

Confessions of a Judicial Activist

RONALD L. SOLOVE*

On Tuesday, July 20, 1993, I sat in the gallery awaiting my turn to testify before the Judiciary Committee of the Ohio State Senate. The South Hearing Room, along with the other facilities occupied by the Ohio Senate, was newly renovated and restored to the historic splendor that years of neglect and budgetary limitations had virtually obliterated. Seated next to me was the director of the Ohio State Bar Association's Government Affairs Office. Before the Committee for consideration was Amended Substitute House Bill 173, a 198-page legislative proposal which was the result of the Ohio Department of Human Services' (ODHS) latest attempt to conform Ohio's system of payroll withholding of child support to the perceived requirements of federal regulations.

For months, the Ohio General Assembly had been focused on the process of adopting a biennial budget for the state. July 20 was to be the last full session of the legislature prior to its summer recess. On the preceding Friday, I had received a phone call from the lobbyist for ODHS asking me to support the legislation in my capacity as president of the newly formed Ohio Association of Domestic Relations Judges (OADRJ). Later that day, the proposed legislation was delivered for my review. Friday afternoon, a notoriously slow time in most courts, was spent reading through the complex, redundant language of the bill.

The ODHS lobbyist had explained that, if the changes were not adopted by the General Assembly at once, Ohio could lose up to twenty-five million dollars in federal reimbursements. Thus, to prevent Ohio from losing federal funds, the ODHS sought a legislative vehicle that would allow it to make the necessary statutory changes quickly. House Bill 173 was that legislative vehicle. Originally, House Bill 173 was a simple piece concerning notification of child support arrears to credit agencies. The language prepared by the ODHS to save the federal reimbursements was added to House Bill 173, which then became Amended Substitute House Bill 173. Finally, the lobbyist described to me the plan to enact Amended Substitute House Bill 173 into law: The Senate Judiciary Committee would quickly report the Bill to the floor where it would be adopted; it would then be returned to the House for concurrence in the Senate amendments; and following such concurrence, the Bill would be forwarded to Governor Voinovich for his signature enacting the legislation as an emergency, which would put it into effect at once. All this was to take place in one day.

* Judge, Franklin County, Ohio, Court of Common Pleas, Division of Domestic Relations and Juvenile Branch.

On Monday morning, I called the ODHS representative and told her that she was going to be very unhappy with me because I could not support the proposed legislation. I was concerned that the Bill contained language which might well impact substantive law, that the language had not been carefully reviewed, and that it was full of potential pitfalls. Moreover, I was deeply concerned about the proposed highly accelerated process and the resulting lack of thoughtful consideration of what was being done and why.

She hurriedly arranged a conference call so that I could discuss my concerns with two lawyers working for the Department. My misgivings were addressed by repeated assurances that any problems could be cleaned up "later" and that the risk of losing federal funds justified the unusual procedure and made immediate action necessary. I could not agree, and I told my friends at the Department of Human Services that I would appear at the Judiciary Committee hearing the next day to express my views on the proposed legislation.

Experience had taught me that I would be wise to arrive a little early for the hearing. After walking the six blocks from the Franklin County Courthouse to the Ohio Statehouse, I went directly into the hearing room and found two Committee members who were old friends. One had been a student of mine during my career as a law professor. The other, a former member of the Columbus City Council, had been a political associate for many years. I explained to them that I was there to express the concerns of the domestic relations judges of Ohio not only about the content of the proposed legislation but also about the expedited procedure by which it was to become law. During our conversation, I observed the ODHS representative in another corner of the hearing room eagerly pressing her case to the chair of the Committee.

After a quorum had gathered and some whispered conversation among the members had occurred, the chair called the Committee to order. He expressed his concerns about the process but seemed resigned to the fact that, once again, a state's decisionmaking powers had been brushed aside by federal mandate. The first witness was the ODHS representative who warned the Committee about the dire consequences of inaction. It quickly became clear that my entreaties had not fallen on deaf ears as Committee members gave her a difficult time. Was this really necessary? Would the federal regulators extend the time required to meet the mandate? What did the mandate really require? Were there potential substantive pitfalls in the Bill's language? Her responses were vague.

The Ohio Bar Association's representative whispered: "Boy, am I glad you're here. It's about time these people listened to the professionals who actually have to work with this stuff." But I wondered whether anyone would really listen.

As I watched the legislative process grinding away, I began to reflect on the events and circumstances that had brought me to this place and time. When I became a domestic relations and juvenile judge in 1987, I thought I would hear and decide cases in these specific areas of the law. Somewhere along the line I discovered that I had to do more.

