Reform of the Family Courts: Lessons from Baltimore

Reform within the Family Courts: Lessons from Baltimore

Ireland is reforming its family court practices. This article presents research, funded by the Irish Research Council, which examines the Family Division of the Circuit Court in Maryland, USA (Baltimore City/ County). It explores the theoretical framework (therapeutic jurisprudence) underpinning the Family Division, the holistic processes and conflict resolution techniques adopted and the lessons that may be learned from the success achieved in assisting the Court Service in Ireland. Triangulating the results, it highlights areas for reform and argues that rather than use inadequate resources as a scapegoat for inaction, a more creative, holistic, stakeholder engaged approach with strong judicial leadership would ensure better outcomes.

Key Points for Family Court Community

- In establishing a Family Court, stakeholders should apply a therapeutic jurisprudence (TJ) framework
- TJ embodies a caring, multidisciplinary approach which seeks to improve the lives of those seeking recourse from the Family Courts
- Examining the Family Division of the Circuit Court in Baltimore City as a potential model of best practice internationally
- Key lessons in the establishment of a Family Court

Keywords: Family law; Therapeutic jurisprudence; Divorce; Multidisciplinary approach; Mediation; Support services.

1. INTRODUCTION

Legal systems across the world have traditionally held 'family' in high esteem. Constitutions and Conventions alike, reiterate the need for respect for family life.[1] Families also play a 'critical role in society's functioning'.[2] With an ever-increasing diversity in what can be defined as 'family', it is reasonable to expect that there will similarly be an increasing need for legal support. States provide frameworks, within which, dependent spouses and children have a measure of protection through legislative provisions, when relationships break down.[3]

[1] Universal Declaration of Human Rights Fr.-U.S., Dec. 10 1948 art. 12, 16; European Convention on Human Rights 1950 (Art.8); Charter of Fundamental Rights of the European Union 2016/c 202/02, art. 8, 9;, Constitution of Ireland 1937 art. 4.
[2] BARBARA A. BABB AND JUDITH MORAN J.D., CARING FOR FAMILIES IN COURT: AN ESSENTIAL APPROACH TO FAMILY JUSTICE (2018).
[3] Judicial Separation and Family Law Reform Act 1989 (Act No.6/1989) (Ir.), http://www.irishstatutebook.ie/eli/1989/act6/enacted/en/html Family Law (Divorce) Act 1996 (Act No.22/1996) (Ir.), http://www.irishstatutebook.ie.eli.1996/act/33/enacted/en/html.

Huntington's argument, that the legal system is 'deeply involved in every aspect of family life, from defining what a family is in the first place to subsidizing families through public education and deductions for dependents,'[4] is therefore, arguably, difficult to contradict. The issue, she believes is 'not the magnitude of that involvement, but the ends it serves'. For many, this involvement comes into focus in the ending of a relationship, resulting in the need to consult a lawyer and invoke the assistance of the Court. The process used in the resolution of conflict between separating parties is often influenced by a wide variety of factors. These include: the extent of the conflict; the background of the parties and their life experiences; their financial resources; the level of autonomy each may have in resolving their own disputes; the impact of lawyers and the legal advice given; the court procedures in place and the extent to which supports services are available. For some, they can afford to engage lawyers and counselling, if required, and resolve matters outside of the courts' process, coming before the courts only to seek declarations or consent orders. Others may not be as well equipped to deal with the family transition. It is in these types of cases that the role of the State becomes arguably more important. While, in theory the law is there to ensure equality for all, Weinstein recognises that, in practice achieving equality may mean the need 'to address imbalances and protect against manifest injustice'.[5] Detailed guidance and proper structures help to ensure that potential litigants can progress, satisfactorily, through the system. This has become increasingly important in an era where many are self-represented.

Efforts have been made to divert 'suitable' cases away from the traditional courts' system. Mediation is offered as an option. Family law, encompassing issues relating to separation, divorce, and custody and access to children, is viewed as particularly suited to the mediation process. It is argued that choosing mediation indicates that '[d]isputants want to regain control and retreat from the professional management of family transition.'[6] Reticence amongst lawyers to encourage clients into the mediation process has been curbed by increased legislative provisions. These require that potential litigants be informed about the possible benefits of such processes. The judiciary have also urged the legal profession to engage with mediation..[7] Ward LJ, for example, in the English case of *Burchall v Bullard*, noted that:

[4] Clare Huntington, *Help Families from Day 1*, N.Y. Times (Sept. 3, 2014) http://nytimes.com/2014/09/03/opinion/help-families-from-day-1.html.
[5] Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RES. 241, 246 (1996).
[6] SINEAD CONNEELY, *Family Mediation in Ireland* 10 (Ashgate, 2002) (2019).
[7] Judicial Separation, *supra* note 3; Family Law, *supra* note 3;; Mediation Act (Act No.27/2017) (Ir.), http://www.irishstatutebook.ie/eli/2017/act/27/enacted/en/html.

> The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate.[8]

Proponents will argue that the traditional ethos of mediation points to the voluntary nature of the process. Jurisdictions, however, vary as to whether it is 'suggested' or 'imposed'. In an Irish context, lawyers are under an obligation to discuss mediation and reconciliation with separating parties and to give them information on available mediation services.[9] This requirement is strengthened by the necessity for the lawyer to accompany any proceedings issued on behalf of a client, with a statutory declaration, signed by the lawyer, to confirm that such information has been provided. Despite this statutory obligation, mediation is often cursorily discussed and summarily dismissed.[10] This is perhaps, due to the timing of the information given. When the situation has escalated to a stage where the parties have consulted a lawyer, it may not be the appropriate time to suggest a conciliatory approach. Significant also, is that some separating parties may perhaps have a misunderstanding of what exactly meditation involves, believing that it is to assist them to reconcile, rather than to settle issues in dispute.[11]

Collaborative practice is also available as an option for separating parties who wish to avoid resolution through the adversarial courts' system. Similar to studies carried out internationally, research into collaborative practice in Ireland has found that those who chose to use the process were satisfied with it.[12] Eight out of ten clients who use the process tend to reach settlement.[13] Although not borne out in the research, the costs involved in employing lawyers and, if considering the team approach, additional experts to address the financial or relationship issues that arise, may be a potential barrier for some separating couples. A unique feature of collaborative practice is the disqualification provision. This stipulates that in the event that

[8] [2005] EWCA Civ 358.
[9] Judicial Separation, *supra* note 3;Family Law, *supra* note 3.
[10] CONNIE HEALY, *Collaborative Practice: An International Perspective*, 14-15 (Routledge) (2017).
[11] CONNIE HEALY, Resolution of Conflict in Family Law Matters: An Alternative and Child-Inclusive Approach, NAT'L U. OF IR. 285 (2014)http://hdl.handle.net/10379/4415.
[12] Healy, *supra* note 10.
[13] *Id*. *See* also Macfarlane, J., *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Case Study* (Department of Justice Canada 2005) Sefton, M., *Collaborative Family Law: A report for Resolution* (2009); Barlow, A., et al, *Mapping Paths to Family Justice: A National Picture of Findings On Out of Court Family Dispute Resolution* FAMILY LAW 306 (March 2013).

settlement is not reached within the process, the parties have to seek alternative representation should they wish to go to court. Having to do so may mean that this process is not suitable for every client.[14] At present, collaborative practice is offered as an option to low income clients through the Irish, state run, Legal Aid Board.[15] For those who do not qualify for legal aid, prohibitive legal costs associated in engaging in either the collaborative process or representation within the courts' system frequently means that many will be self-represented.

