SEPARATION COURT PROPOSAL

This is a proposal for a pilot project for one or two counties. A "Separation Court" would be available to citizens who want temporary relief without filing either a formal divorce or domestic abuse proceeding.

On countless occasions, I have prospective clients call and say, "I'm not ready for divorce, but I would like to get a legal separation." I must then carefully explain to them that in Minnesota, legal separation is a procedure that is just as slow and expensive as divorce, with no advantages.

These people are on to something. Intuitively, there should be a process before divorce which is accessible, inexpensive, and swift. We should see a process like this:

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PROBLEMS WITH THE CURRENT SYSTEM

1. Many domestic problems cannot be addressed directly and efficiently because standing for relief is limited to those who file for divorce, separation, or domestic abuse.

For example, a person with an alcoholic or verbally abusive spouse may not want to divorce. But she may want to separate to induce the spouse to go into treatment, to test the spouse's commitment to the marriage, or simply to reduce conflict in the home. To force a separation, her options are: (1) pay an attorney between $750 and $5000 to start a divorce or legal separation proceeding, have the attorney schedule a hearing about five weeks down the road, and live with the spouse for the weeks that precede the hearing, (2) allege domestic abuse, get free advocacy, have the Sheriff instantly oust the spouse from the home, and buy a year before needing to refile for domestic-abuse or start a divorce proceeding, or (3) do nothing. The problem with number (2) is that there may actually be no domestic abuse or reasonable fear of it. Also, alleging the abuse may further strain the relationship and may unfairly stigmatize the spouse and alienate him from the system. Thus you have three options, all of them bad, for a common problem.

2. People need counseling for many different reasons. But because they are afraid, or procrastinate, or fear they cannot afford it, or distrust "shrinks," they do not follow through. This costs everybody, because problems that fester become worse and end up costing the taxpayer in litigation or government services. Indirect results are crime and low productivity.

3. Some litigation is inevitable because of complex problems or unclear laws. But much of it results from parties who have temporary or chronic mental problems. Those with temporary problems may be going through the phases of denial and anger in the breakup of a relationship. Our no-fault system can force those people into negotiating the consequences of their breakup at a time when mentally they haven't even come to grips with it.

4. Alternative Dispute Resolution methods are not being used because the system directs parties into the litigation mode early on. Once the "warfare" starts and attorneys on the two sides are polarized, it is difficult to redirect parties to cooperative methods.

5. The system seems to have no interest in trying to keep families together. Citizens perceive that the system encourages divorce. This is partly because of "no fault" and partly because hope of reconciliation is usually shattered by the time the parties come before the court.

SEPARATION COURT:

This Court would encompass and replace the Domestic Abuse court and the harassment court. Like the DA court, it would have a short notice procedure. This would be a "cattle call" calendar where anybody could get on the docket any day court was in session, provided the relevant parties were properly notified. Attorneys would be neither encouraged nor prohibited.

An "Ombudsman" clerk would direct parties needing relief to the appropriate forms and procedures. Forms would be as "idiot proof" as possible, with the Ombudsman providing assistance. Procedures would be simplified. The Court would contract with process servers, who would be qualified but cheap.

The Court would have power to:

- Grant harassment orders and other behavior restraining orders --Issue ex parte orders in cases of alleged domestic abuse
- Award exclusive use of residence and order a party out of the home
- Grant other restraining orders regarding property, assets, documents, insurance
- Grant custody and visitation if the parties are in agreement

- Create a child access schedule on a temporary basis if the parties dispute custody

- Order temporary child support and spousal maintenance

- Appoint guardian ad litems and authorize Court Services to mediate or evaluate custody or visitation disputes

- Schedule review dates for any order made by the court to allow a party to prepare more thoroughly

- Recommend counseling and/or mediation (marriage, marriage assessment, divorce, anger, financial, chemical dependency, parenting)

- Prohibit parties from involving their children in their disputes and disparaging the other parent.

