The Tragedy of Family Court

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It's easy to feel like you're wandering in circles at the Queens County Family Court in Jamaica, Queens. The courtrooms, conference rooms, and waiting areas on one side of the building are arranged in a mirror image of those on the other, and people often take a few laps around the floor before they find the right room. But these circles are nothing compared with what people experience inside the courtrooms. Watching the hearings, trials, and meetings, one has the sense that nothing here ever ends.

Take the dispute some months back between two parents over custody of their 14-year-old daughter. She had been living with her mother since the split (the couple never married), with periodic visits from her father. He told the judge that he wanted to see the girl more but that her mother was blocking him. He had recently asked to take his daughter out of the country to accompany him on a business trip (he's a photographer). The mother gave her blessing. Angered that the girl had not packed enough underwear, he decided that she couldn't go with him after all, and sent her back to her mother. His rage at this oversight prompted the mother to announce that she now feared for the girl's safety.

The couple was back in court for the third time in a year to discuss their custody arrangement. The judge confirmed with the appointed lawyer representing the teen that she wanted to keep living with her mother but that she was not afraid of her father and wanted to keep visiting him. Then the judge lectured both parties about the importance of finding a solution to their dispute: "Are we really going to continue arguing about underwear here?" she asked. The answer was apparently yes, so the judge picked a date for the case to go to trial—four months later.

To an outsider, that seems like a long time to wait, but the time frame is typical. According to a 2013 report by the New York State Bar Association, more than 715,000 cases were filed in state family courts in 2011, and more than a quarter were still pending in 2012. If you witness these cases play out, it's easy to see why.

The New York Family Court system was established in 1962 to oversee cases involving neglect, support, paternity, adoption, juvenile and family offenses, and child custody. From its beginnings, according to a report by New York Law School's Diane Abbey Law Center for Children and Families, the court was "notoriously overworked." In the early 1960s, though, no one imagined the family catastrophe that was about to ensue, with the rise in divorce and nonmarital births as well as the scourge of drug use. The child-welfare system went from

overworked to overwhelmed. And the old way of doing things—in which religious organizations took charge of destitute children by denomination—no longer sufficed.

The infamous case of Shirley Wilder proved a turning point. Wilder, whose mother died when she was four and whose father threw her out when she was 11, entered the foster-care system in 1972, when she was 13. She was a black Protestant; every religious agency in the city (mostly Catholic or Jewish) turned down the opportunity to place her with a family. The girl was sent to a residential facility upstate, where she was raped and beaten. The ACLU filed a class-action suit against the city, and the 1986 settlement known as the Wilder Decree mandated reforms of the system, including professional evaluation of children when they arrive in foster care and placement of children with families on a first-come, first-served basis. The responsibility for ensuring that such children were treated well and had access to quality foster care would ultimately rest with family courts.

In recent decades, the system has been inundated with cases, and not just those concerning children in foster care. Joint-custody cases, in which parents (whether married or not) have split up, have proliferated dramatically, in part because more fathers want to play a significant role in their kids' lives. Judges find themselves involved in the minutiae of family dynamics: Should the child go to public school? Should the mother be able to move to another town or county, making it harder for the father to see the child? Should a child stay in the same house with a mother's new boyfriend? Some of these decisions get foisted off on "parenting coordinators," both to relieve the courts and to show parents how to work together. Sometimes it helps, but often it leads only to another endless round of bickering over details, and the cases often wind up back in court.

Other cases have nothing to do with children or marriage. In a ruling in summer 2018, veteran Queens Family Court Judge John H. Hunt suggested that some of the cases clogging the court docket are a result of the 2008 amendment to New York's Family Court Act, which expanded the eligible pool for filing grievances to people not related by blood or marriage. "Since there is no filing fee, all grievances can be aired at no cost, regardless of spiteful motivation, pettiness or legal merit," Hunt wrote, throwing out a case that essentially involved a nasty Twitter exchange between two people who had been in a five-year relationship. He often deals with "allegations by ex-girlfriends and ex-boyfriends that amount to nothing more than name-calling that results in hurt feelings, and disrespectful behavior manifested by ill-advised posts on social media," Hunt told the *New York Post*. "I'm not saying they shouldn't come in here until they get punched in the face, but sometimes 'harassment' is a bit much."