While effective in many cases, processes like mediation and collaborative practice, viewed as 'alternative' to the courts' system, have also been subject to criticism, allegedly, providing private forums where weaker parties rights may not be protected and thus, arguably, leading to what has been referred to as 'second rate' justice. Writers such as Fiss, for example, argue that justice can only be done through the courts and that any type of settlement or compromise reached through negotiations or less adversarial methods of dispute resolution are 'a poor substitute for judgement'.[16] He is of the view that all disputes require the 'thorough presentation promised by the adversary system'[17] and 'when a party settles, society gets less than what appears, and for a price it does not know it is paying'.[18] For Fiss, the judicial system 'knowingly struggles against those inequalities'[19]: inequalities, he believes, may arise perhaps because of unequal bargaining power or settlement behind closed doors. Additional protection, Fiss opines is provided by a judge who can 'supplement the parties' presentations by asking questions, calling his own witnesses, and inviting other persons and institutions to participate as amici.'[20] Feminists too, although initially welcoming a move away from what they viewed as the paternalistic approach of the courts, have raised concerns about the balance of bargaining power within 'private' dispute resolution processes. Autonomy in decision-making is questioned by the feminist movement who highlight concern about financial and family pressures forcing women to accept less as a trade-off for expediency.[21]

So rather than increase adversity further within the system by pitting one possible conflict resolution technique against the other, or viewing either as 'lesser' or 'alternative', is there a way in which the best of both systems can be combined and the skills of all of the professionals,

[14] PAULINE TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION (American Bar Association) 2nd ed. 2008.
[15] The Legal Aid Board is funded by the Irish Government and provides legal representation for litigants under earning under €18,000.
[16] Owen M. Fiss, *Against Settlement* 93 YALE L. J. 1073 (1984).
[17] *Id*. at 1073.
[18] *Id*. at 1085.
[19] *Id*. at 1078
[20] *Id*. at 1077.
[21] June R. Carbone, *A Feminist Perspective on Divorce: The Future of Children* 4 CHILDREN AND DIVORCE 1 183,192 (2004).

judges, lawyers, mediators and support services used effectively to provide a more holistic approach? When a family falls apart, rather than providing *a fait accompli*, the legal system needs to fulfil its statutory and Constitutional obligations to protect family relationships and where possible, ensure that families emerge from the system strengthened rather than depleted. This is the question this research sought to answer. This case study examined the Family Division in Maryland (Baltimore City and Baltimore County) and the potential lessons that may be learned as the Courts Service in Ireland begins the process of developing a Family Courts system.

2. RESEARCH QUESTIONS

As per Yin, case studies allow 'how' and 'why' type questions to be answered, while remaining cognisant of the context within which the research is undertaken.[22] In undertaking this case study, the primary research questions were: How does the Family Court System in Baltimore operate? How does it serve those that use the system: litigants, self-represented litigants, lawyers, Judges and what social services are available for families in transition? What can Ireland learn from the experiences of those involved in the setting up and operation of the system and 'why' might this system provide a model for the Irish Family Court? Concentrating, then, on taking the best from both systems, the results are triangulated with previous research undertaken and proposals made for reform.

3. METHOD

As practitioners, lawyers and members of the judiciary, due to the pressured nature of their work, may sometimes dismiss consideration of the theories underpinning their role as advocates, tending instead, perhaps, to focus on the bottom line. An understanding, or appreciation of the theory, however, helps the profession to take a more reflective stance and use their extensive practical expertise to develop and improve the system within which they operate. This research, therefore, commenced with a doctrinal analysis of the theoretical framework underpinning the Family Division of the Circuit Court in Baltimore City and County.[23] Key resources used included *Caring for Families in Court: An Essential Approach*

[22] Robert K. Yin, *Case Study Research Design and Methods*, (Sage Publications) 4th ed. 2004.
[23] As the Family Division of the Circuit Court in Baltimore City was the focus on the research, reference will only be made to Baltimore County when specific practices observed in Baltimore County are being recounted or where a difference in practice between the two separate Family Divisions were noted.

to Family Justice, co-authored by Professor Barbara Babb, Director of The Sayra and Neil Meyerhoff Center for Families, Children and the Court at the University of Baltimore and Judith D. Moran.[24] Additional sources including the writings of Bronfenbrenner[25] and Wexler[26] also provided a framework within which to develop propositions.

The key proposition examined is that a therapeutic approach to justice provides a more holistic and inclusive means of resolving the legal and emotional issues that arise following conflict in families and that this approach empowers those involved to move beyond these difficulties less damaged than going through the adversarial courts system unsupported. Within this framework, the importance of understanding each litigant's narrative and being cognisant of how this perspective has been framed by the ecology of their development, within their own financial, social and cultural context cannot be underestimated.[27]

With these identifiable propositions in mind, an instrumental case study approach was chosen and boundaries defined as to the breadth and depth of the study undertaken. Insights gained from these types of studies lead to 'evidence-informed decision making' and robust development of professional practice and policy.[28] Counter propositions to a more holistic approach argue that the legal system is there simply to administer justice within the bounds of the law: lawyers are not social workers, nor should they be.

Building on Professor Babb's expertise and her knowledge of the system and the key stakeholders involved, both in the initial set-up stages in Baltimore and in how the system is operated at present, a number of data sources were identified. These included: reviews of existing reports on the establishment and evaluation of the courts since inception; direct observation of the courts, and the use of purposive sampling to select and interview key stakeholders involved in the development of the Family Division and those who currently run the system. Once identified, semi-structured interviews were chosen as this methods allows 'the participant's perspective on the phenomenon of interest … (to) unfold as the participant

[24] Babb, *supra* note 2.
[25] JESSICA KINGSLEY, SIX THEORIES OF CHILD DEVELOPMENT: REVISED FORMULATIONS AND CURRENT ISSUES 187-249 (J. Kingsley Publishers, Ltd., 1992; URIE BRONFENBRENNER, *THE ECOLOGY OF HUMAN DEVELOPMENT: EXPERIMENTS BY NATURE AND DESIGN* (Harvard U. Press, 1979); URIE BRONFENBRENNER AND PAMELA MORRIS, THE ECOLOGY OF DEVELOPMENTAL PROCESS993-1028 (William Damon & Richard. Lerner eds.5th ed.) (199).
[26] David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T. M..COOLEY L. REV., 125 (2000); *See also* David B. Wexler, *From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part* 27 MONASH U. L. REV. 33 (2011).
[27] Toni Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds* 87 MICH. L. REV. 2099, 2105 (1989)
[28] Robert K. Yin, *supra* note 22.

views it (the emic perspective), not as the researcher views it (the etic perspective).'[29] Semi structured interviews were undertaken with two members of the Judiciary, both of whom had provided leadership in the early stages of the project. Interviews were completed with three current court administrators: one in Baltimore city; one in Baltimore County and the Director of the Department of Juvenile and Family Justice with overall responsibility for the coordination of services across Maryland.

Once familiar with the framework underpinning the system, court observation took place to see how the process operates in practice. This consisted of sitting in on court hearings, observing the way lawyers and the judiciary managed cases presented before the court and how the litigants (represented or self-represented) were dealt with. As court observation and interviews were carried out at two sites, Baltimore City and Baltimore County, analysis was possible within and between the two. Observation also took place as to the intake process, what Babb refers to as the 'triage' stage of the process[30]; a hearing by a Magistrate, and the subsequent referral and assessment for support services.

A full assessment of court services entails 'evaluating the quality of the process, the timeliness of the decision-making, accessibility, and the satisfaction of those who use court services.'[31] Ideally, this analysis should be carried out over a number of years to gain a detailed picture of the affect improved court systems may have on the lives of those who come before it.[32] In addressing the limitations of the study, it is important, therefore, to note that the research was carried out over a defined period.. Because of the time-limit, it was not possible to interview litigants that had used the system.[33] This proposition was, therefore, tested through interviews with key stakeholders within the courts' system and a review of statistics held since the Family Divisions' inception. In authenticating the reliability of the data gathered, reference will be made to previous research, reports and publications. Specifically, in an Irish context, research undertaken by the Law Reform Commission (LRC) in 1996 resulted in recommendations to effect change much along the framework adopted in Baltimore; far ranging and innovative

[29] CATHERINE MARSHALL AND GRETCHEN ROSSMAN, DESIGNING QUALITATIVE RESEARCH 144 (Sage 5th ed., Sage, 2011).
[30] Babb, *supra* note 24.
[31] Andrew Schepard and James W. Bozzomo, *Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections on a Survey of Unified Family Courts*, 37 FAM. L. Q/, 333, 352–53 (2003).
[32] *Id*.
[33] Performance data that reflects the impact that the services are having on families was not possible to assess within the time-limits of the study (3 weeks). When questioned on this, Sue German noted that the number of repeat cases had decreased, while acknowledging that:, *I mean there are always going to be that core people that are in such high conflict that they're going to come back no matter what*. See also, her comments further on where she notes that the parenting classes can be transformative in helping potential litigants to understand the conflict and the changes they need to make.

recommendations that have not been implemented, in large part due to lack of a fully engaged stakeholder approach and leadership.

4. THEORETICAL UNDERPINNING

Legal realism dictates that law cannot be viewed separately from society. It recognises that for each family, each person has their own narrative; their own story to tell. Central to the development of the Family Court Division in Baltimore, was a recognition that, to be effective, the ethos of the courts' system needed to change. Rather than a fire-fighting, piecemeal approach, early diagnosis of the issues at stake for the family, the provision of appropriate support services and effective case management were identified as key to ensuring that, where possible, all of a family's legal issues would be dealt with in a holistic way.