All parties with children would be required to watch a videotape and attend a presentation which would emphasize:

(1) the negative effect that conflict between parents has upon children;
(2) the importance to children of having both parents participate in their lives.

If the parties disagreed over custody, a moderator would meet with the parties to ascertain whether an agreement might be readily negotiated.

Neither the moderator nor the videotape would pound parents into agreeing to a custody arrangement that is uncomfortable, just for the sake of creating agreement.

If after the meeting and the videotape the parties still could not agree on custody and visitation, then the court would create a short term access schedule which would promote frequent contact with both parents, if appropriate.

The Court could consider 50-50 sharing or even leaving the kids in the home with the parents alternating in appropriate cases, especially if the parents work different shifts.

Ideally, a guardian ad litem would be appointed for the children, and a review hearing scheduled with the guardian ad litem's report as soon as possible.

The guardian and the reviewing court would be instructed to place NO emphasis on the access schedule created by the court at the emergency hearing when recommending or determining the temporary custody order on review.

If a divorce or other legal proceeding is commenced, the separation and temporary orders would be incorporated into the new file.

Contested custody would then be a three step process:

1. Separation--short term, words "custody" and "visitation" not used, simply to stabilize the situation until agreement or temporary order;

2. Temporary--based on guardian's report and limited oral testimony; Affidavits would be discouraged or prohibited; would stay in effect until further order;

3. Permanent--only as part of a separate proceeding (dissolution, legal separation, paternity, custody).

The biggest problem will be to condense the time between the separation and temporary decisions and still allow sufficient professional input. If the quality of the temporary order is good, most disputes should settle easily.

The goal of the Separation Court would be to:

a. Provide easy access for any parent to get an order which will stabilize children's lives and provide financial security;

b. Make parents aware as soon as possible of the effect of conflict on their kids, before the damage is done;

c. Filter out legitimate custody disputes;

d. Get objective information to the court as soon as possible and eliminate emphasis on ugly affidavits which do lasting damage to the relationship of the parents;

e. Provide legal fluidity for rapidly changing circumstances;

f. Prevent the premature filing of a divorce proceeding where all the parties need is an intervention, and encourage marriage and/or divorce counseling before the parties enter the divorce arena;

g. Reduce stigma of losing temporary custody.

Divorces with children should be less expensive if a separation court is available pro se to handle separation issues and if custody and visitation issues are initially addressed by court services or guardians ad litem. Also, by allowing the separation court to stabilize the situation, the actual filing of the divorce can be postponed, thus allowing the more recalcitrant party to adjust to the breakup and be more amenable to settlement. A recalcitrant party should be allowed to request a marriage assessment*, because a party who feels that the marriage is still alive cannot negotiate reasonably.

*Marriage assessment: not marriage counseling, but a professional evaluation of the prospects of keeping the marriage together.

ACCESS TO PROFESSIONAL SERVICES:

Counselors and attorneys would indicate their fees and credentials in notebooks available to the parties to peruse at the courthouse. These loose leaf notebooks could contain one page of information for each attorney or counselor that chooses to participate. Notebooks for counselors could be divided into categories such as marriage, divorce, mediators, family, anger, chemical abuse, credit, etc. The clerk would be knowledgeable about insurance benefits and non-profit agencies to match up parties with the appropriate counselor.

By having this information at the court house, parties would be much more likely to take advantage of these services. If they go home without, they might find the task of locating an attorney or counselor too daunting and may procrastinate.

The Summons would stress to people their right to independent legal advice. The attorneys who placed their credentials in the notebooks at the courthouse would agree to meet with a Respondent for an initial conference for $50 or less.

PROBLEMS FACING THE SEPARATION COURT:

- Inability of people to even articulate or recognize what problems they have
- Parties recognize problems at different times and perceive the problems differently
- Need for highest quality of public servant
- Controlling cost and caseload
- Insuring due process of law while efficiently and quickly processing a high volume of cases.

