

THERAPEUTIC JURISPRUDENCE IN FAMILY LAW: THE ROLE OF DUE PROCESS

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I. Introduction

1 At first glance, the principles of therapeutic jurisprudence (“TJ”) and the legal system appear at odds. As its name implies, TJ emphasises how law and legal systems affect psychological well-being; it focuses on feelings, behaviour and emotions.¹ In contrast, the legal system emphasises facts and confrontational clashes between adversaries. This article seeks to reconcile the two, and demonstrates how in the arena of family law TJ and due process exist in harmony.

2 For better or worse, many of our social ills and social interactions become the province of the law and the legal system. An individual with mental illness or a substance abuse problem commits a crime, or needs treatment, and the court intervenes. Or a family dissolves and a court decides the financial and custodial arrangements. Unlike other theories of the law and legal systems, TJ recognises and embraces this human element, stressing that law can have therapeutic and anti-therapeutic consequences that spill into people’s lives.² This recognition first came in the arena of mental health law, where court interventions designed to help people, including civil commitment, the insanity defence,

1 B J Winick, “The Jurisprudence of Therapeutic Jurisprudence” (1997) 3 *Psychology, Public Policy, and the Law* 184.

2 David B Wexler, “Reflections on the Scope of Therapeutic Jurisprudence” (1995) 1 *Psychology, Public Policy, and the Law* 220 at 224.

and incompetency to stand trial, instead damaged them further, suggesting the need for a different approach.³

3 As TJ expanded to other areas of the law and the legal system, including family law, it provided not only a new theoretical lens, but a practical one as well. Drawing from the social and behavioural sciences, it offers a “how to” guide across the legal spectrum, including the law’s substantive content, the procedures used in courtrooms and the role of legal actors,⁴ and raises several questions: Is a therapeutic approach compatible with due process or will it dilute the latter? Can legal actors trained in the arts of advocacy and argumentation adapt to TJ’s gentler norms? Will they be overshadowed by those professionals, such as social workers, who are well versed in a therapeutic approach?

II. Is therapeutic jurisprudence fair?

4 The concept of due process is a cornerstone of the legal system. In its simplest formulation it means that legal proceedings must be fundamentally fair. Its basic ingredients are a right to be notified of charges or proceedings, an opportunity to be heard and an unbiased decision-maker.⁵ A related concept is procedural fairness, which emphasises how legal systems treat people, or the relational aspect of due process. These soft components of due process include four elements: voice, neutrality, respectful treatment and trustworthiness.⁶ Voice means the opportunity to tell one’s story, to contribute actively to, and shape, the narrative of events. Neutrality requires an unbiased decision-maker who is transparent about how decisions are made. Respect means dignified and courteous treatment. Trustworthiness requires expressions of benevolence, sincerity and concern.

5 These four elements parallel TJ’s core principles, which similarly emphasise respect, inclusion, kindness and even-

3 David B Wexler, “Reflections on the Scope of Therapeutic Jurisprudence” (1995) 1 *Psychology, Public Policy, and the Law* 220 at 224.

4 David B Wexler, “Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship” (1993) 11 *Behavioral Sciences and the Law* 17.

5 *Goldberg v Kelly* 397 US 254 at 267–68 (1970).

6 Tom R Tyler, *Why People Obey the Law* (Princeton University Press, 2006).

handedness. Thus, many of the values of TJ are already embedded in the legal system. Moreover, as research on procedural fairness has shown, adherence to these values has salutary effects, including better compliance with the legal system's commands. While people care about winning or losing, they care even more about the fairness of procedures.⁷ Numerous studies in such diverse areas as arbitrations, domestic violence disputes, criminal actions and police/citizen interactions have also demonstrated a link between perceptions of fairness and compliance with the law or agreements.⁸ As one example, batterers who believed their court cases were handled fairly are less likely to violate an order for protection than those who thought they were treated unfairly.⁹ In another example, problem-solving courts for drug and mental health cases operating on an enhanced procedural fairness model demonstrate decreased recidivism in comparison to traditional courts.¹⁰ Children are similarly affected by perceptions of procedural fairness. In a study of adolescents and their interactions with legal actors, including the police, school security officers and store security staff, positive perceptions of these legal actors were associated with lower rates of self-reported delinquent behaviours.¹¹

6 Procedural fairness does more than legitimise the moral and legal authority of the legal system and encourage

7 Tom R Tyler, *Why People Obey the Law* (Princeton University Press, 2006); Jason Sunshine & Tom R Tyler, "The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing" (2003) 37 *Law & Society Review* 513; Jonathan Casper, "Procedural Justice in Felony Cases" (1988) 22 *Law & Society Review* 483.

