

Book Review,
Jane Murphy and Jana Singer, *Divorced from Reality: Rethinking Family Dispute Resolution*
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Reality and the Family Courts

by
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Family law substance and procedure are intricately intertwined; substantive family law reforms almost inevitably lead to procedural changes and, indeed, to changes in the role of the courts, lawyers, and often the law itself. Thus, in the era in which fault-based principles carved out limited exceptions to the principle of life-long marriage, divorce procedures were formal, adversarial, and designed to produce moral (as well as legal) judgments. The original California no-fault divorce plan recognized that abolishing fault entirely from divorce would require new procedures to manage family dissolution, and it included a plan for a unified family court that would provide divorce counseling in lieu of declaring one (and only one) party at fault and establish a new, less acrimonious basis for reconstituting families.¹ The plan combined both substantive legal reform and procedural court reform; just as the substantive law was designed to minimize artifice and conflict, so too were the accompanying new procedures. The California legislature, willing to adopt no-fault reforms, but unwilling to pay for them, adopted the substantive changes without equipping the courts with the ability to deal with

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¹ See Herma Hill Kay, *A Family Court: The California Proposal*, 56 CALIF. L. REV. 1205, 1225 (1968); Richard C. Dinkelspiel & Aidan Gough, *The Case for a Family Court—a Summary of the Report of the California Governor's Commission on the Family*, 1 FAM. L.Q., Sept. 1967, at 70, 80.

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them. In *Divorced from Reality*,² Professors Jane Murphy and Jana Singer document the half century in which, while courts have changed, they still fall far short in their ability to reconfigure the legal system to deal with the needs of today's warring families.

Professors Murphy and Singer do yeoman service in comprehensively describing the changes in the role of the courts, the changing role of lawyers in facilitating alternative dispute resolution, and the changing composition of families.³ At the center of their critique of the contemporary family court system is recognition that a major part of the problem lies in the differing forms of families that are increasingly correlated with class; the wealthy still largely elect traditional family structures and are much more likely to settle their disputes out of court. In the meantime, the less well-off command a disproportionate share of family court resources at the same time that the courts are less well-equipped to deal with these families. Murphy and Singer focus on how the court system approaches disputes involving children and, while they applaud the many useful family court reforms, they are "dubious" that these reforms fit the new kinds of family issues raised by non-traditional families. At the core of their critique is a central dilemma facing the courts: mainstream norms (and custody laws) valorize two parent involvement as essential to children's well-being; yet, the couples who do not voluntarily establish working two parent relationships are disproportionately plagued by domestic violence, substance abuse, and multi-partner parenting that undermines judicial efforts (pp. 62-64).⁴ Murphy and Singer admirably establish the ways that this system falls short of promised reforms, but the book stops short of questioning whether the system's objectives are realistic or even desirable.

We first explore the book and its thesis before turning to an evaluation of the accuracy of this disconnect. At the end, we ex-

² JANE C. MURPHY & JANA B. SINGER, *DIVORCED FROM REALITY: RE-THINKING FAMILY DISPUTE RESOLUTION* (NYU PRESS 2015).

³ See, e.g., Linda C. McClain, *Is There a Way Forward in the "War over the Family"? Failure to Flourish: How Law Undermines Family Relationships*, by Clare Huntington, 93 *TEX. L. REV.* 705, 712 (2015).

⁴ One of the more startling statistics in the book is that in Australia, which has a comprehensive system of family relationship centers, 62% of the staff report that "more than half of the families they saw experience violence or abuse." (p. 117).

plore what additional reforms might support the new vision of courts that the book articulates.

The book, while only 155 pages of text, covers lots of territory succinctly. In the first chapter, the authors provide a history of how courts have approached the family and family disputes, beginning with the colonial era. They set out the three themes that then serve to structure the remainder of the book: “the close connection between changes in substantive family law doctrine and changes in family dispute resolution processes; the shifting boundary between the public and private aspects of family dispute resolution; and the differential treatment by the family court system of families with and without financial means.” (p. 5)

The second chapter traces how the critique of the adversary process in family courts has changed the judicial system. The primary focus of many reforms has been an examination of how the adversary system harms children by, among other results, not addressing directly the conflict between parents and, possibly, exacerbating it. And they also point out that critics of the adversary system claim that parents, families, and courts themselves are harmed through a process that is expensive, time-consuming, crowns winners and losers, and exacts a toll on judicial resources, energy, and emotions.

The authors step back to address how these reforms have affected the judicial system in Chapter 3. They argue that family courts are no longer just expected to resolve legal conflicts, looking at what happened in the past; instead, their expanded mission involves managing future conflict. Legal norms, at least with respect to parenting, correspondingly become less important because the court focuses on helping parents help their children in their post-divorce families. As one example, rather than apply custody presumptions to resolve a conflict, courts apply the more amorphous best interest of the child standard (p. 44), which, Murphy and Singer assert, for many judges, involves increased reliance on nonlegal professionals. As a result, there have been both benefits and drawbacks for families.