Even if the court could streamline the number of disputes among adults that it accepts, it would still be stuck with an overwhelming docket of children's cases, which the system now seems almost designed to perpetuate. As Walter Olson wrote in his 1991 book, *The Litigation Explosion*, the rule that mothers generally got custody of children "may or may not embody any timeless wisdom about the special bond between mother and child. . . . What is important, almost more than which rule prevails, is that there be a rule, and one as clear, knowable and universal—as mechanical, in short—as can be." But with the end of no-fault divorce and the introduction of the "best interest of the child" custody standard, that rule is gone. Judges now take into consideration everything from how parents practice their religion to which parent feeds a child healthier meals; whether parents smoke or help with homework or fail to get their child to a scheduled dental appointment. And no decision is ever truly final. Previously, a parent had to

demonstrate that a child's best interest was seriously compromised in order to bring a custody case back to court. Now, they can just come back in six months to start the argument over again. The result: the most urgent cases, involving real allegations of neglect or abuse, compete for time and resources with less severe—even trivial—matters.

At about 11 **A.M.** one day several months ago, I walked into a small meeting room that stretches barely eight feet in either direction. Over the course of a few minutes, ten people crowded in to discuss a custody dispute. A divorcing mother and father were arguing over the placement of their 11-year-old son. The mother, perhaps violating the terms of their temporary arrangement, had allegedly taken the boy to live with her in Connecticut. The mother said that she had not. But in the father's telling, she was pretending to live with relatives in the Bronx and forcing their son to sleep on a foldout couch in the living room. The mother, meanwhile, had accused the father and his sister of abusing the child. The boy tried to hit his father's sister, and when the sister held him back, she left a bruise on his arm. This allegation (no one disputed the facts) led to the involvement of the Administration for Children's Services (ACS), which recommended that both the father and the aunt attend parenting and anger-management classes.

For 15 minutes or so, the father, the sister, their respective lawyers, the ACS caseworker, the lawyer representing ACS, the child's lawyer, and the support magistrate waited for the mother to show up. When she finally arrived, with her court-appointed lawyer, he announced that she had decided to hire her own counsel—but the new attorney would be on vacation for the next two weeks. The court's lawyer presented a letter to this effect and then excused himself. So ten parties had assembled, consuming a half-hour of the lawyers' time and the support magistrate's time and the ACS worker's time (on the public dime) and most of a day's pay for the father (a construction worker), only for the support magistrate to look at her calendar and the judge's calendar and ask if everyone could come back—in two months.

I watched eight hearings and meetings during my visit, and all but one ended in an adjournment. Later that day, I attended a hearing concerning a mother who had been granted primary custody of her son several years ago and wanted to move to South Carolina with him; the hearing was to discuss whether this would be allowed. The mother's lawyer was supposed to have sent a written notice to the father stating that this was her intention, but the paper was never filed, and so again, after about ten minutes of back-and-forth, the judge asked the six people gathered before him—mother, father, each parent's lawyer, the child's guardian *ad litem*, and the child's lawyer—to return later.

Perhaps even more surprising than the inconclusive nature of many of these hearings is the way that they end. I watched three judges turn to their computer screens, pull up their calendars, and offer a series of dates for the next meeting. It's astonishing to watch judges take on the role of administrative assistants, especially in a system in which most agree that more judges are needed to deal with the crush of cases. And the inefficiency has real effects—not just in slowing things down but, more important, on children's well-being. "Children have a very different sense of time than adults," the National Council of Juvenile and Family Court Judges declared in guidelines published in 2016. "Short periods of time for adults seem interminable for children, and extended periods of uncertainty exacerbate childhood anxiety. When litigation proceeds at what attorneys and judges regard as a normal pace, children often perceive the proceedings as extending for vast and infinite periods." Despite recent insights about children's neurological

development and the impact of living in traumatic or unstable family environments, even for short periods, family court luxuriates in deferral and delay.

