

INSTITUTE OF LAW RESEARCH AND REFORM

Methodology of Crystallizing a Matrimonial Support Award in
the Supreme Court and Family Court: An Observation.

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I. INTRODUCTION

In almost every sector of our North American society we extoll family life - it is often said to be the cornerstone of our society. We as a society place great expectations in the family - we expect it to meet a wide variety of our collective and individual needs - everything from being a teacher of social values to social control - economic to emotional spectrums are covered by the family.

Of late, however, increasingly there has been a growing concern for this institution. It is changing. And because of this change, because this institution is relied on so heavily by society, not unexpectedly the change is being felt in a great many areas. We have for so long now expected this one institution to remain static while all else around it changes. Of course this has not been possible.

Because of this a great many disciplines, both social and legal have expressed concern for the institution of the family.

The following paper hopes to examine the family as it operates in one system - the Family Court in terms of being separated/divorced and in arrears re: maintenance payments - from the legal and social policy perspectives; the effect they have upon the family. A systems approach to the above will be utilized.

II. SOCIAL POLICY AND THE FAMILY IN FAMILY COURT

Social Policy is defined by Alfred Kahn as:

"... the implicit or explicit core of principles, or the continuing line of decisions and constraints behind specific programs, legislation, administrative practices or priorities."

1. Alfred Kahn; Social Policy and Social Services: Random House, New York, N.Y. (1973) pg. 8

To this end; when the family is examined in light of a social policy we find we tend not to have that policy in any well-defined form. We tend instead to focus on individual or social problems.

As our society has tended to focus on the individual and the right for us all to be treated as such we have tended to ignore the fact that the individual is also part of the family unit. And that that unit must be seen as that - a unit - not simply a composition of individuals; but an interaction between individuals.

III. SOCIAL POLICY IN FAMILY COURT

What does the above mean in terms of the operational policies in Family Court?

As previously stated this paper hopes to examine the functioning of this system from a "system" analysis. Kahn defined systems analysis as:

"A variety of components are inter-related, by some connective force, so that performance of one component is affected by performance of another component. By studying such relationships, learning how the system is influenced, and arranging for signals (feedback) from components, it is often possible to exert a measure of control."

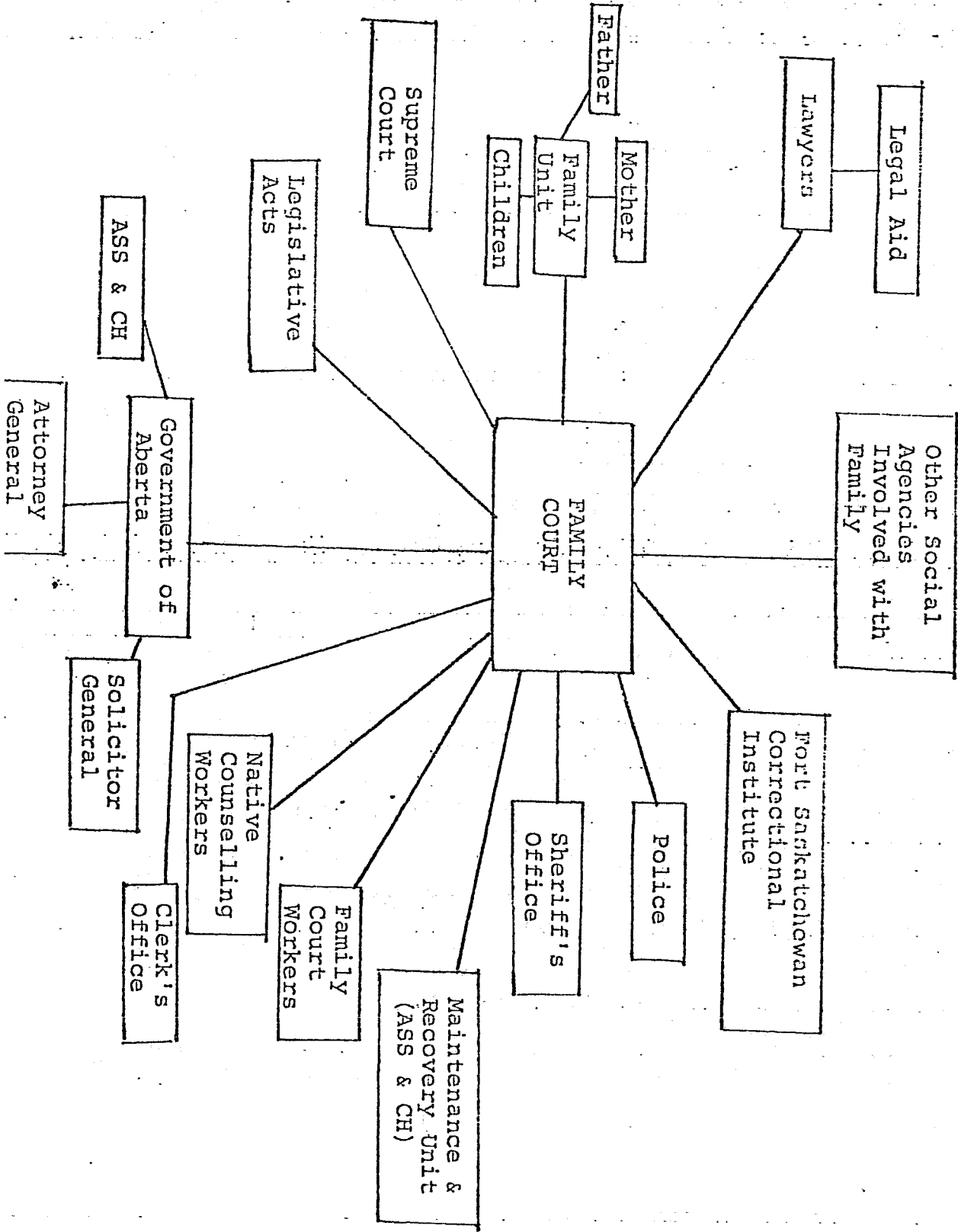
Thus it can be seen that a system approach is a "planful" way to inter-relate the many elements found in a system and their inter-actions between each other.