Chapter 4 provides descriptive information on the complex types of families that now appear in family court. They document the class gap in marriage, and the increasing number of children born in nonmarital families. Consequently, they note

that various demographic groups will have differing types of disputes; for example, the parenting disputes that arise for college-educated parents are more likely to occur in the context of divorce, while parents with less education are more likely to have issues arising from the dissolution of cohabiting, or other less formal, forms of relationships (p. 62). The number of disputes between former cohabitants is likely to increase because of new Obama proposals that encourage the inclusion of custody arrangements along with child support orders (pp. 63-64).⁵ Other challenges for the legal system involve: managing claims between children and adults who function as parents, such as step-parents or grandparents or nonmarital same-sex partner; defining the parents when children are born through assisted reproductive technology; and the “skyrocket”ing number of pro se litigants, who lack familiarity with the legal system (pp. 68-71).

Indeed, the existing system includes a variety of core assumptions that do not match these new realities of family structure and experience. For example, the reformed family law court paradigm presumes that family members have established relationships with one another and their child, and that they have also developed shared parenting practices (pp. 72-73, 76-77). Indeed, parenting plans try to arrange for continued shared cooperation in raising children (p. 72). Yet these assumptions of past cooperation do not fit an increasing number of families. Although more than half of nonmarital children are born to cohabitants, the relationships may dissolve soon after the child’s birth,⁶

⁵ In private family law actions such as divorce proceedings, the courts typically address custodial rights and support obligations at the same time. In state initiated child support actions, in contrast, the courts have no ability to address parenting time, and non-custodial parents must bring a separate action if they wish to obtain a parenting order. Reform efforts seek to make parenting orders much more automatic for unmarried parents. See Stacy Brustin & Lisa Vollendorf Martin, *Paved with Good Intentions: Unintended Consequences of Federal Proposals to Integrate Child Support and Parenting Time*, 48 IND. L. REV. 803 (2015).

⁶ See Sara McLanahan & Audrey Beck, *Parental Relationships in Fragile Families*, 20 FUTURE OF CHILDREN 17 (2010)(although half of the parents in fragile families live together when a child is born, and another one-third are romantically involved, by the time the child turns five, only one-third of the parents are still together).

so there may be a limited history of shared decisionmaking (pp. 72-73).

Chapter 5 turns to an analysis of how the new family dispute paradigm has resulted in new roles for lawyers and judges. Lawyers have developed techniques that encourage cooperative problem-solving (for example, collaborative divorce practices) and that foster client autonomy, encouraging clients to become more involved and engaged in the legal process. Lawyers help clients plan to prevent conflict through setting out dispute resolution process, and lawyers may even play a role as healers, helping clients “(re)build a parenting partnership when they encourage non-adversarial dispute resolution options” (p. 93). Judges no longer simply resolve disputes, but also become involved in the families by, for example working with interdisciplinary teams to address not just the family’s legal needs but also its emotional functioning and recovery. Judges themselves may find their new role more satisfying than acting a neutral arbiters who resolve disputes (p. 97 – citing studies). This new role does, Murphy and Singer note, raise some concerns over judicial neutrality when, for example, a pro se litigant may hear a judge’s comments as establishing a limited set of options (p. 98), or when judges and lawyers play similar roles as part of an interdisciplinary team (p. 103). Moreover, ethical rules have had to adapt to the new limited services representation model and to collaborative law practice, which requires lawyers to withdraw if the clients don’t reach a settlement. (pp. 103-04).

The penultimate chapter explores how other countries are reforming their family law dispute resolution processes. For example, Germany, England, and Wales are separating parenting responsibility orders from divorce orders. The UN Convention on the Rights of the Child has encouraged countries to enact legislation that requires the enhanced involvement of children. In particular, the authors consider Australian reforms in detail. Australia, responding in part to a vigorous fathers’ rights movement (p. 113), has made “the biggest investment in Australian family law ever” (p. 112), through commitment to a system of Family Relationship Centres (FRCs). The FRCs do much of what American courts attempt to do with far fewer resources: provide comprehensive services that help families manage post-separation conflict and encourage the continuing involvement of

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both parents following a break-up. (p. 115). As with American reforms, substantive and procedural changes are intertwined as part of a response to the perceived limitation of the courts in facilitating the ability of non-resident parents to maintain relationships with their children (p. 115). The Australian example, both in its strengths and its limitations, provides a model of what a well-conceived, community-based family approach might look like.