It's not only the children who are put out. Working-class parents often have to travel for hours on public transportation for these hearings, forcing them to give up wages for the day and find alternative child-care arrangements. And the system has other unseen consequences, including making it harder to recruit foster parents, who may not have the time or patience for the endless back-and-forth. When I told Ronald Richter (CEO of the Jewish Child Care Association of New York and former Queens family court judge) about my visit, he said that what I saw was "entirely representative of family court and has been that way since at least 1991, when I started practicing." He is especially frustrated by the calendaring process. During his three terms as a family court judge, he would say to his clerk: "I have to see this case in a week" or "I really don't care when I see it next." But he notes that, for some reason, "judges want to have control over their calendar." This might seem like a minor issue, but Richter estimates that as much as 30 percent of a judge's time can be spent negotiating such administrative matters.

Given the agonizing dilemmas that it confronts daily, family court is never likely to be a smooth-running, model institution. But substantive changes could ameliorate its worst effects and improve, to the extent possible, the work that it does. The simplest reforms should be pursued first.

First, scheduling should be done by clerks or—even better—with technology. Child-welfare expert Richard Gelles, author of the 2017 book *Out of Harm's Way: Creating an Effective Child Welfare System*, suggests that "it would take your average high school junior 15 minutes to develop such a program." This technology could not only save valuable court time and give priority to more urgent cases; it could also allow for transparency, preventing lawyers and judges from double-booking cases for the same slots and then ruining everyone's schedule when they can't be in two places at once. Maura Corrigan, a former Michigan Supreme Court judge who served on the Pew Commission on Children in Foster Care, says that judges often resort to scheduling during court time because they worry that otherwise lawyers will "run roughshod" over their clerks and delay matters even further. But this, too, is a sign of the dysfunction of family court: as in any business or organization, when senior officials have to make every minor administrative decision, the system breaks down.

Second, judges should exercise their authority more vigorously. Lawyers get paid more, the longer a case goes on—this is true in all courts—but family court puts even fewer brakes on such behavior. In almost every state, for instance, lawyers get appointed for children, even if neither parent thinks that that's necessary—a legacy of the "children's rights movement" of the 1970s. As Olson points out, a child "can't just say, 'I want to get on with my life.' And so you get unnecessary litigation." This prolonging of the process can prove detrimental to the child's emotional health and drain money from the parental estate. It's time to revisit the question of whether every child needs a lawyer independent from the parents' counsel. Judges should make these determinations.

Other parties also have incentive to delay the legal process. In cases involving accusations of abuse or neglect, witnesses disappear and forget. Their credibility wanes as the case gets older. One particular problem in family court is that child-welfare workers leave the agency, and the details of the case and the understanding of the family dynamic can be lost. Lawyers know this and take advantage of it. According to a 2016 report, one-quarter of ACS workers have been at

the agency for less than a year—all the more reason that judges should force cases to move more quickly.

Judges often waste time letting the parties hash things out in pretrial hearings, Richter says, when they should be more willing to send the cases to trial—especially if they can announce that they're going to start immediately. "Then, miraculously, after five minutes, there is a settlement," he says. "People just don't come prepared to try cases." And family court judges might be better utilized if their duties resembled their counterparts' in Europe, who play a more active role in questioning witnesses rather than simply relying on lawyers to present evidence.

Third, family court judges should be better educated about what is at stake. They should be required to take courses in child development and adult behavior. "It's as if family court judges think a child's brain development is suspended and not taking place" while these decisions are being made, says Gelles. He recalls being asked to testify in a case involving a child of six months. With a golf tournament to attend, the judge postponed a hearing for six months. "That's 50 percent of the child's life," Gelles observes. Family court judges need to understand that lengthy postponements could have deleterious effects that will last a lifetime.

