

COURT SYSTEM: ADVERSARIAL OR PROBLEM SOLVING? CONTINUING THE CONVERSATION

HON. MARJORIE A. SLABACH (RET.)

PRIVATE JUDGE



Hon. Marjorie A. Slabach (Ret.), presided over a Family Court in San Francisco Superior Court from 1997 to 2011. Prior to serving on the bench, she was a named and founding partner in a private family law firm in Santa Rosa, California. She has been a Certified Family Law Specialist since 1992. Currently she serves as a private judge handling family law matters.

So, you won your case today!! Slam dunk!! Congratulations!! High fives all around!! So, why do you have that sick feeling in your stomach? What about that process doesn't feel right for your client, your opposing party, their kids, and you?

Heidi Tuffias, CFLS, wrote last summer in the ACFLS Specialist "It's Time For Something New." She wrote that it was time to switch from the "adversarial" to a "problem solving" court model. At the same time, the Association of Family and Conciliation Courts (AFCC) Journal (*Family Court Review*)

of July 2013 published a "white paper" from the Institute for the Advancement of the American Legal System (IAALS) calling for a different model of family court for the majority of litigants. If you are the attorney I described in the opening paragraph, it's time we joined them in that conversation.

Both Ms. Tuffias and the IAALS call for a change from the adversarial system to a problem solving system for the general public. This is not revolutionary. In fact, the National Council of Juvenile and Family Court Judges in 1991 presented "Recommendations for a Model Family Court: A Report from the National Family Court Symposium," which included the following:

1. State legislatures should authorize within each court jurisdiction a division to be designated as the Family Court.
2. The Family Court should be a separate facility to allow for centralization of operations which will provide for a holistic approach to the utilization of resources.
3. The Family Court should be staffed with persons who have a strong interest and experience in family law.
4. Judges assigned to Family Court should be assigned or elected to the Family Court specifically.
5. The procedure of the Family Court should stress alternatives to the adversarial model whenever appropriate and consistent with constitutional safeguards

The 2013 IAALS white paper states: "Recognizing that adversarial procedures are essential but do not fit the needs of most separating and divorcing families, family courts have incorporated processes such as mediation and

education into the range of services they offer. These future-focused, problem-solving services encourage parents to resolve their disputes without an adversary trial. Research and experience have established that a significant percentage of separating and divorcing parents benefit from these services. They are well regarded by parents, and save the parties and communities the emotional, educational, and economic costs associated with contentious separation and divorce.

"Therefore, the overall goal for a social policy is not to eliminate the necessary role of litigation, but rather to cabin it and to create alternatives better suited to the realities of family reorganization than the O.K. Corral. Hospitals must have operating rooms, but most patients do not begin or end up there. So, too, courts must have a range of services available besides litigation. Making services such as parent education, mediation, and financial planning widely available is a sound investment in family stability and productivity; helping parents make their own decisions through the separation and divorce, in turn, prepares them to continue doing so without the need for judicial intervention and the adversarial process."

The IAALS white paper concludes that the "velvet revolution" has already taken place in most of the jurisdictions in the U.S. That is, it asserts that "most have moved to a therapeutic model for family cases, where court involvement was reserved for the most complex, conflicted, or dangerous cases, or where judges actively managed the case through a series of processes designed to help the parties resolve their own disputes."

California has not fully embraced the “velvet revolution”; although it has certainly borrowed a few things from it, such as mediation (where it is truly mediation and not a quasi-decision making process) and case management (where cases are truly managed and not simply required to show up and say the parties are still working on a settlement).

Well, you say, I’m doing my part for my clients. I’m acting as a mediator or a collaborative counsel rather than litigator. I’m providing an experience that Ms. Tuffias described. I hire or refer to a parenting coach or child development specialist to work with the parents. I provide a great deal of education to the parties before and during the settlement discussions. In the collaborative process, I work in cooperation with the other attorney to provide a calm statement of the issues and supporting facts. We sit around a table and discuss these issues like civilized people. If necessary, we call in a private judge who sits at the table with us and uses her vast family law experience to bring the parties to a settlement or who listens to all the statements of all the parties and their counsel. And we agree that information can be provided to her which may not be available under the evidence code, so that the decision maker has all the information to be weighed as to its value. So, the system is working for my clients. We don’t need a revolution for my clients.

But what about the parties who can’t afford the private mediator or two-counsel-two-parenting coaches-child-specialist-financial-specialist process? What about the parties who can’t afford even one attorney between them? While I was on the bench in San Francisco, I calculated that 85% of the parties before me were not represented by counsel. What about them? Why should they not receive the same benefits as your clients? And for that matter, why should your middle class clients spend a large portion of their estate in order to access a problem solving system?

I must admit that the adversarial system may be necessary for some very limited purposes, like domestic violence restraining orders, child abuse emergency orders, and enforcement of orders. But these procedures are used by a very limited number of parties.