THOUGHTS ON THE SEPARATION COURT

A separation court is an opportunity for the court system to gain access to people as well as for people to gain access to the court system. By receiving parties when their problems are becoming serious but before they are in the divorce stage, the system can offer education and other resources to try to head off the vicious attacks that so often take place in the chaotic separation phase and which have such a negative effect on children. Many custody disputes result because one or both parents are angry with the other. If the angry person has an opportunity to speak early on, and if he or she is educated that these disputes can be harmful to the children, then many of the custody disputes might be weeded out. Potentially, the burden on court services and guardians ad litem could actually be reduced if they are used more at the separation stage than at

the divorce stage. This would be very hard to guarantee. There does have to be a recognition on the part of the public that it's important to pay these professionals and have enough staff to do their job thoroughly but quickly.

These custody evaluators and guardians ad litem will have to use every efficiency available to them. We can't expect the government or insurance providers to pay for Rolls-Royce custody reports. But we can shoot for a solid Toyota Corolla. Volume is high, and each case cannot command all the attention it deserves. We will be straddling the line between professional and superficial reports. Those in the field who will survive will be those who can work fast, delegate menial tasks, maintain low overhead, and yet stay abreast of their field and do quality work. There is already pressure from the public to raise standards in these fields, just as resources for them are drying up.

Having a separation court would give the court some other opportunities to prevent problems in the future. If there is an easily accessible court to provide for court ordered separations, there is an opportunity to direct people to counseling services that might enable them to improve their communications and save their relationship. Currently, we only see parties in domestic abuse court or after the divorce proceeding is underway. No one in the system attempts to patch up the relationship by this point and probably rightfully so. But in a separation court, where the court is intervening right at the beginning of a marital break-up, perhaps things haven't gone too far. First, the court staff needs to administer domestic abuse diagnostic tests and be sensitive to domestic abuse issues, to separate those cases and direct them to appropriate resources. In other situations, the staff can direct the parties to various types of counseling that might help them address their problems, keep the family together, and avoid future litigation or divorce.

In order to effectively recommend counseling, there must be actual names of counselors available right at the court house. It won't be enough for the judge to merely suggest. People don't know who to call. They're afraid of the cost. Some are afraid of revealing themselves to professionals. There are all kinds of reasons for them to procrastinate. But if the court takes the opportunity to point the people to the back of the room where there is a loose leaf notebook of counselors' names and credentials, and if the clerk is familiar with insurance plans, there is an opportunity to set the people up with counseling at once. They are much more likely to follow through with that counseling if they get a specific name to call right there on the spot.

Another way to get people to counseling or at least avail themselves of professional services is to suggest a marriage assessment. In this situation, one party believes the marriage is over or is uncertain that it could possibly be restored, and the other person believes the marriage should continue. The marriage assessment would be a battery of tests and interviews which would help determine whether the marriage was viable and whether there's any hope for the marriage to continue. There are several benefits from such a program. It gives parties who are reluctant to go ahead with the divorce an opportunity to participate in a process where their voice is heard so they doesn't feel a divorce is necessarily forced down their throat. We know that

people who are suffering from rejection in a relationship are the ones that are the most likely to act out their loss of control in litigation. This would be a healthy way for them to make their case and speak their peace. Also, it would be an opportunity to become acquainted with professional counseling services. If the marriage can't be patched up, they can be referred to divorce counseling that will help them work through their feelings without having to act them out in the legal arena. Many of the Respondents in divorce proceedings are chemically dependent. A marriage assessment will raise this issue in a way that is less threatening than having a judge order an evaluation. A referral after a marriage assessment is more likely to be followed. Finally, at the point of separation there is the possibility of healing some relationships that are just suffering from lack of communication. If both parties have some motivation to stay together, a marriage assessment will reveal this and direct them in a positive way. It is not a primary purpose of the system to force people to stay married, or force them into marriage counseling. Such notions are unrealistic in this era. Marriages break down much more often than they did in the past, and sometimes that is a good thing. But why should we pass up an opportunity to help people if we can? Why should people feel that the system encourages divorce, as so many do? We can encourage positive options, even if we don't stand in the way of anyone who desires a divorce.

