A Suggestion:

The Family Lawyer

by John S. Bradway • *Professor Emeritus, Law School of Duke University*

Professor Bradway sets forth a proposal for the Association's new Section of Family Law: that it work on establishing a program to create a new legal entity, "the family", which would be represented by its own "family lawyer" as contrasted with the personal counsel that individual members of the family might employ. He envisions that the creation of such a new artificial "person" would in time lead to the growth of a new body of law.

The American Bar Association, at its 1958 meeting in Los Angeles, brought into being a Section of Family Law. In due course this Section will give a good account of itself to: its members, the Association and the general public. All this, however, lies in the future. The immediate question is—what *might* it do? The possibilities are limited only by the imagination of the members, which characteristic we may be sure, is in excellent working order. One of these possibilities forms the subject of the present article.

It is suggested that the Section would do well to engage in a creative task which may be described in terms of three interlocking divisions. It should create a *family lawyer*. It should stimulate the various legislatures to create a *family* unit recognized by law. It should develop a field of substantive and procedural law of rights and remedies relevant to this legal entity.

The term, *family lawyer*, probably brings to the reader's mind a member of the profession who takes an inclusive and continuing interest in the legal problems which beset the members of a family. But this is not the suggestion. Our family lawyer would represent the family unit rather than its members. He would be distinguished by the area of his professional interest, the artificial nature of his client and the point of view with which he approaches his work.

As far as the area of his professional interest is concerned he would be a specialist; but, if one may use the term, a generalized specialist. That is to say he would be interested in all legal problems of the family unit. Since the family may well be involved in nearly as many activities with legal significance as are its own members, the potential field of operations would probably be pretty broad.

The effect upon the profession as a whole of the introduction of a group of lawyers with generalized interest should be beneficial. Already there are plenty of specialists. However useful their specialties may be to the client and to themselves the profession itself may not be too greatly advantaged. The prospect of a so-called profession which would consist exclusively or even largely of individualistic specialists suggests structural weakness. If and when external pressure is exerted upon such a profession, the lack of some common denominator of mutual experience would greatly hamper group efforts at resistance. The family lawyer would be a distinct contribution to such a common denominator.

But the creation of this personage with inclusive interest should also be of value to the client. It is probably characteristic of a specialist that he finds satisfaction in functioning in a familiar groove. When the door of his law office opens it is usually to admit a visitor who brings with him a problem which is readily ascertained, and, perhaps, fairly readily solved. But, for example, if the client who comes to the door of the tax law specialist should bring with him a problem which does not lie in the field of taxation, readjustments are required. Either the lawyer accepts unfamiliar employment or he must make a reference; in either instance the client's interest may be jeopardized. The specialist is at his best when he is dealing with the *expected*. The general practitioner is the man who faces up to the challenge of the *unexpected*. In so doing he displays such characteristics as: resourcefulness, change of mental pace, imagination, ability to improvise. He develops his own powers to the fullest. Our proposed family lawyer will be a general practitioner in a wide field which, by courtesy, we may call a speciality.

The client of the family lawyer as we have proposed will be an artificial legal entity. Each individual member of a family will still be free to retain his own private counsel. It is the rights and obligations of the family *unit* which will be the concern of our proposed professional personage.

Another significant departure will be the attitude of mind of the practitioner. There is need for the public to realize that such an attitude exists in the profession. The legal profession has received unfavorable publicity from the stereotype known widely as the divorce lawyer. Whether the real divorce lawyer actually lives up (or rather down) to his advance public billing may be argued. The fact remains that the image of the divorce lawyer in the public mind is generally of a person whose professional interests, to say the least, are limited. Even if we could engage the public in a general discussion with a view to convincing its members that divorce lawyers are not as black as they are sometimes painted, there is no reason to assume that the effect would be lasting.

When we find fanciful individuals likening a divorce to a funeral at which the judge plays the part of an undertaker and the lawyers are described in terms of pall bearers or grave diggers it is time to substitute in the public mind some other sort of professional image, more flattering to the Bar.

The family lawyer as now proposed would serve as an excellent antidote for any public misunderstanding which may exist regarding the attitude of the Bar toward divorce and other distressing family complications which for better or for worse are settled in the courts, the newspapers and elsewhere. The divorce lawyer appears generally as a remedial functionary. We may differ at times as to whether the cure in such cases may not be more distressing to the patient than the disease, but divorce is at least a remedy if not always the best. Our proposed family lawyer would approach his labors in a preventive spirit. He would expect to be consulted in the first instance by a healthy normally functioning family, a going concern, a living social organism. His job would be to use the resources of the law to keep it so.