I.

Children are the victims of divorce. The devastation children feel at divorce is similar to the way they feel when a parent dies suddenly, for each experience disrupts close family relationships. Each weakens the protection of the family; each begins with an acute crisis followed by disequilibrium that may last several years or longer; and each introduces a chain of long-lasting changes that are not predictable at the outset. But divorce may well be a more difficult tragedy for the child to master psychologically.

....

... When I asked him the usual question that we ask all children of divorce—if you had three wishes, what would they be?—he said, “I want to die.”

Startled at this unexpected response, I said, “Why? What would happen if you died?”

“If I were dead,” the little boy said in a somber tone, “I’d be in heaven. My dad would be there. My mom would be there. And we’d live in the same house.”¹

In 1970, while I was editor in chief of the *Ohio State Law Journal*, we published an article by Judge Clayton W. Rose, Jr., written while he was a judge of the court on which I now sit. Judge Rose wrote about the advisability of adopting the principle of no-fault divorce for the State of Ohio. In 1974, the first no-fault grounds and procedures became effective in Ohio. Judge Rose suggested that a no-fault regime would have beneficial psychological effects for divorcing spouses, that honesty would prevail in domestic proceedings, and that less conflict and more amicable resolutions of cases would result.

Ohio, in the early 1970s, was in the mainstream in its acceptance of no-fault marital termination. The benign motives of the various legislatures were the same as Judge Rose referenced. However, on reflection, the past twenty years indicate that an unintended impact of the no-fault system may be a perceived shift in the policy of the states regarding the desirability of the maintenance of intact families. Instead of discouraging divorce through endorsement of the concept that marital termination should only occur to

¹ JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* 13, 268 (1989).

correct a wrong done to one of the spouses, the legislatures have appeared to facilitate, and thereby approve, the ending of marriages.

The requirement of fault as a condition precedent to the termination of marriages reinforced the general social attitude that divorce was not desirable and was to be permitted only under aggravated circumstances. Perhaps this attitude no longer prevailed among the citizens of the states; however, the policy of the states at least had held some line against the encouragement of marital termination. With the adoption of no-fault, it could be argued that the message was that divorce was no longer "wrong." The divorce rate rose dramatically during the 1970s. And more and more children were affected by the divorce of their parents. In 1992 in Franklin County, 3,354 new marital termination cases involving minor children were filed, and 1,089 post decree cases involving custody or visitation disputes were filed.

Custody disputes are horribly destructive and expensive propositions. Parents, focused on their own hurt and anger, are often afraid of losing their relationships with their children; thus they fail to appreciate and meet the urgent needs of their children during this most stressful period. Parents simply do not comprehend the children's experience of divorce. Nor do they understand that the conflict between them is likely to exacerbate the suffering of their children.

My first contact with parents involved in a custody dispute usually occurs at a pretrial status conference about three or four months after the case is filed. I take this opportunity to attempt to focus their attention on their children. At this stage, guardians ad litem are appointed and psychological evaluations of all the parties are ordered. Costs begin to mount. Parents can often expect to spend as much on attorneys and expert fees and costs as a year or more of college might cost. If the dispute is not resolved and goes to trial, that experience itself may well destroy any remaining possibility that the parents can learn to communicate or cooperate in the care of their children.

For many years, Ohio law provided that a child twelve years of age or over could elect the parent with whom he or she wanted to live. *In camera* interviews with children forced to make such an election were horrible experiences for them and for me. Parents, unable to take responsibility and decide what was best for their children, placed that responsibility on the shoulders of their hurting and often terrified youngsters. In 1991, the provision for the custody election was removed from Ohio law but was replaced by legislation *requiring* the court to interview a child of any age to determine the child's "wishes and concerns" about care following the divorce. The child still must confront the stress of a meeting with the judge and often is placed under great pressure by the combatant parents.

A few short months on the bench convinced me that the adversarial atmosphere of the courtroom was absolutely the wrong place to make determinations about the welfare of the children of divorce. The overwhelming number of cases involved disputes between two parents, both of whom were capable of adequately providing for their children. If either parent were suddenly to die in an automobile accident, no one would question the ability of the survivor to care for the children. But now they had decided to abdicate their responsibilities and turn over the lives of their precious children to a stranger in a black robe. The solution imposed by the judge was not their solution, and post decree disputes concerning visitation, support, or court-ordered custody were likely to occur. The suffering of the innocents would go on and on.