A separation hearing would also be an opportunity for the court to pound into the consciousness of the parties the importance of keeping their personal conflicts away from the children, to not involve the children in their disputes, to support and not discredit the other parent, to impress upon them the importance of having both parents remain participating actively in the children's lives. This could be done either just from the bully pulpit of the judge's bench or from some program that parties would be required to attend if they avail themselves of the separation court. If only a small percentage of the parties take these lessons to heart and keep their children out of their conflict, it would have a great positive effect on keeping those children from developing problems in the future.

In sum, the separation court offers a great opportunity to use preventive medicine to avoid future problems with the parents and the children.

The court would need to organize and schedule cases in an efficient way to use time to the best advantage. A party who has a problem would come in and talk to a clerk. The clerk would be knowledgeable and would have that party fill out the appropriate form and schedule a hearing. If there were safety issues, then the hearing would be sooner. If not, then it could be scheduled in a manner that allowed sufficient information to be gathered by both sides. In no event should the hearing be scheduled more than a few weeks down the road, unless both parties so desire. Right now in some counties, a party seeking support in a divorce proceeding can wait almost three months for a temporary hearing. In domestic abuse proceedings the wait is only two weeks. That contrast is intolerable.

Personal service would be necessary when there is heavy handed emergency relief. If a party is going to be ordered to do something, or leave his or her home, fairness would require that notice is direct or guaranteed in some way. Serving to a suitable person of age and discretion won't guarantee notice in family conflicts. Serving by mail to a last known address isn't assured of reaching the party. Some exception may be required for a party who doesn't work in a public place or is ducking service, but we must avoid the temptation of using publication which reaches nobody and costs too much. Perhaps an affidavit of telephone contact by the Sheriff if the party is advised that the papers are available for pickup. This will be a tough problem in many cases.

Files should stay open and be cumulative--not a new file for each incident. That way the court has background information handy.

To keep the calendar from getting backed up in days, it may require a "cattle call" calendar where everybody is scheduled at one or two times in a morning or afternoon, rather than each person having an individual time. The problem with the cattle call type calendars is that if you have too many scheduled on one day, then the parties have to wait. That can be discouraging. On the other hand, if people can attend this court without the expense of having an attorney, then they shouldn't mind giving up a few hours of work to sit there and get something accomplished as a trade-off for having something scheduled further down the road. The Court needs to be creative if people are going to be sitting around. The time can be spent viewing the video tapes or using the other resources that are there. Those with attorneys should go earlier, so as not to be penalized for having attorneys who are paid hourly. The court will benefit from having attorneys since their presentation is usually more efficient. The cases that are settled quickly can go first, the cases that have attorneys can go next, then cases that don't involve children, and finally those that are required to see video tapes. Where language or disability barriers are present the court can give special consideration. With mediation available, time can be spent working on settlement, while people are waiting for their turn to go before the judge.

CUSTODY

Determining custody and visitation is going to be a difficult problem at a separation or emergency court. On such short notice, it should be the court's main goal simply to stabilize the situation. The court won't really be in a position to make an in-depth decision. Terms like "custody" and "visitation" should probably be avoided since they carry weight to people and may be over-interpreted by decision-makers or evaluators down the road. The court will first need to find out to what extent the parties can agree on where the children should be on a temporary basis. If they don't agree, a mediator can work with them, lay out their working schedules and the children's activity schedules, and try to come up with something that is stable but non-prejudicial to the parties. The court can adopt the schedule, then schedule a

review date if the situation calls for it. The court may ascertain whether a divorce proceeding will follow. If it looks like a serious dispute, then it would be worthwhile to appoint a guardian ad litem or authorize court services to mediate or evaluate at this point, then schedule another review hearing for custody and visitation only so far down the line as is necessary to allow the guardian or court services to do their work. While some may frown at giving guardians too much influence, consider the existing alternative: the court at a temporary hearing never sees the parties until they walk in the door, never hears from a neutral party, and has to cut through the nastiness of the affidavits in an attempt to locate some truth.