At its foundation, the Family Courts' system in Baltimore City and County, recognizes that families and their legal issues can rarely be seen in isolation. Factors like their economic, cultural and social circumstances impact on a family's daily life. In adopting this approach, Babb and others who were instrumental in pioneering reform drew from a theoretical foundation, built on an understanding of what Bronfenbrenner describes as the 'ecology of human development': the multi-layered web into which disputants are born.[34] Bronfenbrenner describes a series of 'systems' which, in his view, allows humans to develop in a manner similar to a 'set of nested structures, each inside the next, like a set of Russian dolls.'[35] The first system he identified was the 'micro-system'which, he believed, represented the immediate relationships people have in their lives: the relationship, for example, between a parent and a child; between a child and a teacher. The next level, Bronfenbrenner viewed as the 'meso-system', namely, the relationships between differing 'micro-systems': the child's home and school environment combined, for example. One will undoubtedly influence the other. Bronfenbrenner next examined factors outside of an individual's direct environment, what he termed the 'exo-system': a parent's relationship with their work environment and the impact this may have on a particular family. Unexpected unemployment, for example, may not be relevant to the immediate issues at dispute but will affect how matters are resolved. Finally,

[34] Bronfenbrenner, *supra* note 25; *See also* Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court* 71 S. CAL. L. REV, 469 (1998); *See also* Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L. J. 775 (1997).
[35] *Id*. at 201.

wider social policy and developments, at national or international level, form part of what Bronfenbrenner referred to as the 'macro-system', or society's plan.

In examining the concept of 'conflict' with a view to better understanding it, sociologists like Simmel and Coser, argue that it does not always have to be a negative force but can, in fact, be a variable: sometimes "destructive", but sometimes "constructive" or even creative … an opportunity for learning and growth.'[36] Depending on the ability of the potential litigants to take a constructive approach, new solutions may be reached. Coser cautions, however, that left to their own devices, some social conflicts may be infinite. Thus, to 'prevent their struggle from becoming a zero sum game in which the outcome can only be total defeat or total victory,'[37] feuding parties need to have a 'common interest' in agreeing 'explicit provisions' as to what constitutes the end of the conflict.[38] Once these parameters or 'symbols'[39] are in place, '[t]ermination of conflict becomes a problem to be solved by both parties.'[40]

What affects disputants' ability to set these parameters? Coser, like Bronfenbrenner, points to the importance of 'groups'[41] that tend to form naturally within the Bronfenbrenner 'systems,' and the importance of understanding the extent to which groups will seek to protect and maintain their members. As a natural response, when a threat arises from something outside of the group, the group tends to mobilize to protect itself.[42] If, however, as is the case in family conflicts, the actions of one of the members threatens the preservation of the group from within, the conflict is often more deep-seated and difficult to resolve. Coser argues that hostilities that have been building up within the group will suddenly come to the fore; those that perceive themselves as 'underprivileged' will seek to assert their rights.[43]

Another important factor is time. Douzinas, as a postmodern legal scholar, notes that the '[t]ime of justice differs from the time of interpretation.'[44] Issues that have caused hurt or conflict when a relationship breaks down may be less relevant when a case comes to a court hearing or settlement. Conversely, dealing with immediate issues in a timely manner may assist in de-

[36] Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*,16 OHIO ST. J. OF DISP. RESOL. 1 (2000).
[37] L.A., Coser, *The Termination of Conflict*, 5 THE J. CONFLICT RESOL. 347, 347–353 (1961).
[38] *Id*.
[39] *Id*.
[40] *Id*.
[41] L.A., Coser, THE FUNCTIONS OF SOCIAL CONFLICT 35 (Free Press, 1956).
[42] GEORGE SIMMEL, CONFLICT 43-44(Free Press, 1955);*see also* Cose, *supra* note 41 at 67..
[43] Coser, *supra* note 41.)
[44] COSTAS DOUZINAS, LAW AND JUSTICE IN POSTMODERNITY 218 (Cambridge University Press, 2015).

escalating the conflict. Taking this into account, the system chosen and which has been in use in Baltimore since 1998, is one based on therapeutic jurisprudence.

So what does a therapeutic approach involve?

A hearing before a court through the traditional adversarial system can prove therapeutic for certain people at various times in their lives, notably in situations where people need the public vindication provided through a court hearing, an acknowledgment of a wrong or the need to assert a right.[45] The aim of the court system is to administer justice as per the rule of law. Taking a therapeutic approach, envisages a situation where the law is used to find the best solution possible for the parties involved, based on their particular issues at a point in time.

Wexler, one of the founders of the therapeutic jurisprudence movement describes it as:

> …simply a way of looking at the law in a richer way, and then bringing to the table some of these areas and issues that previously have gone unnoticed… (TJ) simply suggests that we think about these issues and see if they can be factored into our law-making, lawyering, or judging.[46]

He stresses that its aim is not to 'trump' the rule of law; therapeutic jurisprudence exists merely as a 'lens' through which to view laws and legal actors. He also clarified that:

> In actuality, therapeutic jurisprudence ("TJ") is not and has never pretended to be a full-blown "theory". More properly, and more modestly, it is simply a 'field of inquiry' — in essence a research agenda — focusing attention on the often overlooked area of the impact of the law on psychological wellbeing and the like. From the very beginning, however, TJ has sought to work with frameworks or heuristics to organise and guide thought.[47]

Therefore, as noted above, the aim of therapeutic jurisprudence is not to detract from the rule of law but to 'concentrate on the law's impact on people's emotional lives and psychological well-being.'[48] King, notes that taking a therapeutic approach also allows an element of 'intrinsic motivation' towards 'self-determination' for disputing parties, acknowledging 'that the individual must confront and solve her own problems.'[49] Central to this is the concept of

[45] Susan Swaim Danicoff, *Families in Circle Process: Restorative Justice in Family Law*, 53FAMILY COURT REVIEW 427 (2015).
[46] Wexler,*supra* note 26, at 125-134..
[47] Wexler,*supra* note 26..
[48] Susan Daicoff, *The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*,19 TOURO L. REV. 825 (2004).
[49]Michael S. King, *Should Problem-Solving Courts Be Solution-Focused Courts,* 80 REV. JUR. U.P.R. 1005 (2011)..

'narrative theory'. Understanding a person's 'narrative' and 'how they tell their story' embodies a poststructuralist approach; recognizing the potential benefits of focussing 'on contextualised means making, rather than universal truths or all-encompassing reality.'[50] Hearing their 'story' is key, both in ensuring that litigants receive substantive and procedural justice and are treated with respect and empathy by the courts' system. Brooks and Madden refer to the notion of therapeutic jurisprudence as 'relationship-centred lawyering.'[51] It assists lawyers to think beyond taking a homogenous approach to all family law matters, that every family is 'the same' and understand that issues arise for a variety of specific and, sometimes almost pre-determined reasons.

For many lawyers, the notion of taking a more therapeutic approach, whereby clients have a central, participatory role and autonomy in decision-making, may prove to be an uncomfortable dawn. Lawyers practicing within the adversarial system retain a certain element of control over a case and seek, as per their legal training, to minimize exposure to risks for clients. Going beyond what they see as the strict or basic facts of a case, may seem like exposing their clients to potential risks.

Critics of therapeutic jurisprudence question its usefulness. Bruce Arrigo argues that there are difficulties in engaging in a therapeutic jurisprudence approach. Firstly, because it starts from a premise that assumes all substantive law is fair, he believes, it cannot apply the law therapeutically when this may not always be the case. He also raises concerns that 'therapeutic jurisprudence promotes a moral, good, and docile individual in a one-size-fits-all law.' [52] Ward, similarly, is critical of what he terms the promotion of the 'good lives' model.[53] Others argue that therapeutic jurisprudence is merely 'old wine in new bottles.'[54] Much concern has been raised about the definitional issues surrounding what is meant by 'therapeutic'; who decides what is therapeutic and on what basis.

---

[50] Gene Combs and Jill Freedman, *Narrative, Poststructuralism, and Social Justice: Current Practices in Narrative Therapy* (2012) 40 THE COUNSELING PSYCHOLOGIST 7 1033–1060, 1036 (2012).
[51] SusanL. Brooks & Robert G. Madden, *Relationship-Centered Lawyering: Social Science Theory for Transforming Legal Practice* 78 Rev. JUr. U.P.R. 23 (2009).
[52] Bruce Arrigo, *The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Enquiry of Law, Psychology and Crime*, 11 PSYCHIATRY, PSYCHL. &L.23,43 (2004).
[53] Tony Ward, *Good Lives and the Rehabilitation of Offenders: Promises and Problems*, 7 AGGRESSION AND VIOLENT BEHAVIOUR 5, 513-528 (2002); **Tony** Ward& Claire Stewart., *Criminogenic Needs and Human Needs: A Theoretical Model*, 9 PSYCHOLOGY, CRIME AND L. 2,125-143 (2003).
[54] Bruce D..Sales & DanielW. **S**human, *The Newly Emerging Mental Health Law*,2 AMER. J. OF ORTHOPSYCIATRY 64, 172-179 (1994);. Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented. The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575,, 583 (2008).