Judges are also too lenient with the adults. Those adults who want more time to change their ways—usually in promising to stop using drugs—are often granted years of second chances. Gelles suggests that judges simply don't understand the likelihood of those adults following through on promises. "If an adult hasn't shown change in 90 days and the judge continues the case for another 90 days or six months, they have done an injustice to the child."

ACS investigators and family court need to communicate more closely, as well. Another reason for the delay and complication of cases is the over-involvement of child-protective services in custody disputes. My interviews suggest that it is not uncommon for parents to make frivolous reports about neglect by a partner in order to gain the upper hand—and that may help explain why as many as one in three Americans under 18 will come into contact with Child Protective Services. "You will see families with 30 previous investigations," says Ivy Hammond, who works as an Emergency Response Children's Social Worker for Los Angeles County Department of Children and Family Services and also for the Children's Data Network at the University of Southern California. "It is a back-and-forth, 'he said, she said.' " As an investigator, she explains, "you have to say: 'Stop calling this in.' This is not child abuse. It's white noise."

It can be difficult for a caseworker to make such determinations, of course, particularly since he or she may not know that the person calling in the complaint is in the middle of a family court proceeding. This is where enhanced communication can help: judges should be made aware if the parties to a case are lodging frivolous complaints against each other—and they should warn parties against doing so, lest it get held against them in a judgment.

Existing laws already require the timely adjudication of family court cases. In 1997, Congress passed the Adoption and Safe Families Act (ASFA), which attempted to address the problem of children remaining in custody limbo. It mandated, for instance, that states must initiate a termination-of-parental-rights procedure for any child who has been in foster care for 15 out of the last 22 months. But caseworkers and lawyers have found loopholes—for instance, for children taken in by other relatives, the rules don't necessarily apply.

It is also common for caseworkers and supervisors to "fail to make decisions," as Gelles writes in *Out of Harm's Way*:

In Philadelphia, I asked a number of caseworkers why a particular child was in out-of-home care with a non-relative foster parent for more than fifteen months. The answer was that the judge had approved continuing placement. "But what about the fifteen-month rule?" I asked. "Did you submit a written request for a waiver that allowed the child to stay in care for more than fifteen months?" "Oh, no," the workers responded in near uniformity. "If the judge approved remaining in foster care, we accepted that as allowing us to waive the fifteen-month rule." Of course, that answer is a violation of federal law—but no matter, that's how it goes.

It is unlikely that Congress will revisit ASFA anytime soon, but states can do more to shorten the time that children are in limbo. Arizona's legislature passed a law concerning babies born substance-abused; if their parents have not made progress in getting off drugs within a year, their parental rights would be severed. A special "rocket docket," which would speed up the cases of these infants and toddlers, has also been enacted. Other states simply have "right to a speedy trial" statutes for family court. New York should consider one as well.

Critics argue that family court will need more financial resources to carry out such mandates. Judge Barbara Salinitro, a judge in the Queens Family Court and former president of the New York City Family Court Judges Association, says that "if you're going to give judges in the whole state six months to complete fact finding and a trial," then the legislature "would have to give us 100 more judges to allow us the resources to do that." She notes: "We would need more clerks, more courtrooms, more technology, and an extra layer of resources and additional attorneys for children and parents. It becomes an explosive proposition financially." As it is, the lawyers and judges aren't paid much, and their positions tend to be low-prestige.

New York has taken some incremental steps. In 2015, the state legislature added nine new judges to family court in New York City to deal with delays. The pending caseload per judge went from 525 cases in early 2015 to about 470 today. That remains an enormous number, and the system still seems painfully slow. Earlier, in the fall of 2010, Queens Family Court had added a separate trial part—where some judges get tasked with overseeing hearings and mediation while others preside over actual trials—in order to move things along more quickly.

As intractable as family court's problems often seem, reformers can't lose heart—too much is at stake in the lives of too many children. Much of what is going wrong in family court is not the result of inadequate funding or resources. The problems may have begun with a devastating cultural revolution, but bureaucratic incompetence, outdated technology, and weak leadership have played major roles since then. These problems can be addressed meaningfully.