PAYING FOR COUNSELING, MEDIATORS, EVALUATORS, GUARDIANS

There are three sources for payments of professional services whether it be guardians, court services, counselors of all varieties, and attorneys: the parties themselves, their insurance providers, and the court. And it will be incumbent upon the courts and the system to develop a fair way of allocating the costs between these three. The uncertainty of medical insurance makes this issue more difficult right now. But because physical health and mental health are intertwined, the insurance providers have a stake in success.

OCCUPANCY OF THE HOME

Occupancy of the home is one of the toughest issues in family law. It epitomizes the conflict between safety issues and fairness. Pulling a person out of his or her home is one of the most intrusive actions that the state can take. We still cherish the notion that the home is a castle. There need be very compelling reasons for the government to take somebody's keys. For the most part, this should only happen when there is a threat to safety or if children are being harmed physically or emotionally.

But in some ways the current system is too restrictive. There may be considerable harm to children without actual physical abuse taking place. If the co-habitants are married, and there is no physical abuse, a party can get exclusive occupancy, but only after drafting and serving expensive documents and co-existing under strained circumstances for the three to twelve weeks until the temporary hearing takes place. If they aren't married, there is no practical recourse unless there is domestic abuse.

As a result, these situations sometimes leak into the domestic abuse system when they don't belong there. Right now, it requires a finding of domestic abuse before the court can order somebody out of their home on an ex parte basis. Yet these orders are routinely granted on the mere allegations of the petitioner. All domestic abuse petitions seem to be treated the same. Judges and Referees are afraid of the consequences if they say no to a request for ex parte relief and then abuse occurs, so they usually say yes.

The separation court would consider all requests for occupancy of the home, whether or not abuse has already occurred.

A request for ex parte occupancy of the home should be handled sensitively. First, clerks or advocates trained in domestic abuse should help the applicant articulate his or her specific concerns. When the person who would be ejected from the home has a track record of abuse, then the clerk or advocate should spell out the specific reasons why an order is appropriate. The judge should have a hearing in chambers with the applicant and advocate, rather than simply sign a pile of orders that are stacked up on the desk. Alternatives such as temporarily moving the requesting party out for a short time should be considered. Ulterior motives should be assessed. The hearing after service of the order should be held as soon as is reasonable. The well-being of children should occupy the highest priority.

DOMESTIC ABUSE

Nothing is more important to our family law system than preventing domestic abuse. We do not want to go back to the days where abuse was ignored by the police and the courts, where battered women had nowhere to turn and no one to advocate for them. This court system will require all court personnel to have careful training in these issues.

Having said that, the domestic abuse system, which is created by Chapter 518B, is problematic and inefficient. For example, no relief is available unless there is a finding of domestic abuse. Otherwise, the court is without authority to do anything for the people involved, even if the court feels that some intervention is appropriate. What we really have is a fault system of emergency relief. We got away from fault in the divorce setting which has spared the courts from lengthy testimony, ugly reconstructions of family history, prolonged proceedings, and uncertainty of result. No-fault has helped the court focus on the real issue: the restructuring of the family.

Now we still have the same problem with emergency relief. Most petitions result in consent orders, but those orders can come back to haunt the respondent, in the context of physical custody issues, joint legal custody Issues, and availability of mediation. Also, respondents may be surprised at how they can be charged with a crime for insignificant violations of the order or how the order can be used at will to control the direction of communication. You don't have to be a male advocate to come across numerous examples of parties treated unfairly by the domestic abuse system.