With respect to this being a new way forward for lawyers, Freckelton, in particular, raises concerns about such processes signifying 'intellectual laziness, woolliness, a discomfort with conflict, or the realities of the adversarial system of justice.'[55] Others have expressed concern that it will result in a reversion to paternalism, with lawyers imposing their own values on clients.[56] Coupled with this is the familiar cry of 'This is what a good lawyer does anyway.' Quinn, for example, cautions against criminal law defense attorneys becoming what she describes as 'rehabilitation change agents,' something, she believes, would undermine the role of lawyer as a zealous advocate.[57] Daicoff, in response to these criticisms, acknowledges good lawyering may well 'implicitly or unconsciously take those concerns into account — whereas those involved in a therapeutic approach within the comprehensive law movement go a step further by explicitly valuing and promoting such factors.'[58] Cameron, too, describes the difference between practicing as a litigator and working in collaborative, therapeutic way as between that of 'molding the story' to fit within the rules of the adversarial system and 'helping (clients) to build a unified story'[59]; taking all of their needs into account.

FINDINGS

The mission of the Baltimore court is to:

> Provide a fair and efficient forum to resolve family legal matters in a problem-solving manner, with the goal of **improving** the lives of the families and children who appear before the court.
>
> To that end, the court shall make appropriate **services available** for families who need them. The court shall also provide an environment that support judges, court staff and attorneys so that they can **respond effectively to the many legal and non-legal issues of families in the justice system.*[60]***

[55] *Id.* at 593
[56] Macfarlane, *supra* note 13.
[57] Mae C. Quinn, *An RSVP TO Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 B. C. L. REV.539,595 (2007).
[58] Susan Daicoff,*Law as a Healing Profession: The Comprehensive Law Movement*, 6 PEPP. DISP. RESOL. L.J. 1 (2006).
[59] NANCY CAMERON, COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE 106 (Continuing Legal Education Society of British Columbia, 2004).
[60] Emphasis added

The Family Division in Baltimore, established in 1998, is essentially a court based, court connected system that aims to assist with the legal and non-legal needs of children and families centred around early intervention, less adversarial dispute resolution and improved case management.[61] It was established by means of a court rule, rather than legislation.[62] The aim: to embody a system where a family would have all of its issues dealt with holistically. If, for example, factors leading to the breakdown of a marriage or relationship included domestic violence or drug or alcohol addiction, services are provided, up-front, to assist couples deal with these issues. Brooks and Roberts note the importance of providing these services early and in a 'preventive and noncoercive fashion.'[63] Rather than have separate hearings about individual aspects of the conflict, all are dealt with together and a co-ordinated approach taken. Services enshrined within the Family Court System in Baltimore include: Mediation (Custody and Visitation); Custody Investigations; Trained Personnel to respond to emergencies; Information and Assistance – with special assistance for self-represented litigants; Parenting Seminars and Family Support Services. The emphasis throughout is that the parents are the primary decision- makers and, where possible, parents are supported in this role.

So how does a typical case progress through the Family Courts' system in Baltimore?

Examining the records held by the Baltimore courts office and in line with trends internationally, many of those seeking remedies before the courts are self-represented.[64] The Family Divisions of the Circuit Court at Baltimore City and Baltimore County both provide on-site assistance on a 'first come-first served' basis where self-represented litigants may enlist the help of a lawyer in completing court documents and obtaining procedural advices. The Self Represented Litigant Project based in Baltimore City has meant that there are two attorneys available on a full-time basis. Sue German, Court Administrator, Baltimore City advised that it was hoped that, with additional funding, they will be in a position to increase the number of attorneys available and to extend their remit to providing guidance in relation to other matters that may be relevant to potential family law litigants, for example, landlord and tenant issues

[61] The concept of a Family Court was first envisaged in Rhode Island in 1961, spreading to New York 1962 and Hawaii 1965 and culminating in an American Bar Association Summit on the Unified Family Court entitled 'Exploring Solutions for Families, Women and Children in Crisis in 1998.[61] Following on from this, the Coordinating Council of the Unified Family Court show cased the model developed by the The Sayra and Neil Meyerhoff Center for Families, Children and the Court , University of Baltimore in 2002.

[62] MD. Code A., FAM. LAW §16-307 (West 2021) (The 1998 Rule was a State-wide reform and permitted the creation of Family Divisions in Baltimore City and Anne Arundel, Baltimore County, Montgomery County and Prince George County).

[63] Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453, 455 (2002).

[64] Interview with Sue German, Court Administrator in Baltimore City (insert date of interview) – 89% of persons coming before the courts in Baltimore city are pro se.

or employment law. This support has been effective in helping those who cannot afford a lawyer. Interpreters are also available, if required.

All cases, once initiated, are assigned a unique identification number and a case manager. Any further proceedings instituted or issues relevant to that family are linked to that number. Central to the establishment was the need for a clear definition of what matters are to be dealt with on a 'one family, one case basis'.[65] Once an application is lodged, if the respondent is contesting the case , the disputing parties meet with a magistrate.[66] The magistrate holds a brief meeting at which s/he will hear both sides and will determine whether support is needed. If so, s/he will refer for services.

Support Services

As observed at the Family Division of the Circuit Court in Baltimore County, , assessment as to the need for support services are carried out by the social services department, often on the same day as the Magistrate's hearing[67]. The need for what has been termed 'medical services' to include counselling, custody evaluations and support was recognized, many years ago, by Judge Kathleen Friedman.[68] Judge Friedman, now retired, recalls what she saw as the futility of court orders without addressing the underlying psychological and social needs of those appearing before the court. She collaborated with a local hospital to access and evaluate services needed and how they should be provided.[69] Recognizing that problems are still going to exist for families in their 'exo-systems', and that poverty, drugs and other social issues will

[65] This discussion focused on issues including the burden of proof applicable in differing cases, what information could be shared between various court offices and the need for consent and transparency. *See* LINDA SZYMANSKI, POLICY ALTERNATIVES AND CURRENT PRACTICE IN THE SPECIAL PROBLEM AREAS OF JURISDICTION OVER THE FAMILY 8-9 (1993). Therein the authors discuss the differing standards of proof and the additional concerns of mixing juvenile justice issues with wider criminal matters. Babb notes '[i]n defining comprehensive subject matter jurisdiction, then, it is more prudent for court reformers to err on the side of over-inclusive jurisdiction, as opposed to under-inclusive jurisdiction; reformers must empower their unified family court to respond as comprehensively as possible to all of a family's related legal matters. This jurisdiction encompasses all divorce or dissolution and related matters, including distribution of marital property, separation, and annulment; child custody, visitation, modification, and interstate custody cases; child support establishment, modification, enforcement, and uniform reciprocal support cases; determination of paternity; child abuse and neglect; termination of parental rights; domestic violence proceedings; adoption; juvenile delinquency proceedings; adult and juvenile guardianship and conservatorship; mental health matters, including civil commitment and confinement; legal-medical issues, including right to die, abortion, and living wills; emancipation; and name change.' She notes however that '[e]xperts differ, however, about whether to include criminal jurisdiction over intra-familial matters, such as child abuse and domestic violence, within the family court's jurisdiction (sic);' *See* Barbara Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 518 (1998).

[66] Md. Code A., FAM. LAW §9-208 (West 2021). Magistrates are appointed by the courts under Maryland Rule 9-208. In family law matters, they have jurisdiction to hear applications for uncontested divorce, child support pendente lite, etc. If the matter is uncontested, consent orders or rulings can be made once the appropriate time periods have elapsed. They can also refer the parties to social services for assessment of need for support services.

[67] This was observed at the Baltimore County courthouse. After the parties initial meeting with the Magistrate, they were assessed by the head social work and referred for services, as appropriate.

[68] Interview with Judge Kathleen Friedman (ret.), Balt. City Md. (Wednesday 28th May 2019).