The diagram on page 3 is an example of the number of systems the writer found currently to be present in the Family Court

2. Alfred Kahn; Social Policy and Social Services: Random House, New York, N.W. (1973) page 142.

operation in Edmonton. The effects of these will be elaborated on below; as will some of the observable side effects these have on the functioning of this court.

Systems Impinging Upon The Edmonton Family Court



IV. FORMAL SYSTEMS

Government

Family Court was created to deal specifically with sociological problems that arise within a family unit; the aim being to maintain the unit whenever possible. However failing this, to deal as positively as possible with this family unit if dissolution of the marriage appears inevitable.

As such the system falls under the auspices of 3 different governmental departments - the Attorney General, Alberta Social Services and Community Health, and the Solicitor General's department. In conjunction with this then we have:

- Family Court judges - 5
- Family Court counsellors (Social Workers)
- Clerk of the Court and his staff.
- Maintenance and Recovery Workers of each regional unit in the city
- Conciliation Project.

With reference to the above then, one can predict a wide variety of different philosophies and policies to be operating for the various components - all however dealing with one client - the family appearing before the court. In addition to the above are also counsel which may at times represent either/ both the husband and wife in court.

At present there appear to be no clear cut policies as to the direction/purpose of a good many of these departments. Thus at times they can be seen to be operating from cross-purposes - the left hand often now knowing/appreciating

nor understanding what the right is doing. Three governmental departments at times will relay 3 different policies to one department, causing confusion as to which route to follow.

Functions of Each Department

At present a case may be brought before the Family Court in one of 2 ways:

(1) As a result of the husband (generally) being in arrears re: maintenance/support payments awarded in either Family or Supreme Courts and his wife swearing an affidavit re: same.

(2) As a result of the couple being separated/divorced and one party being on social assistance the Department of Social Services and Community Health may make a third party application in order to force the respondent spouse to reimburse the government.

Generally a social worker initially interviews the petitioner to assess the entire family situation and offer any assistance possible to that family and the court in reaching an amicable settlement for all parties concerned.

The Clerk of the Court's office is generally responsible for collection of monies awarded to the wife, ASS & CH and for noting when these orders fall in default. However, at present there appears to be no systematic manner in which errant orders are noted. To this date they appear to be randomly selected from a carousel of payment cards and only when a clerk has free time to do so. Therefore, it is possible for one errant payee to be noted to be in arrears several times while others may be unnoticed for months - particularly if the wife does

not lay a further complaint. This is especially true for the wife who is on social assistance. Her monies come directly from ASS & CH; therefore, she will not notice if her husband fails to make the proper payments. While the wife and family who depend strictly on these payments will certainly be more likely to notice the missed support payment.

At present it also is unclear as to the method available to the Maintenance and Recovery Workers of ASS & CH to be made aware of a default of payment once they have filed a third party application - there appears to be no formal method of advising the Department of this default; consequently, it may not be noticed unless by the previously mentioned random spot check by a Clerk of the Court.

Often the social workers and accounts department of the Family Court can be seen to be operating from different philosophies, i.e. the workers seeking to find an amiable solution for the family unit; the clerks seeking to control the missed payments by issuance of summons/warrants.