In the spring of 1989, I received a call from Dr. Susan Steinman, the director of the Divorce Services Department of Columbus Children's Hospital Child Guidance Center. She asked if I could meet with her to discuss the feasibility of developing a custody mediation program in our court. Although I had some familiarity with alternative dispute resolution (ADR), having published an article in the *Commercial Law Journal* concerning dispute resolution in commercial cases, I was not particularly conversant with the use of mediation in child custody cases. Like many family lawyers, I believed that parents who were so conflicted that they could not resolve custody issues were unlikely to be able to sit down with a mediator and reach a workable agreement. However, I was so distressed by the custody fights I had observed that I was ready to at least listen.

My breakfast meeting with Dr. Steinman convinced me that mediation was the option I had been looking for. With the blessing of my colleagues on the bench, I convened a representative committee of those whom I perceived to be interested in custody issues, including groups representing fathers' and mothers' interests, members of the bar, psychologists, social workers, and other court personnel. Over several months, we designed a system under which couples with child-centered disputes would be evaluated by a court employee for suitability for referral to mediation. We developed criteria for accreditation by the court of trained custody mediators, and we recruited the mediators we would need. In September of 1989, the court adopted a local rule requiring mediation assessment and referral. The program has been in operation for almost four years at this writing.

II.

With two law schools, a population of almost one million, the presence of the state capital, and an economy based largely on banking, insurance, government, and education, Franklin County has a significant population of

lawyers. However, a relative few practice regularly in domestic relations court. Having taught many of the lawyers who appear before me and having practiced in the area since 1970, I know most of the practitioners, many very well. Some are good friends. While the mediation program was being designed, and the mandatory mediation assessment rule was being formulated, a divorce specialist with a substantial and lucrative practice came solemnly into my office and closed the door behind him.

“Judge,” he said, “I need to talk to you. I think you’re making a big mistake.”

I assured him that he could speak freely.

“This mediation business—it’s a bad idea. A lot of lawyers don’t like this. You know, you’d really make everyone happier if you’d just stick to deciding cases and forget trying to change the way things are done here.”

I thanked him for his advice, and he left.

Canon 7 of the Code of Professional Responsibility requires a lawyer representing a client in a matrimonial dispute to represent his or her client zealously within the bounds of the law. In a custody dispute, the lawyer often must do what is best for the case, as opposed to what is best for the kids. If the client wants to contest parental rights and responsibilities, the lawyer must counsel and represent that client notwithstanding the fact that continued parental conflict victimizes the children who are the subject of the dispute.

Although an individual practitioner may have no dilemma in pursuing custody litigation, I believe that the profession does indeed have a dilemma. Matrimonial lawyers and the judges who hear custody cases must recognize—and most do—the futility of attempting to allocate the responsibilities of parenting through the adversarial process. To resolve the dilemma, the profession must actively support the development of alternative resolution techniques. Thus, we can collectively atone for the harm done to individual children.

I began to seek out opportunities to address lawyers and judges concerning the benefits of establishing custody mediation programs. As a matter of happy coincidence, Ohio Supreme Court Chief Justice Thomas J. Moyer, another strong convert to the benefits of alternative dispute resolution, appointed me to a committee to design and develop ADR programs in all Ohio courts. I became chair of the Family Law Subcommittee of the Ohio Supreme Court’s Alternative Dispute Resolution Committee, a position which provided me with further opportunities to promote custody mediation programs. As a result of the Subcommittee’s work, the Ohio Supreme Court adopted a rule of superintendence that established mediator qualifications and, more importantly, legitimated mediation as a desirable program for court sponsorship.

In the process, I became increasingly convinced that it was my obligation, notwithstanding the advice of my lawyer friend, to attempt to change the way things were done. Deciding cases is not enough.

III.

Ohio has what is best characterized as a hodgepodge system of courts that deals with domestic relations problems. All eighty-eight counties have courts of common pleas presided over by a total of 355 common pleas judges.² The jurisdiction of these courts includes matters usually characterized as general criminal and civil, probate, domestic relations, and juvenile. In thirteen counties, a separate domestic relations division hears all divorce and related matters. Eight counties have separate juvenile divisions. In six counties, the domestic relations and juvenile jurisdictions are combined into one division. In sixty-seven counties, the juvenile jurisdiction is combined with the probate jurisdiction. In seven counties, general criminal and civil, probate, domestic relations, and juvenile cases are heard in one division. In sixty-two counties, the general criminal and civil division also hears domestic relations cases.

