources, early identification of urgent cases, and diversion of non-urgent cases to dispute resolution agencies, are essential.

This will often require multidisciplinary work, involving court administrators, mental health and social work professionals, and judicial officers, so as to set up criteria for allocation of cases.

Multidisciplinary Processes

A court dealing with family matters is not simply an institution for deciding between parties to a dispute; in fact, in many situations, the parties come to the court for resolution of issues between them. However, traditionally courts will only act if the problem placed before them is framed in terms of a request to decide which of the parties is right and which is wrong, who wins and who loses.

On the other hand, the therapeutic professions seek to help those who come to them to resolve their problems. They are traditionally based on work between an individual and the therapist, to enable the individual to reach equilibrium in some issue that troubles him or her.

When members of a family are unable to resolve some issue that troubles them, there may be matters of law and/or fact which are unclear, but in all cases the relationships between them need attention. For this reason, a family court needs to supply services of both kinds, legal/judicial and psychosocial. The approach needs to be multidisciplinary, placing experienced professionals at the disposal of the parties so that the matters brought before the court can be handled in a way which is most appropriate in the circumstances, taking into account the needs of all who may be affected by the problems. Such professionals should be attached to the court, either as an integral part of the court or contracted to handle speedily referrals made by the court.

The accessibility of social workers and other professionals, to those who approach the court and judicial officers, is required to enable triage, in the sense of allocation of the family members to the services they need in accordance with the issues presented.

In addition, these social workers should be empowered to administer early assessment, using specific intake tools, and, for example, to initiate and conduct a Family Group Conference. They can also intervene immediately where this is necessary to prevent further deterioration of a situation which has become, or threatens to become, a source of harm to a family member.

All of the above require collaboration between judges and mental health professionals. Working together should not only limit juridogenic harm; it may also limit iatrogenic harm by mental health professionals, so that those trying to help the children will not work at cross purposes.

Specialist Judges and Training for Lawyers and Court Staff

Family court work, especially in cases involving children, is multidisciplinary. In order that the court can deal with the needs of family members, those involved need, alongside knowledge of the law and procedures, some familiarity with those disciplines and professional areas which intersect with the courts work.

These include psychology and child development, psychiatry and social work, alternative dispute resolution, psychology and therapies.

This means that judicial officers should be appointed to deal with family cases after they have received appropriate training in these areas, and should also be given periodical in-service training and updates as to developments in these fields. In the absence of knowledge of these extra-legal areas, judges may not appreciate the needs of the parties, as opposed to their claims and allegations. They may fail to identify their own perhaps inaccurate ideas, about human behaviour and relationships, and they are more susceptible to persuasion by unscrupulous lawyers and so-called experts, and to with the possibility of harmful results for the families who seek the court's help.

Court administrators should also be trained in these areas; and courts should encourage specialization for lawyers who appear in such cases, or at least training of lawyers in these important linked disciplines.

One Family – One Judge

In many jurisdictions, applications involving families are allocated to different court or judge according to subject matter: for example, applications for exclusion orders with allegations of abuse to one court, matters of property to a different court, child support to a third court, issues of division of time spent with parents to a different court, matters of child abuse and neglect to a separate court.

This leads to a waste of court time for the parties and of judicial time for the court, and lack of continuity in management of the cases. Each application is brought before a judge who is unfamiliar with the parties and their lawyers and needs to read afresh all the material in the file and understand all that has happened before the case reaches him, and for the parties or their counsel to explain the stage reached before the hearing can proceed.

When a claim or application is made to a family court, it should be allocated to a specific judicial officer, who will from that time on deal with all future applications and claims in family matters made by the original applicant or a member of his family.

Thus, the court can relate comprehensively to all the proceedings involving members of the family, thereby enabling balancing all the interests and needs which need to be served, and also dealing with matters in order of urgency and importance without waiting for the decision by another judicial officer. This

might include combining child protection applications with issues of care and contact pending between the parents.

The judge thereby is enabled to identify all the relationships within the family, and over a period of time to observe the signs of mental health issues. He is able to track the reactions to orders and prevent manipulations.

Swift Handling by the Court

Court systems have to manage their case load in the light of available resources, taking into account the urgency of the need for a decision. This requires the establishment of criteria for determining urgency, using triage by trained personnel.

Cases involving children should always be dealt with as swiftly as possible. Apart from the child's own perception of time, the child is affected by the tension and stress undergone by the parents in the course of adversarial proceedings, and by their unavailability to deal with the child's problems.