It should also be stated that if the payment is made to the Clerk of the Family Court; that payment may be delayed approximately 2 weeks before it finally reaches his family - this is especially true in cases of non-certified cheques which are initially sent to the bank before going to the spouse. This further delays payment to the spouse, plus creating extra paper flow for the Clerk's office.

If a summons is issued this is forwarded to the Sheriff's Office generally for execution (occasionally a social worker will serve the summons if they feel this will be a move amenable to resolving the situation). Warrants if issued, are forwarded to the City Police or appropriate RCMP detachments.

V. INFORMAL SYSTEMS

At this point mention of some of the informal systems operating perhaps need brief mention. Because of lack of specific guidelines and purposes for departments to follow various informal systems can be seen operating within the Family Court. An example of this is the execution of warrants by the City Police. Police discretion is used in a wide variety of instances. Firstly warrants from Family Court are given low priority - they are but a fraction (121 over 6 months) of the approximately 2,000 issued each month. Police also tend to express the feeling they are performing a "collection agency" function vs. a "police function". Another view often expressed is one of stating that in every other instance of a warrant being issued, the accused is arrested, incarcerated and the sentence completed. In dealing with Family Court matters, however, the accused may be released from jail and is subsequently 30, 60, 90 days behind in support payments. He is still in default. In every other instance the released person's sentence is complete.

Police, therefore tend to often get to know "regulars" who have warrants issued for them, may telephone them several times to inform them of the warrant, may escort them to a bank to obtain funds, or may deliver payment to Family Court in lieu of actually executing the warrant.

Other informal systems operating are the random checks of payment cards, commencing court at 10:00 a.m. vs. 9:30 a.m. as it states in the subpoena to appear in court.

Though all of the above may come to be excepted practice for those working within the system, it certainly tends to be highly confusing for those appearing before the court.

VI. LEGAL POLICY

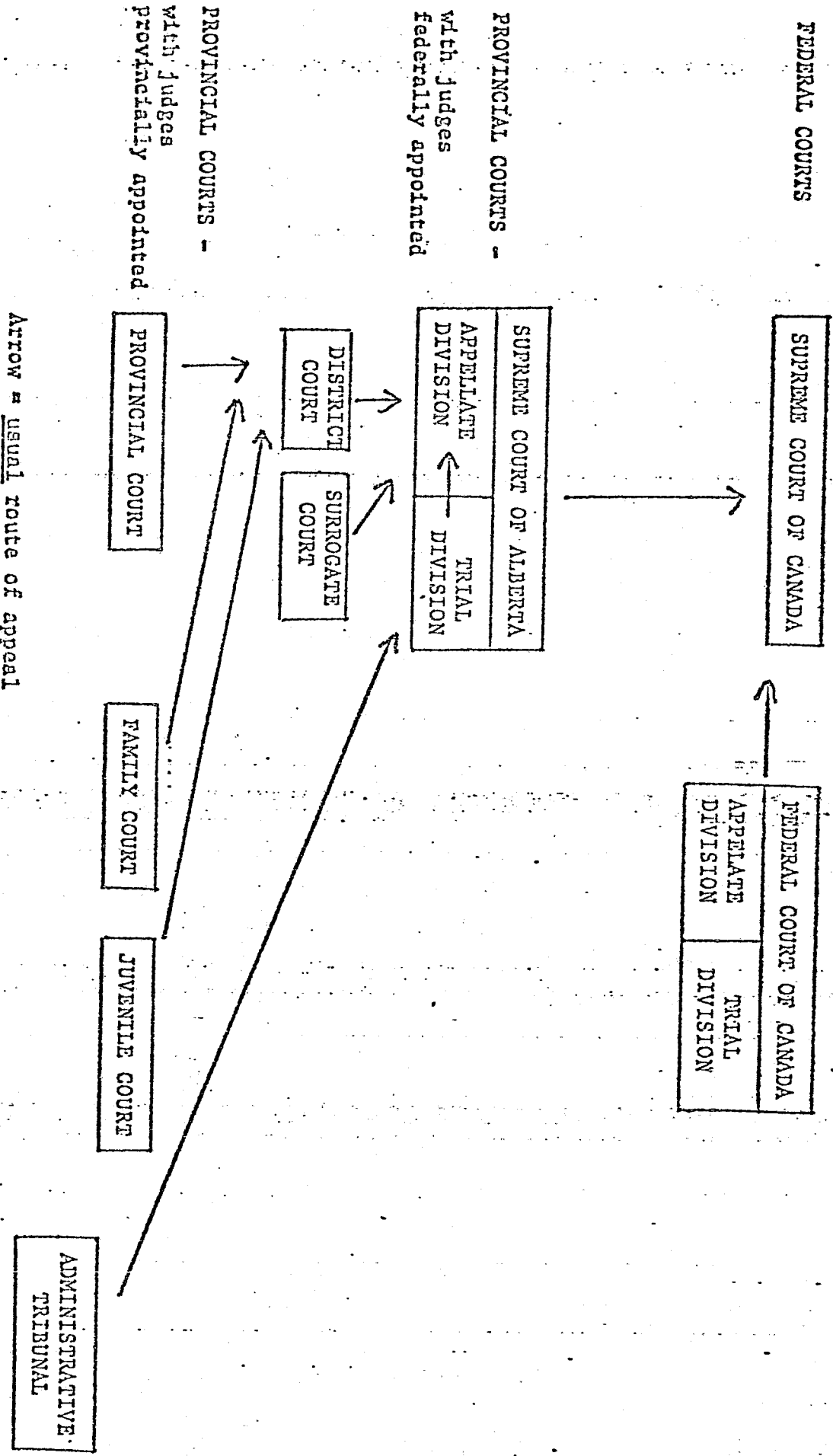
With respect of legal policy, please note the diagram on page 9. Family Court is established as a provincial court with provincially appointed judges (5 in number). It's jurisdiction is limited to the following Acts:

1. Criminal Code (non-support)
2. Domestic Relations Act (non-support)
3. Criminal Code (Family assault)
4. Criminal Code (threats or fear of personal injury)
5. Liquor Control Act (interdiction)
6. Family Court Act (filing of Supreme Court orders for maintenance for enforcement only)
7. Family Court Act (custody/access)
8. Charges against adults under the School Act
9. Charges against adults under the Child Welfare Act
10. Mental Health Act (committal of a family member)
11. Maintenance orders under the Reciprocal Enforcement of Maintenance Orders Act.

With regard to maintenance application the Family Court only has jurisdiction to enforce Supreme Court orders, it cannot alter these. This must be done by returning to Supreme Court - a situation many of those who appear before the Family Court can ill-afford. Family Court has been structured so that appearance with a lawyer is unnecessary and as many who appear before the court tend to be unemployed or on social assistance and also may not fall under the present guidelines for qualification for Legal Aid; - access to Supreme Court for variation of maintenance orders is denied them. Supreme Court proceedings can nullify or hold in abeyance any Family Court proceedings.

FIGURE ONE

FEDERAL AND ALBERTA COURT STRUCTURE



Arrow = usual route of appeal

Original orders from Family Court can be made for a wife; wife and children; or children only. Under the Domestic Relations Act (non-support); if a wife applied for support for herself as well as her children she must prove grounds of her husband's desertion or her husband's cruelty causing her to leave the marital home.

The usual procedure is for the owing spouse to be summonsed to a show cause hearing in the Family Court. (Here again a check of the court docket may reveal 8-9 show cause hearings scheduled for 1 court room in 1 morning, however if the summons has not been served it is not unusual for only 2-3 cases to be heard). At the hearing the judge may question both the husband and wife re: current financial situations and order certain amounts to be commenced as payment. Generally these are not usually sufficient to solely support the family. Some other source must be relied upon - extra income from the working mother, social assistance, etc.

Family Court further has an informal policy of not enforcing those arrears which are more than a year old. A check of the carousel reveals that inevitably a great percentage of the cases show some form of arrears - it is almost impossible to find a payment card which does not reveal this.

The final remedy the Family Court has is imprisonment of the owing spouse to a provincial gaol for not more than 90 days.

VII. CONCLUSION

From considering the above, several comments seem obvious:

(1) At present there appear to be an enormous number of system interacting with and having an impact upon one system - Family Court. At times the interactions purposes of the systems run counter to each other, or

may be repetitious of each other. For example, the Sheriff's Office and social workers' both serve summons. There is no formal feedback mechanism operating between the systems to enable them to avoid the above problems.

(2) Family Court as it presently functions may only enforce orders made in Supreme Court; it cannot vary those orders. Therefore the actual power - the court possesses at present is limited. In order to change an order the individual must return to Supreme Court. This is not always possible. Numerous situations may have occurred which necessitate making the original order smaller or larger. Family Court cannot do this. Arrears therefore amount in great volume and for almost every order the Court deals with. People are before the Court with very serious concerns yet there are very few methods afforded the Court to adequately and justly bring about solutions to these concerns.

Because of the number of systems involved in the Family Court and because of functions at times being held in abeyance by proceedings in Supreme Court; the situation tends to get overly complicated and confused. Unenforceable orders are enforced - paper flow is enlarged and complicated - often taking precedence over the individual - roles of agencies and individuals are blurred.

Remedies must be sought to enable the Court to adequately, fairly deal with the problems it faces. If not, it faces the threat of becoming a token reality; not serving nor being utilized by those who need it most.