This lack of uniformity in organization of the court structure is most likely attributable to the political processes involved in the creation of judgeships by the Ohio General Assembly over the years. The Ohio Constitution, Article IV, vests the judicial power of the state in a supreme court, courts of appeal, courts of common pleas and divisions of the courts of common pleas. The courts of common pleas and any divisions of those courts have been established by the state legislature in a piecemeal fashion over the years. It is apparent that no uniform policy related to the jurisdictions of the various divisions has governed their establishment or the assignment of subject matter jurisdiction to the courts.

One result of this lack of coherent policy is a wide disparity in the caseload of judges around the state, particularly in the urban centers, as revealed by the Ohio Supreme Court's *Ohio Courts Summary* for 1992. For example, the population of Franklin County, which includes the City of Columbus, is 961,437. Four judges sit in the combined division of domestic relations and juvenile law. In 1992, the total new filings, transfers, and reactivation of domestic relations cases averaged 2,619 cases per judge. In Hamilton County, population 866,228, encompassing the Cincinnati area, three judges of the domestic relations division averaged 5,573 such cases each. However, each of the Franklin County judges also averaged 7,717 new, transferred, or

² THE SUPREME COURT OF OHIO, OHIO COURTS SUMMARY: 1992, at 1A. This text is the primary source for the statistics cited. Readers interested in a statistical overview of Ohio courts are encouraged to consult this source for additional information.

reactivated juvenile cases. In Hamilton County, a separate, two-judge juvenile division handles that jurisdiction.

Far more significant than the numerical disparities are the impediments to a unified approach to family problems arising from the varying assignments of subject matter jurisdiction. Only thirteen of the eighty-eight counties have judges who hear only domestic relations cases, and only eight counties have specialized juvenile judges. Six counties combine these jurisdictions in what might be characterized as family courts. Since judges in Ohio are elected to specific divisions, the majority of domestic or juvenile cases are handled by judges who were elected to divisions that also hear general civil and criminal cases or probate cases. One can deduce that most judges in Ohio who hear domestic cases do not see those matters as their primary responsibility.

Conversations with my colleagues in all divisions of the courts of common pleas around the state reinforce this conclusion. Those who are not "specialists" virtually unanimously express distaste for the domestic relations cases they are forced to hear. Most, if not all, sought election based upon an interest in civil and criminal litigation and view domestic relations cases as baggage they would prefer to lose. The pressures of their general dockets tend to push domestic cases to the background, particularly in the absence of any constitutional or statutory speedy-trial mandates applying to divorce matters.

Further complicating the situation is the increasing complexity of domestic relations and juvenile law. The past five years have seen extensive revision of virtually every aspect of domestic relations law in Ohio. Major substantive changes have been legislated in statutes governing the allocation of parental rights and responsibilities, the determination of child support, the enforcement of child support orders, the determination of parentage, the identification and division of marital property, and the establishment of orders for spousal support. Continuing legal education programs for lawyers and judges concentrating on family law have proliferated. Many practitioners who formerly appeared regularly in my court have withdrawn from the domestic practice, citing their unwillingness to attempt to keep up with seemingly constant change and increasing complexity in the law. Judges, of course, must find a way to deal with this increasing complexity without the option of deciding to concentrate in other areas.

Another consequence of this patchwork of domestic jurisdiction has been the absence of any cohesive voice for the concerns of judges about legislative action in the domestic relations arena. The judges of Ohio have been organized into several judicial associations, including the Ohio Association of Juvenile and Family Court Judges (OAJFCJ), all of which are member organizations of the Ohio Judicial Conference. Domestic relations concerns are supposed to be

voiced by the OAJFCJ, but the issues of juvenile justice have become all-consuming.

Finally, the paucity of specialized domestic relations judges makes the development of state-wide programs for families experiencing marital breakdown a difficult task. The construction of alternative means of resolving disputes in family cases, the design of parental education programs, and the establishment of systems to enable pro se litigants to gain access to the courts in domestic violence situations require the interest and energy of the judges.

IV.

In September 1990, Judge Alba Whiteside of the Tenth District Court of Appeals became chair of the Ohio Judicial Conference and appointed me to chair the Family Law and Procedure Committee. The focus of the Committee became the formulation of proposals to rectify some of the problems generated by the series of legislative changes to Ohio family law. Over a period of some eighteen months, the Committee worked at analyzing problems and drafting proposed legislation to alleviate technical difficulties as well as substantive problems that experience with the law had revealed.