[69] *Id*.

continue to impact, the system and the supports it provides strive to improve the lives of those that come before it. Services provided can be divided into five main categories:

1. Parenting classes: The classes provided are not focused on telling the parties 'how to parent', but rather advice as to how to co-parent effectively, now that they are no longer in a family unit (COPE).[70] Recognizing that not all families are alike, classes have also been developed for couples who did not have a pre-existing relationship, may not ever have lived together as a family but may have a child together (SHAPE).[71] Sue German, Court Administrator, Baltimore City notes 'Anytime children are involved and it's contested, then we order them to go, but the way that the court rule is written there is no contempt attached to failure to attend this class.' Research undertaken shows that the approach taken in these classes can assist the parties to understand the issues between them better such that they reach their own resolution without the need for further intervention. German, for example, advised that:

> … the parenting education classes at the beginning are really helpful… last week or the week before that, I sat down with these people and they said, 'Yeah, you know I went to this class and we realised that we needed to do things differently and we started to talk to each other and so this is what we came up with.' Yes, this works.

2. Evaluations: A Home Study or a full Custody Evaluation. The home study involves an inspection of the home the children live in to ensure that it is safe and habitable. In the event that there are issues with the standard of accommodation, assistance is provided. A Custody Evaluation, in contrast, is more detailed. It includes gathering information on school records, psychological evaluations of parents, prison records and fitness to parent. Sue German notes that this service is 'a Godsend for us because it cuts the cost for our people (the litigants), it definitely cuts the cost for our court and they do a really, really, good job. [72] Evaluations are carried out within a specified time and for a specified fee.

[70] Md. Code A., FAM. LAW §9-204-205(West 2021).
[71] *Id.*
[72] Sue German advises that the fee for a full custody evaluation which would include an inspection of the home/homes in which the children do or will reside costs 600 dollars. If the parties are unable to pay, the can apply for a fee waiver and this will be granted based on their financial circumstances.

3. Support Services for Children: Classes are provided for children whose parents are separating. The aim, German notes, is to help children 'understand what has gone on with your parents is not your fault. You didn't do it. There are other kids that have the same issues. You are not alone in the world.' For older children, the classes focus on understanding conflict resolution techniques. This helps not only in the family transition but is also a life skill. German explains that classes may be recommended when a litigant comes in and says: 'I have got this 14 year old that I don't know what to do with'.

4. Support for victims of Domestic Violence: In cases where there are issues of domestic violence, the social services coordinator will assist in completing the necessary documentation for a protective order and accompany the applicant to court. If a protective order is granted, copies are furnished to a special unit in the sheriff's office who serve them on the respondent. Additionally, Baltimore city run a Protective Order Advocacy Representation through which attorneys are available, free of charge, to represent abuse victims at the final hearing. Counselling for victims of domestic violence, drug and alcohol testing and counselling for addiction issues is provided, as required.

5. Assistance with financial concerns: One magistrate, out of the five that normally operate within Baltimore city courthouse is tasked with assisting those who have been unable to fulfil their obligations regarding the payment of financial support to dependent spouses and children. Failure to discharge the monies due is an offence punishable by imprisonment. This magistrate's role is to find out why payments are not being made and to provide assistance.[73] As part of the role, the magistrate has access to a serious of programmes to assist litigants with resumes, interview preparation and the programmes link in with local business to help find employment. This is aimed at getting the litigant back into the workforce and avoiding jail.

[73] Once ordered, this is a requirement under Maryland law and is punishable by imprisonment

Additional services available at the Family Divisions in both Baltimore City and County include: Drug and Alcohol testing; a State-wide call centre (Maryland Court Help Center); a comprehensive video library; legal help through online content and access to all relevant court forms online, all of this content being available in five languages through the language portals. In reviewing the many valuable services that are available as part of the Family Courts division, however, German notes that 'the biggest gap that we have is (services for) mental health issues'. She notes that while the 'University of Maryland has a clinic that is totally free' it is specifically 'for children who have been traumatised by violence or sexual abuse in the household.' Counselling and support is provided to them and their families but there are no other mental health services for 'poor people'. This is mainly due to a lack of funding but is a significant issue as many family law problems stem from parenting in situations where the parties may have cognitive disabilities or have suffered trauma.[74]

Additional facilities provided at Baltimore City Courthouse include onsite childcare. This allows litigants to leave their child in a safe environment while they are attending court rather than having to pay for childcare or miss an important court date. An interesting approach was also maximising the use of court buildings for supervised access. Additional costs are incurred because of the need for evening security at the courthouse, but it is an efficient use of the court building after the courts have concluded for the day. While Richard Abbot, Director of the Department of Juvenile and Family Services[75], notes that some parties may be reluctant to avail of access on the court premises, for others, it provides a safe environment, especially in situations where access needs to be supervised. Recognizing this reluctance, and due to extra funding being available, the Family Courts Division in Baltimore County, in contrast, provides facilities for access at a location separate from the court building. Abbott, comments that "some courts don't pay any attention to social issues that are surrounding them, however these issues need to be addressed."[76] Being cognizant of the wider implications for litigants coming before the courts is essential when taking a therapeutic approach to the law.

[74] Carol Coulter, *An Examination of Length, Contested, and Complex Child Protection Cases In the District Court* (2018). This accords with research undertaken by the Child Care Law Reporting Project in Ireland highlighting lack of services for parents with mental health or cognitive difficulties.
[75] The Department of Juvenile and Family Services is incorporated within the Maryland Administrative Office of the Courts. The department works with all the circuit courts to promote effective family court reform through the Family Divisions. Each Family Division of the Circuit Court is separate, governed by separate local governments and much deference is given to the administrative judge in each jurisdiction. The Maryland Judiciary as a whole does, however, promote uniformity and there are no local rules.
[76] Interview with Richard Abbott, Dir. of the Dep't. of Juvenile and Family Services, Md. Judiciary, in Balt., Md (May 21, 2019).

A Spectrum of Dispute Resolution

After services have been provided, as appropriate, the parties progress through the system. Abbott notes, for example, that the social worker who undertook the custody evaluation presents the results to both parties in the presence, if applicable, of their lawyers. This is effective as both the applicant and the respondent hear the findings at the same time and know what issues the social worker will reference before the judge. Litigants, therefore, have a better understanding of how things will work out in court.

As an initial step, the parties are invited to take part in co-mediation.[77] As Babb has noted, mediation and other less adversarial processes offered as "court-connected programs are likely to gain greater acceptance by the parties; they tend to view procedures in this setting as unbiased due to the affiliation with the court."[78] Co-mediation also avoids concerns regarding gender balance and can be useful in ensuring that cross-cultural issues may be addressed ,e.g., African-American, Indian, Hispanic mediators as appropriate.[79] Initially, the parties attend two hours of mediation at a cost of 150 dollars, set fee.[80] In general, parties attend the mediation without their lawyers.[81] The mediators work with the couple to assist them to reach a solution, cognizant at all times that the parents are the primary decision-makers and the ones often best qualified to make decisions that suit their particular needs.[82] If any issues of concern arise with regard to the safety of any of the parties or the children of the relationship, these matters are addressed. If the case cannot be resolved through mediation, there is the additional option of participating in a Court Ordered Settlement conference.

At the Court Ordered Settlement conference, a retired judge will assist the parties and conduct what may be described as a preliminary hearing of the case. This is achieved by offering retired judges the opportunity to avail themselves to more generous pension packages if they work a

[77] MD. CODE ANN., FAM. LAW § 9-208 (West, 2001). (Mediation is mandatory in Maryland for all custody cases (with a few noted exceptions to include cases where there is an allegation of domestic violence)).
[78] Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 522 (1998).
[79] The mediators used in Baltimore city are employed on a contract basis. In Baltimore County, there are court employed mediators on-site. There does not appear to be any specific regulatory body for mediators.
[80] In Baltimore City, the court has a panel of mediators that they call upon and they mediate based on a set fee. In Baltimore County, there are mediators on site. Compliance in terms of attending the mediation sessions is an issue but the court statistics indicate that where parties attend, 50% of cases are settled through the mediation process – Interview with Sue German. If litigants are not in a position to pay the mediator's fee, they can apply for a few waiver and this will be granted depending on their financial circumstances
[81] This was observed at Baltimore County courthouse. The applicant and respondent wished for their lawyers to attend the mediation but were advised that this was not permitted. They were advised that if they wished their lawyers to negotiate, further settlement negotiations should be arranged at the offices of one of the lawyers.
[82] Sue German advises that 50% of those who attend mediation, settle their disputes within the mediation process.

certain number of hours. Having someone with the authority perceived of a retired judge, can focus the parties as to the possible outcome likely to be achieved through a court hearing. If a settlement is not reached, however, a trial date will be given.

Once a case progresses to court it is heard by judges who have been appointed to the Family Courts. A difficulty with the system is that these judges are not family law specialists.[83] All court proceedings are recorded. Parties can obtain copies of transcripts if they wish to challenge any rulings made, or alternatively, audio files are available.