In the final chapter, the authors articulate a number of components so that the family court system can better serve the needs of today's diverse families. They suggest that some of the family-oriented services currently in courts should instead be placed in communities. They argue that courts should focus on what the legal system "does best and what it alone can do: authoritatively resolve high-conflict cases, protect vulnerable family members, and articulate norms for novel legal problems" (p. 132). As a second reform, they look for ways to enhance children's participation, especially when this can be done in a non-adversarial manner. This recommendation develops out of evidence that children benefit when they have been involved in helping the family move forward after a divorce (p. 133).

Third, they argue that family courts should move away from the primary emphasis of the current model on serving divorcing families. Doing so would mean recognizing the differing needs of other types of families. For example, parent education programs typically focus on post-divorce parenting; Murphy and Singer note that many of the families in the court system have very different structures from the generic nuclear married family of two involved parents. Strengthening families might mean providing legal advice, establishing community-based visitation centers where visitation could be supervised, and helping low-income child support obligors find jobs (p. 136). They note that mediation is based on self-autonomy, but may be a difficult model for parties who have little experience with the legal system. "Evaluative mediation" might provide more guidance, particularly when the parties are unrepresented (p. 137). They emphasize the importance of educating parties new to the courts and providing access to legal services, including new kinds of legal help. Thus, for example, they applaud the growing availability of unbundled legal services, of lawyers providing specific tasks rather than rep-

resentation from start to finish, as a development that expands the availability of legal advice without disproportionate expense.

Overall, Murphy and Singer argue that the new paradigm does hold some promise for making family disputes less contentious but it is ill-suited to the increasing number of diverse families in the courts, including nonmarital families and others that do not fit the traditional nuclear, comparatively wealthy, family that is in divorce court.⁷ They acknowledge that realizing the new paradigm's promise for all families requires intensive use of resources, as other commentators have also pointed out.⁸ At the same time, they recognize that diverse family needs require more diverse approaches; they accordingly recommend returning some of the adversariness to the court system (particularly in cases of abuse), allowing for more collaborative problem solving within the courts (particularly in ways in that include pro se litigants), and changing substantive legal norms to encompass a range of family structures and relationships. These reforms could produce more responsive courts that better address the varied families that appear before them. Yet, as Murphy and Singer acknowledge, even with these reforms and substantially more resources, there are limits on what the courts can do when it comes to family dynamics and conflict.⁹

These limitations, which are significant and substantial, involve two central dilemmas for family law, which the authors acknowledge without fully engaging. The first is economic. Greater inequality has changed the relationship between men and women across different parts of the economy, with different

⁷ For additional discussion of the new paradigm and concerns about it, see Linda C. McClain, *Is There A Way Forward in the "War over the Family"?*, 93 TEX. L. REV. 705, 733-34 (2015).

⁸ Professor Clare Huntington is more positive about the paradigm shift, and suggests that the legal system should provide even more cooperative means for dispute resolution. *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (2014).

⁹ See also Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEO. J. POV. L. & POL'Y 473, 480 (2015) ("how do access to justice activists, and court reformers more generally, protect against the coercive and subordinating potential of state intervention while facilitating protective and supportive state functions accessed through courts?").

implications for different families.¹⁰ The single most effective way to address most of the problems the authors identify is to bring back stable, decent paying jobs for blue collar men – and everyone else. With greater income, non-custodial parents would be more likely to seek custody, pay child support and, for that matter, hire lawyers, but better economic prospects are also likely to create more stable families without judicial intervention — and to engage in the kind of shared parenting and joint decision-making that the current system assumes. The underlying changes in the family are not just a product of changes in norms, but changes in circumstances that cannot be adequately addressed through even the best designed and funded legal system.

This first dilemma sets up the second. If long term economic and norm changes have produced family changes, and if the economic and norm changes affect different families in different ways, it is not clear that the legal system can adequately address the needs of each group, particularly where those needs are in conflict. This raises the issue of whether the legal system is the best place to address family needs *at all*.

To be sure, for some families, the late twentieth century paradigm works adequately. The top third or so of the country involves college graduates who have remade what Murphy and Singer describe as the “divorcing nuclear” family (p. 135). This group forms the basis for the “new” court system that we have characterized as the “first system of family law.” This group whose members are overwhelmingly likely to get married albeit at much later ages than the rest of the population, also has low divorce rates, and it remains committed to two parent involvement following divorce or separation. Family court legal and social norms reflect the commitments of this group, and to the extent the participants would prefer a different resolution of their family relationships, they have the sophistication and resources to negotiate settlements on their own terms.