Finally, an extensive report was prepared and distributed to interested parties, particularly the chair of the Ohio House of Representatives' Children and Youth Committee. This report contained proposed legislative language to clarify the requirement that the court make mandatory findings of fact in all property division cases. The mandate had created difficulties and delays in uncontested divorces by requiring that the court find a value for every piece of marital property, down to the toaster and the lounge chair, whether requested by the parties or not. People of modest means and having no dispute were required to incur appraisal costs that were not justified by the nature of their action. Additional proposals included the elimination of redundant paperwork in shared parenting cases and, most importantly for the children of Ohio, the elimination of the requirement that the judge interview any child, regardless of age, if either parent requested the interview in the context of a custody dispute.

Nothing happened. Although the chair of the House Committee acknowledged receipt of the proposal, no legislation was introduced.

On May 24, 1993, with the support of the Ohio Judicial Conference and the blessing of the OAJFCJ, a constitution for a new judicial association, the Ohio Association of Domestic Relations Judges, was adopted, and officers for the new association were elected. At virtually the same time, the Ohio General Assembly was considering legislation to modify the child support guidelines for the state. This revision, mandated by federal law, was the result of two years of work by a task force established by the legislature. The sponsors of the

legislation were most interested in the support of the newly organized OADRI, and as the new president of the association, I was instructed to provide the requested assistance. Shortly after the May meeting, I testified in favor of adoption of the legislation. The Ohio Association of Domestic Relations Judges was recognized by the legislature as a player.

V.

Standing at the podium before the Senate Judiciary Committee, I spoke of the desperate need for careful and considered lawmaking in the matrimonial arena. It was unclear what the federal mandates actually required in the way of changes to Ohio's child support wage withholding system. "I think we ought to look before leaping," I told the committee.

The chair of the Committee decided to delay acting on the bill and to defer it for further study to determine what absolutely needed to be done and the time frame required to do it. "I don't like the procedure, and I don't like the position we're in," he told the members of his Committee.

The days after the Committee hearing produced the following: an extension of the imposition of any federal penalties until December 31, 1993. The Ohio Department of Human Services agreed to include the Ohio Association of Domestic Relations Judges in a review of the wage withholding system, and a member of the Governor's policy staff indicated that a meeting to hear the judges' concerns was certainly in order.

VI.

Many problems plague the domestic relations court system. The press of the caseload creates a feeling on the part of the litigants that no one really cares. The problems that they bring before the courts involve the very core of their emotional being. They come to court seeking vindication for wrongs they perceive to have been done to them by one once loved and now often despised. They want to see the judge and tell their stories. Cases often get continued, and the litigants feel that they are being shunted aside. Once their case is resolved, most often by settlement but sometimes after an arduous, emotionally rending, and expensive trial, they remain unsatisfied because the resolution of their legal dispute does little to resolve the hurt, anger, and emotional anguish they have experienced. If they have children, they are unable to cut free entirely of their former spouse. They face a future of possible disputes over custody, support, and visitation. Almost universally, they believe it will never end.

Many lawyers are dissatisfied with the system as well. Domestic relations, once an area in which a general practitioner could feel comfortable, has become

and keeps becoming, more complex and plagued with pitfalls for the unwary, inexperienced, or overworked. Issues of pension evaluation and division, tax consequences of property division and spousal support, complications caused by bankruptcy proceedings, and a myriad of other twists of the law and its requirements confront the matrimonial practitioner on a daily basis. Increasing complexity has led to increased legal fees. Clients are almost never happy, and often their frustration and dissatisfaction are directed at the lawyer who was supposed to make it all better. Lawyers who went into the domestic practice to help people with real life problems often become bitter, cynical, and unhappy with their work.

Domestic relations judges must deal with the dissatisfied litigants and their unhappy lawyers. Virtually constant revisions in the law plague the orderly administration of the courts. Bitter custody and property disputes abound, and the allegation that one parent or the other is sexually abusing a child arises in more and more cases. Domestic violence charges proliferate as well. Aggressive child support enforcement clogs contempt dockets with cases that have no real solution, as the courts are expected to make chronically disinterested and irresponsible parents suddenly eager to live up to their obligations. Government funding crises abound, and program and staff funding is a constant problem. For the "nonspecialist" judge who must hear domestic disputes, the press of the criminal and civil dockets creates additional problems of case management. Courtroom security is a constant concern.

Judges can no longer view their role as simply to hear and decide cases. The concerns of litigants, lawyers, and judges compel an activism directed at improving the system, caring for the children of divorce, and promoting adequately funded and managed courts. This activism must be viewed as an integral part of the job of judging. Canon 4 of the Code of Judicial Conduct is enabling: "A judge may engage in activities to improve the law, the legal system, and the administration of justice." In fact, in view of the circumstances surrounding the complexity of domestic relations law today, a judge *must* engage in such activities.