Court observation confirmed that litigants, whether represented by lawyers, or self-represented were given adequate time to present their case and guided, if necessary, through the evidential and procedural requirements. In a case where the applicant was seeking a protective order, the Judge applied a therapeutic approach in asking the applicant and respondent how statements made by the other "made them feel." In contrast to what was expected based on a theoretical review of how the system operated, however, the Judge did not seem to be aware of the details of a previous court attendance in relation to the same matter. The Judge, however, rose to consider the arguments made and, on her return, carefully explained the evidential requirements under the legislation and the reasons for her decision. Similar approaches were observed in child custody and divorce cases.

Engagement by the Judiciary

Whitfill comments that "how a judge exercises their discretion is a product of their life experiences"[84] Training for the judiciary, therefore and additionally lawyers and court staff is an essential part of the preparatory and ongoing work undertaken by the Family Division in Baltimore.[85] German comments that: "by and large the last interaction they (the judges) have had with family law was in law school." The majority are not, as noted earlier, family law specialists. The Court service therefore provides seminars on what she refers to as 'the nuts and bolts of family law."[86] Central to that training is gaining an understanding of what German describes as "the underlying issue" or "trauma informed stuff", namely, information:

[83] Interview with Judge Albert Matricciani (ret.), Balt., Md. (May 15, 2019).
[84] Risa Garon &Judge Cypert Whitfill, *A Mental Health Professional and a Judge's Journey: Providing Responsible Parenting, Giving Children a Voice*, 37(3) FAM. L. Q. 459, 472 (2003).
[85] Circuit Court judges in Maryland are appointed by the Governor and preside over all Circuit Court matters to include criminal and civil cases in trial courts of general jurisdiction. Family Division judges (a division of the Circuit Court) as Judges of the Circuit Court are not specialists in family law matters.
[86] *See supra* note 83.

> about brain chemistry and the effects of growing up in a larger jurisdiction when you're poor, and everybody you know is in prison and you don't have a dad. All of that stuff, you know, goes to create this person who is now standing in front of you. And so, when you are making decisions about who should have custody, who's going to be the best mum or dad for these kids there are things that you need to take into account… … when you have this person standing in front of you and they're acting in a particular manner or they have a long history of acting in a particular manner, there may be a reason for it.

This training is of particular importance, for judges, given the number of self-represented litigants coming before the courts. German notes that "it's very difficult for them (the judges), not only to hear the stories and to deal with the issues but they also have to sort of act as a pseudo lawyer and keep control of the flow and they're not accustomed to that. You know, trying to get somebody through cross-examination and explaining why you can't ask that question …"

Judge Albert J. Matricciani Jr., one of the pioneering forces behind implementing change within the courts, highlighted the importance of taking a gradual approach with the judiciary. He noted that many judges may be set in their ways and resistant to change. From his experience in bringing in the necessary reforms, Judge Matricciani Jr., advised that it is best to begin with judges who were receptive to the idea and who have an understanding of the challenges presented in family law cases. From there, having a policy that all incoming judges engage with the new model means that change, though gradual, will be effective and long lasting.[87] Richard Abbott, too acknowledges that "judges listen to other judges… it's always good to have follow-up with a judge who says, yeah, this works really good in our court."[88] Abbott is keen to emphasize, however, that he does not want "judges being social workers, because they're not qualified to do that" and points to the importance of a support network of 'professional staff to do those things." Abbot acknowledges, however, that it took "a little while to get judges to understand that this is better for you." This support and training for lawyers and members of the judiciary accord with the therapeutic approach.[89]

[87] Matricciani *supra* note 83.
[88] Abbott *supra* note 76.
[89] Barbara A. Babb & Judith Moran J.D., *supra* note 2, at 126.

The Final Piece of the Jigsaw: The Sayra and Neil Meyerhoff Center for Families, Children and the Court

While costs have been incurred in restructuring the physical and technological set-up of the courts, many of the services are provided by maximizing available resources. Universities across Baltimore city provide the courts with assistance through the services of law students, trainee mediators, and trainee medical professionals.[90] Lawyers may choose to fulfill part of their continuing professional development requirements by contributing to pro bono services.

The establishment of the Sayra and Neil Meyerhoff Center for Families, Children and the Court in 2000, however, was instrumental in the success of the Family Court System in Baltimore. Established by Professor Barbara Babb at the University of Baltimore, the Center is committed to improving the practice of Family law in Maryland. In accordance with its stated mission, it aims to help and strengthen those that come before the court and to improve the practice of family law and the operation of the family justice system in Maryland, nationally and internationally.[91] Recognizing the importance of the theory of human development and through the lens of a therapeutic jurisprudential approach, provides support for the Family Court system by educating law students in family law and, specifically, the advantages of taking a more holistic and comprehensive approach. In addition, the Center assists in the delivery of the courts service through education of lawyers and judges.

Recognizing that part of taking this holistic approach involves engaging with children and young people in an effort to keep them in the education system, the Center established a Truancy Court Program. The aim of the program is to ensure early intervention if children are dropping out of the educational system by cocooning them in a framework that provides mentorship, education, and support. This support is coordinated through the Center and engages law students and volunteer judges to access progress and to work with these children and young adults. The statistics reveal that 75% of the students who participated in CFCC's Truancy Court Program decreased their unexcused absences by 65%.[92]

[90] University of Maryland, Johns Hopkins University, Howard University, Loyola University and Morgan State University
[91] *Sayra and Neil Meyerhoff Center for Families, Children and the Courts*, U. OF BALTIMORE (last visited Sept. 23, 2020), https://law.ubalt.edu/centers/cfcc/.
[92] *Truancy Court Program: Strategies and Features*, U. OF BALTIMORE (last visited Aug. 20, 2020), https://law.ubalt.edu/centers/cfcc/truancycourtprogram/strategiesandfeatures/index.cfm (The Truancy Court Program has operated in over 50 schools throughout Baltimore City and County, Montgomery County and Anne Arundel County).

In addition, the Sayra and Neil Meyerhoff Center for Families, Children and the Court **(CFCC)** developed a set of performance standards against which the Family Court system is evaluated.[93] These standards address the extent to which access to justice is provided; an analysis of expenditure and timeliness; an appraisal of equality, fairness and integrity; independence and accountability and analyses public trust and confidence in the system. The standards were developed around the recognition, mentioned earlier, that courts interact with families when they are at particularly vulnerable periods in their lives. Richard Abbott notes that "tweaks" have been made to the system as it has evolved. For example, initially, the Magistrates met with the attorneys rather than the litigants. Feedback indicated that litigants felt that they were taking a day off work and that there was no point as they were not given an opportunity to be present. Now Magistrates meet with the parties first and then their attorneys. Abbott's goal has always been to "actually bring everybody together and write up some best practice."[94]

DISCUSSION

Ireland is emerging from a conservative past. Constitutional provisions are being gradually amended. Under the Constitution of 1937, marriage (between a man and a woman) was for life. In recent times, however, amendments permit divorce on a no-fault basis, where the parties have lived separate and apart for two out of the previous three years.[95] Significantly, and in a break from the Catholic influence at the time of the enshrining of the Constitution in 1937, the Irish State made history by being the first country to pass a referendum to provide for same-sex marriage.[96] Protections, although arguably not as robust, are also in place to protect the rights of cohabiting couples.[97]

[93] Barbara A. Babb &Jeffrey A. Kuhn (2002) *Performance Standards and Measures for Maryland's Family Divisions*, Md. Judiciary 4-60 (2002) (last visited Aug. 23, 2020) https://www.courts.state.md.us/sites/default/files/import/family/publications/performancestandards.pdf.
[94] Abbott,*supra* note 76.
[95] Family Law Act 2019 (Act No. 37) (Ir.), http://www.irishstatutebook.ie/eli/2019/act/37/enacted/en/print.html.
[96] Constitution of Ireland 1937 art. 41, *amended* by Constitution of Ireland art. 34, Marriage Equality Act 2015 (Ir.), https://data.oireachtas.ie/ie/oireachtas/act/2015/C34/mul/enacted/a34th15.pdf.
[97] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 http://www.irishstatutebook.ie/eli/2010/act/24/enacted/en/html.

Divorce first became available to separating couples in Ireland in 1996. Prior to this, there had been a recognition that the family law system was in a state of "crisis."[98] The Irish Law Reform Commission (LRC) had already begun a consultation process in 1994, which culminated in a Report on the Family Courts in 1996.[99] The report was thorough and wide-ranging and made many valuable recommendations for reform. The Commission called for the creation of fifteen "Regional Courts"[100] to operate as a division of the Circuit Court with a unified family law jurisdiction.[101] It was envisaged that each court would have a Family Court Information Centre where potential litigants would receive:

> impartial, objectively presented information relating to available alternatives to litigation, implications of separation, court processes and case management information and information on available support services.