8 Denise C Gottfredson *et al*, "How Drug Treatment Courts Work: An Analysis of Mediators" (2007) 44 *Journal of Research in Crime and Delinquency* 3; Tom R Tyler, *Why People Obey the Law* (Princeton University Press, 2006); Raymond Paternoster *et al*, "Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault" (1997) 31 *Law & Society Review* 169; E Allan Lind *et al*, "Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic" (1993) 38 *Administrative Science Quarterly* 224.

9 Raymond Paternoster *et al*, "Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault" (1997) 31 *Law & Society Review* 169; Deborah A Eckberg & Marcy R Podkopacz, "Family Court Fairness Study" (Fourth Jud District Res Division, Hennepin Co, MN) (2004).

10 Denise C Gottfredson *et al*, "How Drug Treatment Courts Work: An Analysis of Mediators" (2007) 44 *Journal of Research in Crime and Delinquency* 3.

11 Jeffrey Fagan & Tom R Tyler, "Legal Socialization of Children and Adolescents" (2005) 18 *Social Justice Research* 217.

compliance. It also engenders emotional and psychological well-being because it communicates social inclusion, respect and worthiness. And it does so without compromising the legal system. Instead it strengthens it by emphasising its foundation: fairness. TJ treads a similar path, but with an enhanced emphasis on the dynamics of human behaviour, including how to infuse insights from the behavioral sciences into legal interactions. This raises the question, discussed next in the context of family law, of how the role of legal professionals and the legal process may be affected.

III. Will therapeutic jurisprudence turn legal actors into social workers?

7 Of the many areas of the law, family law is arguably among the most suited to a TJ approach.¹² The dissolution of a family has emotional and psychological consequences. TJ, with its emphasis on the psychological and the emotional, provides a much needed antidote to this.

8 Legal professionals, though, are seemingly trained in a very different art, where the psychological and emotional are rarely acknowledged, and where advocacy is valued over collaboration and facts are emphasised over feelings. They may believe that a TJ approach will smother these skill sets and require learning a new set more akin to being a social worker than a lawyer. However, the two seemingly different approaches have much in common. Both lawyers and social workers rely on communication skills, and a deep and holistic knowledge of their clients. Both are trained in listening and eliciting skills so as to probe and uncover information. Both believe in client self-determination. Both rely on forming trusting relationships, whether with their clients, their colleagues, or the institutions they

12 Barbara A Babb, “An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective” (1997) 72(3) *Indiana Law Journal* 775; Marsha B Freeman, “Love Means Always Having to Say You’re Sorry: Applying the Realities of Therapeutic Jurisprudence to Family Law” (2008) 17 *UCLA Women’s Law Journal* 215; Vicki Lens, “Against the Grain: Therapeutic Judging in a Traditional Family Court” (2015) 41 *Law and Social Inquiry* 71.

work within. Both are nimble in their approach, recognising that different tactics may be needed across cases and circumstances. And both, perhaps surprisingly, are actually trained in similar arts. Advocacy skills are a core competency of the social work profession;¹³ the legal profession often emphasises collaboration over conflict, as evidenced by the emphasis on mediation and arbitration, especially in the context of family law.