For a second group experiencing a “second system” of family law, the new paradigm might actually be made to be more responsive based on many of the terms Murphy and Singer suggest. Members of this group receive public benefits and are sub-

¹⁰ See JUNE CARBONE AND NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (2014).

ject to state-initiated actions. This public law system has sought to maximize child support orders, and thus it is a group that might benefit from more effectively targeted legal assistance employment assistance, and other services that go beyond private dispute resolution.¹¹

The group that is of most concern, regardless of whether the court system continues to focus on reducing conflict and fostering co-parenting relationships, or whether it moves to the twenty-first century paradigm that Murphy and Singer propose, is a group engaged in what we have termed the “third system of family law.”¹² This system gives its members the greatest autonomy when they stay out of court, regardless of the court’s model. This middle group, which clusters around the fiftieth percentile of American family incomes and typically graduates from high school but not college, still marries more than the bottom group, but it has become much more likely to divorce and to have children without marrying than the top group. At the same time, it is less likely to be receiving state services or to involve dysfunctional parents than the bottom group.

Those involved in the “third system” have become less likely to formalize their family relationships, as they have become less likely to marry or to seek custodial orders if they marry and divorce.¹³ Their family relationships do not necessarily follow an elite model of two parent commitment, but may involve a more varied set of relationships that include grandparents, aunts and uncles as caretakers, and a greater number of blended and step-parent families. Unlike traditional families, this third group may not necessarily have access to counsel or the sophistication to effect private bargains. In addition, as Murphy and Singer observe, they often find court processes, such as mediation, more oriented to the norms of the elite, rather than the circumstances of their communities. At the same time, members of this group are not

¹¹ June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 113; See also Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status (Pts. I—III)*, 16 STAN. L. REV. 257 (1964); 16 STAN. L. REV. 900 (1964); 17 STAN. L. REV. 614 (1965).;

¹² Carbone & Cahn, *supra* note 11.

¹³ PATRICIA BROWN & STEVEN T. COOK, CHILDREN’S PLACEMENT ARRANGEMENTS IN DIVORCE AND PATERNITY CASES IN WISCONSIN 2 (rev. ed. 2012), available at http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/2009-11/Task4A_CS_09-11_Final_revi2012.pdf.

necessarily receiving public support and the state does not therefore require them to assign away their child support rights.¹⁴ These families achieve agency in family affairs primarily by staying out of court, and resolving the terms of family life without outside intervention. When Murphy and Singer call for more “adversarial proceedings,” they overwhelmingly mean rulings that would recognize the norms of this group – norms that suggest, for example, that an abusive parent may lose access to his children. Yet, most efforts at family law reform seek to increase the involvement of this group in formalized family processes that establish paternity, set formal support obligations, and make custodial orders routine for a higher percentage of families. The net result may be less, rather than more autonomy, and a disruption rather than reinforcement of the emerging norms in the communities about which Murphy and Singer express the greatest concern.¹⁵

By focusing on how the new family court paradigm serves, and disserves, its litigants, Murphy and Singer have provided a powerful critique of our existing system for resolving family disputes. And, by suggesting new reforms, they persuasively show how to promote improved responsiveness. Their analysis also points to some of the ongoing questions about the viability of the courts to resolve family disputes.¹⁶ Ultimately, even though the

¹⁴ Of course, they can voluntarily initiate child support actions on their own or through use of the state IV-D agency. Less than one-third of custodial parents reported that the other parent has a visitation order. KYE LIPPOLD & ELAINE SORENSON, CHARACTERISTICS OF FAMILIES SERVED BY THE CHILD SUPPORT (IV-D) PROGRAM: 2010 CENSUS SURVEY RESULTS 13 (2013), https://www.acf.hhs.gov/sites/default/files/programs/css/iv_d_characteristics_2010_census_results.pdf.

¹⁵ Bargains that deviate from state-mandated guidelines are difficult, and courts will not often support a trade of in-kind support for access to the child or a termination of the other parent’s involvement and support, even among the elite. Michael Jackson could not persuade the courts to accept his agreement with his ex-wife, Debbie Rowe, for example, to terminate Rowe’s parental status in exchange for a release in responsibility for support. On the other hand, for those couples not on welfare, if the custodial parent does not seek support, no one is likely to notice. See Carbone & Cahn, *The Triple System*, *supra* note 11, at 1224.

¹⁶ In turn, the book’s critique of the system’s differential treatment of families with and without means nonetheless raises question of whether it makes sense to apply the same co-parenting and economic sharing norms to all

family court system cannot, on its own, solve the economic and relational problems that lead to the millions of domestic relations cases its year, Murphy and Singer argue that legal process can become more hospitable to the families that find them themselves in court. The book leads to a deeper understanding of the potential role of family courts in helping families resolve conflicts.

types of families. See June Carbone & Naomi Cahn, *Against Marriage Equality* (unpublished manuscript on file with authors 2015).