To facilitate this, it was proposed that a Family Assessment Service would be available to each court and adequately funded. Any assessment required by the court would be undertaken by this service and reports provided to the court.[102] Attendance at Information sessions would be mandatory. Guidance on the types of dispute resolution processes available would also be provided. The Family Mediation Service, which was, at that time, operating on a pilot basis in Dublin, should, they recommended, be extended nationwide and "should be viewed as complementary to the judicial process, and not as a replacement thereof."[103] Important recommendations were also made about simplifying procedures, ensuring that there was an effective case management system and audio recording systems. Judges dealing with family

[98] At present family law cases in Ireland are dealt with at three court levels. The District Court is the most basic entry level for family law cases. It deals with matters including applications for maintenance, custody and access and emergency orders for protection under the Domestic violence legislation. This is also the court that hears public law childcare applications where the State is seeking to have children taken into care. In most districts, family law is dealt with alongside other civil and criminal matters with certain days being allocated as 'family law days' or sittings being held occasionally, which are reserved specifically for family law matters. The next level is the Circuit Court which plays a central role in the administration of family law cases dealing with separation and divorce and has parallel jurisdiction the District Court with regard to orders for maintenance, barring orders etc. and deals with appeals from the District Court. Finally, under Article 34.3.4 of the Constitution the High Court has original jurisdiction in all matters and deals with questions of law and fact. The High court caseload includes: Adoption and Abduction. There is also a specific Children's court, based in Dublin, dealing primarily with juvenile offences. Judges in Ireland are appointed from solicitors and barristers who have ten years in practice, although they do not need to have practised in a certain area of law.

[99] THE LAW REFORM COMMISSION REPORT ON FAMILY COURTS (LRC 52-1996) (Ir,), https://www.lawreform.ie/_fileupload/Reports/rFamilyCourts.pdf.

[100] *Id*. (The Court Service Annual Court Report 2018 again calls for the establishment of regional courts).

[101] *Id* at 127. (Issues to be included: Separation, Child Custody, Access and Guardianship, Maintenance, Domestic Violence issues, disputes in relation to the family home, under the Married Women's Status Act 1957, The Succession Act 1965, the Partition Acts 1868-1976, Wardship Proceedings, Nullity, Proceedings under the Status of Children Act, Adoption Proceedings and proceedings under the Child Care Act – where children are being taken into the care of the State. This would not however extend to dealing with criminal issues involving children, due to the administration difficulties involved and the fact that at that time the age of criminal responsibility in Ireland was seven years of age).

[102] It is notable that at that time in Ireland, the Probation Service was providing an investigation and reporting service under the auspices of the Probation and Welfare Service of the Department of Justice. The service investigation and reports in private child access/custody disputes. This service was discontinued leaving litigants with little option but to request these services/reports on a private basis leading to increased costs and delays within the family justice system.

[103] The Law Reform Commission, *supra* note 99.

law, they recommended, should be appointed for a minimum of one year and have specific training, including training in case management. The Commission recommended that "lawyers" also undertake training and that:

> Such courses should be inter-disciplinary, involving inputs from areas such as psychiatry, psychology, sociology, and social work. Heightening awareness of alternative methods of dispute resolution would be one purpose of such courses. Up-dating courses should be available for those already practising in family law.

Additional recommendations included active case management, including the implementation of pre-trial procedures to ensure that parties receive whatever assistance they needed before ending up at a hearing. Special provisions were to be available for emergency applications in cases of domestic violence or maintenance applications. Fundamental in the running of these courts was the proviso that there would be a sufficient number of Regional courts so that litigants did not have to travel long distances and a sufficient number of judges. The LRC recommended that Free Legal Aid and Advice be available, and in disputes where the welfare of children was in issue, there would be a provision for the appointment of lawyers.[104] Importantly, also, it was envisaged that these Centres would collate statistical data to inform further reform and improvements within the Family Court system.

It is clear in reviewing the LRC's recommendations, had they been acted upon, Ireland would have arguably been on par with Baltimore in the establishment of an effective family courts' system. A crucial difference, however, was even though there was an acknowledgment that family law cases "usually constitute only part of a broader set of problems arising from family disharmony" and that "it is perhaps time to consider how reforms in our legal processes may help in the process of personal and family empowerment,"[105] the LRC was keen to note that while a measure of "informality" may be required, the Commission specifically ruled out the adoption of a therapeutic approach. Instead, the report stated:

---

[104] For a child whose welfare is in issue in family proceedings, where this appears to the court to be necessary in the interests of the child. Legislation should specify a list of non-exclusive factors which a judge should consider in deciding whether to appoint a representative. These factors might include the extent of hostility between the parents; whether there is a history of recurring resort to litigation; whether mental illness or disorder is relevant; whether child abuse is in issue **…**The role of legal representative is to advise the child and act as advocate for the child in court.

[105]The Law Reform Commission, *supra* note 1 (quoting THE LAW REFORM COMMISSION CONSULTATION PAPER ON FAMILY COURTS (1994) (Ir.) https://www.lawreform.ie/_fileupload/Reports/rFamilyCourts.pdf .

> It needs to be recognized that judicial proceedings, even though conducted with informality and sensitivity, are not therapeutic exercises and that it is not possible to exclude from them some element of confrontation.[106]

This approach was taken despite earlier attempts to address the inadequacies of a purely adversarial system for family law. In parliamentary debates dating back to 1993, Deputy Alan Shatter, as he then was, having practiced as a family lawyer, raised the need for reform of the family courts.[107] He spoke about what he termed the "judicial roulette" that separating parties faced when entering the court system due to the lack of uniformity of approach.[108] Others argued that "as a society, we have allowed the dissolution of marriages to be governed solely by the courts which are judgmental, secretive and expensive"[109] and called for "a holistic view of the tragedy of marriage breakdown" supporting the provision of mediation and counselling.[110] More recently, leading family and child law expert Professor Geoffrey Shannon also called for a change in approach and attitude to the way family law matters are dealt with. In his Eleventh Report as the Special Rapporteur on Child Protection and family law advisor to the Irish Government published in 2018, Professor Shannon again calls for the consideration of taking a therapeutic interdisciplinary approach to family law proceedings.[111]

As part of the reform and development of the courts (National Development Plan 2018-2027), it is proposed that a new Family Law and Children Court Complex will be built close to the Four Courts Building[112] in Dublin (Ireland's capital city)[113]. Many proactive and important changes are being discussed and some work is already underway with pilot programs having been put in place to provide domestic violence counselling and mediation on-site at Dolphin House, one of the main family law centers in Dublin. The current Chief Justice in Ireland, Mr. Justice Frank Clarke, has, on a number of occasions, highlighted his commitment to improving access to justice. Former President of the District Court, Judge Rosemary Hogan, implemented a new case management system in the District Court. A judicial council has been established and held its first meeting in December 2019. The Council has been tasked with providing training for members of the judiciary.[114] As noted earlier, judges may be reluctant to engage in

---

[106] *Id* at 19, para 3.06.
[107] 428 No. 4 Dáil Deb. (Mar. 26, 1993) (Ir.), https://www.oireachtas.ie/en/debates/debate/dail/1993-03-26/3/.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] GEOFFREY SHANNON, ELEVENTH REPORT AS THE SPECIAL RAPPORTEUR ON CHILD PROTECTION (2018) (Ir.) .
[112] The Four Courts Building houses the High Court, Court of Appeal, Supreme Court and Dublin Circuit Court
[113] National Development Plan 2018-2027 (Ir.) https://assets.gov.ie/19240/62af938dce404ed68380e268d7e9a5bb.pdf.
[114] Judicial Council Act 2019 (Act No. 33/2019) (Ir.)http://www.irishstatutebook.ie/eli/2019/act/33/enacted/en/html.

training that they perceive may impede on their role in administering the law in any way or that could, as previously noted, potentially infer that they take on additional responsibilities as "social workers." Any training provided should also provide them with an understanding of the person standing before them and the socio-economic challenges they may face. This, supplemented with appropriate reports from qualified social workers, would assist the courts in taking a more holistic approach.

The Family Law Committee of the Law Society of Ireland have also to be commended for the work they are doing in terms of gathering information on the various processes used by different courts throughout the country with a view to trying to streamline and standardise the way court documents, orders etc. are drafted making them more user friendly for self-represented litigants and indeed, the lawyers. In addition, the Court service has recently signed up to the Digital Campaign committing to updating the technological capabilities of the courts.[115] This change has been somewhat fast-tracked because of the need to move hearings and services online due to the impact of COVID 19.