9 Thus TJ is not as foreign as it may first seem. As noted above, the foundation has already been laid because of the strong overlap between the principles of procedural fairness and TJ. But TJ does require an additional step: attunement to the emotional and psychological environment so as to avoid the acrimony that can damage family relationships.¹⁴

10 Thus, for lawyers representing parties in family court, it requires changing one's mindset and recognising it is an arena for emphasising soft skills, rather than deploying the hard edges of the adversarial system.¹⁵ This change occurs from the first meeting with a client, where the lawyer gathers not only the financial and other facts, but holistically assesses the state of the family, including how acrimonious the divorce may be and potential emotional triggers and barriers to a resolution.¹⁶ This does not require a degree in social work or psychology. It is simply a recognition of the environmental and social context, which is part of any legal case, and especially family law cases. Such information can be gathered using active listening, which is a conversational technique that emphasises focusing on what the other speaker says and using specific cues and questions to reinforce that the interviewer is closely listening.¹⁷ It is not only

13 See, for example, Richard Hoefler, *Advocacy Practice for Social Justice* (Lyceum Books, 3rd Ed, 2016).

14 Michael S King, "Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice" (2008) 32 *Melbourne University Law Review* 1096.

15 Vicki Lens, "Against the Grain: Therapeutic Judging in a Traditional Family Court" (2015) 41 *Law and Social Inquiry* 71.

16 Michael S King "Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice" (2008) 32 *Melbourne University Law Review* 1096.

17 Carl R Rogers & Richard E Farson, *Active Listening* (Martino Publishing, 2015).

a good way to gather information – a primary task of a lawyer – but also to set a tone and build relationships with clients that engender trust and enable the lawyer to understand a client’s emotional needs. A more holistic assessment, gathered through these techniques, will also allow a lawyer to better assess the viability of alternate dispute resolution or other less adversarial methods.¹⁸

11 TJ court appearances also take on a different hue, but one entirely consistent with the roles and responsibilities of legal actors. What is different is the tone and tenor. Lawyers and judges act with the added awareness of the emotional and psychological tensions roiling under the surface. This extends to how legal actors speak to one another, including their tone, tenor, and even body language, as it can have spillover effects.¹⁹ For parties to a divorce, public court appearances (or settlement negotiations with all parties present) are an emotional minefield that can be either exacerbated or tempered by the behaviour of legal actors. Lawyers are not only arguing the law or advocating for their client; they are also serving as *de facto* role models for how to resolve disputes. Similarly, the judge, as the orchestrator of the proceedings, can compose a harmonious ballad, or a concert out of key.²⁰ By tuning into the emotional environment of the courtroom while performing their legal tasks, legal actors can minimise the psychological harm to the family.

12 To be sure, not all legal actors are equally adept at understanding underlying emotional and psychological issues, or communicating in less adversarial ways. And while some lawyers may gravitate towards such an approach, others do not. Fortunately, there is a cornucopia of knowledge drawing from the social sciences that can help legal actors understand family

18 Emily Stannard, *Therapeutic Jurisprudence in Aotearoa New Zealand’s Family Justice System* (2020) (Thesis, Master of Laws, University of Otago).

19 Vicki Lens, Colleen Cary Katz & Kimberly Spencer Suarez, “Case Workers in Family Court: A Therapeutic Jurisprudence Analysis” (2016) 68 *Children and Youth Services Review* 107.

20 Vicki Lens, “Against the Grain: Therapeutic Judging in a Traditional Family Court” (2015) 41 *Law and Social Inquiry* 71.

dynamics and the etiology of divorce in a more holistic way.²¹ Similarly, there are many avenues for learning more therapeutic communication strategies, drawing from the skill set of social workers and other mental health professionals.

13 Importantly, learning these skills does not transform a lawyer into a social worker. Rather it is in the nature of interdisciplinary work like family law. Notably, social workers in legal settings make the reverse journey, adding a more enhanced knowledge of the law and legal advocacy to their social work skills, but without diminishing their primary role. Likewise, legal actors benefit from a broader repertoire of skills, including a heightened ability to handle the emotional and practical challenges of family law.²²

21 For a discussion of this literature, see Justice Debbie Ong, “Family Justice Courts Workplan 2020: Today is a New Day” *Family Justice Courts* (21 May 2020) at paras 22–26.

22 Emily Stannard, *Therapeutic Jurisprudence in Aotearoa New Zealand’s Family Justice System* (2020) (Thesis, Master of Laws, University of Otago); Michael S King “Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice” (2008) 32 *Melbourne University Law Review* 1096.