For this reason, in any court system, resources, and especially judicial officers, should be given to the family court in order to enable appropriate handling of cases involving children. It is unacceptable that the time taken before the parties first meet a court professional – a judge, social worker, mediator or other, should exceed a matter of days. It is unacceptable that a disputed case should take many months or longer until resolution, whether by agreement or adjudication.

The judicial officer has to be able to determine the timetable and ensure compliance.

This includes imposing sanctions for unacceptable delays, including imposition of costs to be paid to the treasury for waste of court time.

Where an expert or other professional is appointed, the decision should include the final date by which a report is to be filed, and obliging the parties promptly to comply with the requirements of the court appointed professional.

Experts

In family cases, especially those involving children, the court may need the assistance of an expert, either to give an opinion as to matters of mental health relating to the parties and the children or to conduct a professional intervention so as to relieve stress and repair some situation which adversely affects the child. This may be a matter of urgency, especially where a child is not in contact with one of the parents.

It is undesirable for the parties and the children to be seen by more than one expert in a specific field, so the court needs to have control over the appointment of the expert, including defining the role of the expert; choosing the expert;

requiring the parties compliance; fixing how much, and by whom the fee is payable; and time limits for the expert's actions.

In choosing the expert the court should take account of the knowledge, skill, education, training, experience, and appropriateness of the person concerned relating to the specific issue to be handled; academic degrees and membership of a professional organization are not necessarily predictors of the suitability of a person for the task being set.

The expert should be permitted to directly apply to the court for directions and to report on compliance or non-compliance by those involved.

Child Involvement

While it is now accepted that a child should be involved in decision making, where such decisions might affect the child, the level and degree of involvement needs to be carefully considered, and adapted to the needs of the specific child. The needs of a pre-schooler are very different from those of an adolescent; the level of maturity and ability to weigh alternatives is not necessarily a function of chronological age; and each child in a family has his or her own special personality and sensitivities.

When a court is faced with an issue involving a child, there needs to be an arrangement which assesses and provides for the child's involvement in such a way as to avoid unnecessary harm while promoting the child's understanding of the issues. This will usually require the involvement of professionals who can conduct the assessment and advise the court whether the child should:

- give evidence in the case, and if so, how;
- be seen and have a conversation with the judicial officer, and if so, at what stage, and who should be present;
- have a lawyer appointed to represent the child, or to independently advocate for the child's needs and interests;
- how the child should be informed of the court's decision, and by whom.

This requires that the court have access to such professionals, and also that the judicial officer be properly informed and trained in order to enable a correct decision.

The court should convey to the child that the primary responsibility for making decisions is that of the parents, and if they are unable to agree, the court will decide, after taking into account all the material before it, including the views of the child.

It must, however, be emphasized that in no case should the child be given the impression that his or her views will be decisive.

Enforcement

Where it is found that there is no alternative to making a judicial decision, the legal system needs to ensure that decisions and orders made by the court are in fact carried out. In other words, the public has an important interest in seeing that justice should not only be seen; it must also be done. A situation in which a court has invested time and effort in reaching a decision, and that decision is not carried out by the party who is ordered to do so, is intolerable.

The reason should be clear: a court whose orders are disobeyed without the imposition of sanctions loses the respect of those whom it serves. This is especially the case where an order involving a child is given; the child for whose benefit the decision is made is deprived of the benefits intended. Not only that; the child observes that court decisions can be disregarded.

The institution of the court is thereby brought into disrepute.

So, the court needs to be equipped with processes which enable the imposition of penalties for non-compliance, which are sufficiently severe and immediate as to make disobedience unpalatable for the person who is required to comply.

This may take the form of imprisonment or a fine for contempt of court, or other measures specific to the order which has been disobeyed, such as orders for the payment of compensation for non-compliance with an order for child-parent contact, or the costs of additional proceedings to the other party or to the State treasury.

In order to be effective, such remedies must be immediate, in the sense that an allegation of non-compliance is brought to the attention of the court (or other agency empowered to enforce the order) immediately, and adjudicated, with the imposition and effectuation of sanctions where ordered, in a matter of days. This is of particular importance in cases involving children, whose perception of time is different from that of adults.

If an agency outside the court is empowered to enforce decisions, that agency must be subject to the close supervision of the court.

Experience shows that in many cases the threat of sanctions is sufficient to persuade the recalcitrant party to comply with the orders of the court.



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LAW AND JUSTICE ADVISORY BOARD TWO WISHES FOUNDATION

It is our hope that these and further key recommendations will form a basis for improving the prospects of a full and happy family life for children and their parents, even when the structure of the family undergoes changes.

We invite feedback, and would appreciate any comments, on this Discussion Paper.

For any feedback or more information, please get in touch with us:

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