The great majority simply need an environment and resources in which to solve the issues of their reorganization of the family, to figure out each of their responsibilities and obligations, and to move themselves forward into a new family pattern. In order to do this, I’ll vote for Ms. Tuffias’s vision of the family court. But to make that happen we need a real revolution.

The first piece of that revolution is to add more Family Law Judges, with the caveat that those judges actually have family law experience (preferably CFLS credentials). In December 2011, the AOC issued a report to the Legislature on a Special Assessment of the Need for New Judgeships in Family and Juvenile Law Assignments, which determined that Family Law departments throughout California were not sufficiently staffed with judges. While there were at that time 239 full-time equivalent judges hearing family law matters (not including dependency or juvenile), an additional 378 full-time equivalent judges were required, an increase of 158%. The report found that more judges were needed in order to provide those judges with more time (a) to focus on settlement discussions and case management, (b) to give greater time for parties’ participation and more explanation of the proceedings (education), (c) to interview children, (d) for contested custody matters, and (e) to make findings and orders.

The addition of judges in my vision would allow those judges to sit at that round table and assist the parties with information giving and receiving. They would invite the family (including the child where appropriate) with their supporting family members (a grandmother, brother, minister, etc.) to sit at the table. Attorneys would be welcome, but take a back seat in the discussion. The judge would have skills in managing difficult conversations, with the goal of allowing each person his or her dignity and providing each person with more resources for managing their futures upon leaving the table than they had upon entering the room.

The second piece of the revolution is to provide mediators for property and financial matters as well as more mediators for parenting issues. These

mediators should not be recommending mediators. Their numbers should be sufficient to provide for a series of meetings with each set of parents or parties to allow for thorough and meaningful education and discussions. The 45 minutes of “fact gathering” resulting in a written recommendation to the judge should forever be a thing of the past. In addition, in-house investigators and/or evaluators would be provided to give the parties and their mediator and judge enough information to make good decisions.

The third piece of this revolution is the education piece. Using the concept of the hospital scenario, in order to keep people from becoming patients, medical personnel spend a great deal of time and money preaching preventative health care. Nutritionists and physical exercise gurus tout the benefits of understanding the care and feeding of the body to avoid the use of doctors and hospitals. The community should be as concerned with providing preventative information/education to each and every citizen about marriage, about the laws governing marriage, about child support, and parenting. Court and community collaborations should provide that information as part of the education system and the public media system.

The fourth piece in the revolution is to develop collaborative efforts with agencies in the community that would provide low cost services to families who need therapy, drug or alcohol rehabilitation, financial planning, and miscellaneous services.

The fifth piece of the revolution, and perhaps the most important, is the addition of skilled diagnosticians who examine each matter as it comes through the door of the court to determine to which track the case should be assigned. Does it require immediate adversarial action (DV, child abuse); does it require a specialized problem solving court for rehabilitation (drug abuse, mental health issues, etc.); should it be assigned to a parenting mediator; or should it go first to the property and support mediator; should it go to an education component first? This triage process would be the key to providing the needed services to the

Continued on page 46 (Slabach)

SLABACH

Continued from page 15

appropriate parties. Perhaps fewer additional judges would be required if the cases were triaged properly, with more mediators spending more time with the parties, and with more education provided to the parties in order to allow them to make informed decisions.

Obviously, this revolution is a difficult conversation to have in the face of budgetary restrictions. But that is the larger revolution we must undertake. It is society's responsibility to provide for the families' reorganizations for a better citizenry.

In order to move this conversation forward, ACFLS and the California chapter of AFCC have collaborated to form a Children and Families in Crisis Task Force with the following objectives:

1. To provide recommendations seeking to answer the dilemma voiced in the Resolution: Declaration of Public Health Crisis which describes children and families in crisis.
 2. To seek out family court models in other jurisdictions and analyze their usefulness as determined by the needs of California Family Court Litigants.
 3. To recommend model(s) for preventative action, including, but not limited to, education for potential litigants.
 4. To recommend model(s) for dealing with children and families in crisis seeking services from the court.
 5. To recommend model(s) for dealing with chronic cases of family distress, (e.g., those families which disproportionately access the services of the court).
 6. To advocate for appropriate proportional funding for Family Courts and services.
 7. To advocate for appropriate training and expertise for all professionals dealing with children and families in the court system.
- The ultimate goal will be to bring those recommendations back to the collaborating organizations to determine whether legislation should be proposed for furthering that "velvet revolution."
- The task force needs more hands, more vision, more energy for this revolution. If any ACFLS member wishes to provide input, time, or energy, please let your president, Lynette Robe, know, so that she can appoint more members to that task force or at least send your names on to the co-chairs. We have a lot of work to do to further this conversation. ■