Where the respondent opposes the petition, the parties become entangled in a bitter battle over the truth, with family members and friends called upon to testify against each other, and with attorneys racking up huge bills (often uncollectible) in a short period of time. Because the focus is on events, the evidence is all testimonial and

time consuming. Because of the time considerations, it is impossible to adequately prepare with depositions or other fact screening processes. Issues about the financial circumstances of the parties and the children become secondary.

How would the separation court include domestic abuse filings and issues? The relief now offered by the domestic abuse system would be included within the more extensive things that this court would be able to do. But because the authority of the court would not turn on the issue of whether there was domestic abuse, the court could focus on the future concerns of the parties and the children.

In many cases, there is serious domestic abuse, and nobody should dismiss or minimize that. A batterer should be sanctioned and should have restraints on his movement and behavior. But currently many domestic abuse petitions are brought based on a confrontation between the parties involving a push or a shove, where there is no control through violence.

We need to have trained clerks and advocates who are able to read into situations, who are able to elicit from those seeking relief whether there is a real issue of battering and control through violence. In the most egregious cases, the person who is the victim may in fact be reluctant to admit there is violence. We need to separate out those situations from the domestic squabbles that involve some grabbing, shoving, or threats, but that don't involve the control of one individual by another through violence or threats of violence. Those who have been involved in a single domestic confrontation are able to speak for themselves and resolve their own disputes, if there is a referee there to keep them focused. Those people might not be chronically violent, but in the ultimate stress point of the relationship find themselves in a situation where they pushed, shoved, or threatened. The court should not condone violence in any relationship, but these are not the cases that the court needs to devote special resources.

The punishment should fit the crime. Batterers should be criminally charged and be civilly restrained. But the fellow who pushes his wife out of the way when she is blocking him from leaving the room during an argument doesn't deserve to be caught in the same net.

CONCLUSION

By the time cases come to the divorce stage, the damage is already done to the children or the ability of the parties to cooperate. In most cases, one party is eager to settle and cooperate, and the other is angry, resistant, in denial, etc. That person needs to go through these phases before meaningful mediation can take place. We need a "legal separation" phase prior to filing that is pro se accessible.

Our legal system for marriage dissolutions (and other "family" issues) descends from the old english law. Although the "complaint" has been renamed "petition," the same process of service with summons, motions, discovery, and trial remain in effect.

Yet the subjects of domestic relations lawsuits are much different than the disputes that led to the development of our legal process. We are instead preoccupied with the emotional stress of relationships that break up, the financial implications of separating households, and most importantly the relationship of children to their estranged parents. While emotion is a factor in almost all lawsuits, nowhere is it so continually in the foreground as in family law.

To effectively handle these disputes, shouldn't we have a system that recognizes the normal patterns of relationship breakdowns? For example, shouldn't our system take into account the stages of grief that a person must pass through to finally accept that a relationship is dead--the denial, anger, bargaining, and acceptance?

When a relationship dies, it is rare that the parties reach that conclusion simultaneously. Usually only one person pulls the plug, having privately gone through the phases of evaluation for some period of time, while the other is in denial or is unaware of the level of the partner's dissatisfaction. We ask this person who is in an emotional whirlwind to be reasonable and negotiate issues that will affect her or him forever. Then we are surprised when he or she "acts out" in the legal arena. The parties, the children, the attorneys, and the courts all get sucked into an emotional quagmire. Can't we design a system that is structured to take these dynamics as a given?

Separation time is a time of anarchy and chaos. Relationships hang in the balance. Tensions are high, emotions are volatile, wounds are open. Children are the witnesses or the victims of the battles; they are snatched, tugged, bribed, ignored, dislocated. This is the time when locks are changed, houses are cleaned out, credit cards are maxed out. This is when alcoholics resume drinking, when jobs are lost, when there is screaming, vilifying, pushing, shoving, hitting, even killing. Damage is done that can't be repaired, to relationships, to financial security, to children. This is the time when people most need court intervention--and that access is denied because of the expenses and the delay.

Send comments on this proposal to:

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