POLICY AND PRACTICE IMPLICATIONS

This research project is worthwhile for a number of reasons. It is timely and of immediate practical relevance as reform of the Family Court system in Ireland is beginning and decisions are being made as to how best to achieve a better outcome for family law litigants. The newly published *Programme for Government – A Shared Future* (Government, 2020) commits to "strengthen early intervention and family support services through proactive expansion of services that have strong outcomes for children and their families."[116] It reviews the commitments made in the National Development Plan to the establishment of a dedicated Family Court within existing court structures and the increased use of less adversarial means of dispute resolution. Further, the Programme outlines the Government commitment "to a new social contract with citizens, one that will protect them and their families at different times in their lives."[117]

[115] CT. SERV., ANNUAL COURT SERVICE REPORT 2019, https://www.courts.ie/acc/alfresco/9bd89c8a-3187-44c3-a2e9-ff0855e69cb5/CourtsServiceAnnualReport2019.pdf/pdf#view=fitH (indeed, this may be tested earlier than initially anticipated as a result of the impact of court closures as a result of COVID 19. The Chief Justice, Mr. Frank Clarke at the publication of the Annual Court Service Report 2019, commented that the courts had progressed 5 years in the last 5 months).
[116] DEPT. OF THE TAOISEACH, PROGRAMME FOR GOVERNMENT – A SHARED FUTURE (Ir.) https://static.rasset.ie/documents/news/2020/06/draft-programme-for-govt.pdf.
[117] *Id.*

How can this be achieved? On 30th September, 2020, the Minister for Justice announced a renewed commitment to reform the Family courts. A Family Court Bill General Scheme has been published, which provides for a dedicated Family Court, with increased access to alternative methods of dispute resolution, effective case management, and the appointment of specialist family law judges.[118] The "Guiding principles" refer to minimizing conflict and "in so far as possible" making the system "user friendly" for the parties. The general tenor of the bill is towards efficiency in the operation of the courts referring, for example, to "maximum word counts for submissions." While it is acknowledged that this is a draft, and an expert panel has been appointed and consultation proposed with key stakeholders, there is no reference, as yet, to the underlying ethos. The provision of support services was mentioned in accompanying news reports, but is not mentioned in the scheme, as published.[119].The results of this research tend to confirm the initial hypothesis that a therapeutic approach to the establishment of the proposed family court is crucial. Any new system would benefit from a robust theoretical framework and a change in mindset to a system that is focused on resolving, rather than settling, conflict.[120] Engaging with a therapeutic approach will help, rather than hinder, families who find themselves in difficulty and empower them with the tools and resources they need to overcome the "transition' in their lives. Trying to address the legal issues without being cognizant of the wider implications for litigants, their socio-economic backgrounds, and how orders made by the court will affect their daily lives may be futile. Lawyers and the judiciary need to be educated on the challenges of parenting and working in differing socio-economic spheres.

A crucial element of this is the adoption of a multidisciplinary approach with onsite family support for parenting issues, drug and alcohol programs, counselling and support for those with issues around intimate partner violence, and onsite services for custody evaluations. Potential litigants need to understand the benefits of availing of these services. Part of this education will be in helping litigants realize that these services are being provided to assist them, rather than being imposed on them. While the support services provided in Baltimore are wide-ranging, gaps noted, particularly in the lack of services for parents who suffer from mental health,

[118] DEP'T OF JUSTICE AND EQUAL., FAMILY COURT BILL GENERAL SCHEME (SEPTEMBER 2020)http://www.justice.ie/en/JELR/Family%20Court%20Bill%20General%20Scheme.pdf/Files/Family%20Court%20Bill%20General%20Scheme.pdf
[119] *Id.*
[120] Jeffrey Z. Rubin, *The Nature of Conflict and Negotiation* in NEGOTIATION THEORY , AND PRACTICE (J. William Breslin & Jeffrey Z.Rubin eds., 1991.

trauma, or cognitive disabilities, need to be addressed. Research undertaken by the Child Care Law Reporting Project in Ireland has also highlighted concerns around parental capacity being assessed without giving due recognition to mental health-related issues and the difficulties that may pose in leading to unfair outcomes for parents. As noted by Weinstein earlier, some need additional supports to ensure that they are treated equally. Crucially, services should be available countrywide and not solely in the larger urban areas. Availability of supports, it is hoped, will result in families becoming less reliant on the courts' system to resolve their disputes.

Implementing a spectrum of managed dispute resolution processes, enshrined within the courts process that includes assistance by magistrates or registrars, mediation, judicial conferences, and, if necessary, court hearings, removes the division between processes considered "alternative" and court based and provides a range of mechanisms to "fit the forum to the fuss."[121] In an Irish context, the mediation process could be further improved by the introduction of a statutory provision for privilege and the regulation and transparent certification of mediators within a regulatory framework. [122]

Resources will be required. This article, however, highlights the danger in using lack of resources and inertia as an impediment to the development of an effective courts system. If anything has been gained from the awfulness of the pandemic, it is a realization that action can be taken when it needs to be. The courts in Ireland have, as noted by the Chief Justice, progressed five years in five months in terms of online facilities, virtual hearings, and the provision of information to litigants. Simplification of processes and effective case management, including the provision of online information and services, will assist in understanding the practical operation of the new system for all stakeholders, including non-represented litigants. [123]

[121] John Lande &Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases* 42(2)FAM. CT. REV. 280 (2004).
[122] Mediation Act of 2017 (Act. No. 27/2017) (Ir.), http://www.irishstatutebook.ie/eli/2017/act/27/enacted/en/html (In 1996, the LRC highlighted the importance of ensuring that the mediation service had 'sufficient safeguards to ensure that the allied goals of fairness and justice are achieved, and should develop a strict Code of Practice.' The Commission was prescriptive in recommending the nature and length of training and qualifications required to practice as a mediator. They also recognised that legal advice should be available to the parties before and during the mediation process. An important recommendation, made in 1996, was that there should be statutory provisions to protect privilege during the mediation process. This the Commission noted would make it easier for all litigants and especially self-represented litigants. These recommendations were not incorporated into the Mediation Act 2017. The Act provides for the establishment of a Mediation Council, although this has not been established to date. It does not provide a specific statutory privilege for mediation).
[123] Recent changes were made to online court systems including the live courts online have been made at short notice out of the necessity caused as a result of COVID 19. While the circumstances leading to change were unpredicted and unfortunate, once deemed necessary for the functioning of the courts' system, changes which had previously been resisted or considered impossible have now been made at short notice.

This article, therefore, challenges key stakeholders and professionals alike to find creative means of streamlining roles and processes such that any initial financial investment will, in time, lead to fewer cases actually coming before the courts. It is argued that much could be done to streamline and reform the system that is in place through the more effective use of professional skills and infrastructure, physical and technological. It is clear from the research undertaken that engaged stakeholder consultation in the set-up of the system led by strong judicial leadership is key to convincing lawyers, mediators, counselling services, and the Judiciary of the need for, and potential benefits of, an interdisciplinary system with a therapeutic focus. Consulting children as to the services they require and the way in which these should be implemented will also be an important aspect of any proposed changes.

Similar to the approach taken in Baltimore, much of this can be achieved by the effective use of services which may already be in existence. Creative solutions like establishing Centers at Universities to support the courts would have the dual benefit of cutting the costs involved in the provision of services and provide opportunities for law students, trainee mental health professionals, and trainee mediators to gain valuable practical experience. Universities could also assist with commissioned research including the preparation of bench books and training for members of the judiciary.[124] Additional practical measures like maximizing the use of court buildings for supervised access, onsite childcare facilities, and engaging with the wider business community to assist with providing part-time employment for those who may be unable to pay child support or maintenance, rather than imposing prison sentences for failure to pay, would enable those who are in financial difficulty reengage in meaningful employment. Lawyers, for their part, could with the approval of the Law Society of Ireland, contribute to assist self-represented litigants as part of their continuing professional development obligations. The collation and review of statistical data and monitoring of the system in accordance with a defined set of Performance Standards, as is the practice in Baltimore, will pave the way for further development and reform.

Many of the proposals made by The Law Reform Commission in 1996 are the key elements of what the courts in Baltimore have adopted to create their family division. Family law cases will remain difficult. Operating within Brofenbrenner's "system" there are many variables. Even with an efficient and effective courts' system, issues such as poverty and addiction will

continue to influence the way in which family life transpires. In examining the system in Baltimore, a city which, arguably, has many societal issues to address, however, a lot can be learned from a court that's aim is to actively help those it comes in contact with. Will it remedy all of a litigant's issues? Probably not, but ensuring that the professionals that they come in contact with have an understanding of what it is like to walk in their shoes may assist in reaching a common language and approach within which continuing efforts can be made.