Our suggestion would be much clearer if we could offer an analogy. For example, if we could say that we have in mind something like a family doctor. It is true he tends in his viewpoint toward the preventive side. But this splendid and useful addition to the medical profession serves the individual members of the family rather than the family itself. Neither can we call upon the old family firm of English solicitors to appear as a sort of exhibit A. These distinguished gentlemen may hold shut the door of the closet in which the various family skeletons are kept. But in law they too represent individuals and not a unit.

Our suggestion then is the creation of a Family Lawyer who will be a specialist with generalized tendencies. He will represent a unit rather than the individuals who compose that unit. He will hold himself out to the public as one who is concerned with preventive law rather than remedial.

The Family Lawyer's Client... The Family Itself

As we have said the client of the Family Lawyer will be the Family itself. It is necessary to comment briefly upon this unit. Attention is directed to the bonds which hold the members together. Generally, when we speak of the family, we are thinking of a unit bound together by factors of significance in the field of sociology, anthropology, biology, psychiatry and some of the other physical and social sciences. The word *family* may be susceptible of definition by the legislature and the courts but the legislators and jurists who use it appear to have in mind a group of persons held together by ties of blood, or economic pressures rather than by the law. As a consequence the lawyer represents the individual members.

Even the marriage license does not connote to the holders the element of unity as proposed. It represents, of course, a form of civil control over the members of the family. Its utility in making a record in order that all and sundry may be able to deal in an orderly manner with property interests is clear. Similarly it may be argued that its issuance serves a real purpose in excusing two persons of opposite sex from the operation of certain of the criminal statutes. More recently it has been used as a screening device in connection with the refusal of the state to permit certain people to marry. None of these aspects is immediately relevant.

It is suggested that under the present proposal the marriage license should be considered a form of franchise or authorization to permit two persons to engage in the "enterprise" which we call operating a family. We do not refer to it as a "business" because the object is only partly in the economic field. It is a special sort of joint adventure, a group program, a mutual effort in which the state has an interest. That interest while not too clearly spelled out would appear to be to encourage the creation and maintenance of stable, enduring families. Therefore this license, or franchise would be enjoyed during good behavior. Those who possess it would in effect, be held out to the public as qualified and competent to perform this essential public or quasi-public function.

It is proposed that the family unit thus created by law should operate separate and apart from the individuals who happen to compose it. They would have their rights and duties. It would have its privileges and obligations, all matters of law. This legal concept would be in addition to the various phases of the family which are already employed in the fields of sociology, anthropology, economics, and the rest of the social and physical sciences.

We need a precise analogy to serve as an illustration of the sort of agency, of enterprise, this "unit" would be. Unfortunately there is none currently available. The nearest examples occur in the field of corporate law.

The proposed family unit would be a corporation in the sense of an artificial person. But the ties which bind the family members together would not be of the economic sort which motivate stockholders; even the stockholders of families which incorporate a family business. Our family would not be primarily concerned with the accumula-

tion of the sort of profit suggested by money dividends.

The proposed family would be somewhat like the non-profit corporation. This body generally functions without stock and the members are held together by the desire to promote some common purpose, some mutual ideal, some joint program. These programs frequently belong under certain well-known legal headings represented by the objectives: religious, educational, eleemosynary, charitable. But the members of these groups are held together only by this ideal. The members of the family have many and varied bonds some of them in the spiritual field, some matters of economics, some elsewhere. That is why the word "status" is regarded as descriptive. The non-stock corporation does not create a status. The family relation does.

There is still a third type of corporation, one which is quasi-public. This may be still a bit closer to our purpose because it has in it more of status. The most obvious example is the bar association which has been integrated by statute or rule of court or both. The resulting agency is more nearly a status because its obligations are touched with a type of public interest. It owes duties both to its members and to the general public and its motivation is not primarily economic. It is hard to get into. The members bear to one another a relation not too different from that enjoyed by individuals one to another in a family. Only the bar association, because of its size, will hardly serve as the complete illustration for which we are seeking. The status concept is emphasized if one considers the relation of the individual lawyer to his client and the relation of the bar association as a group to the general public. There is a persuasive argument that the public is the client of the organized Bar.

Neither can we borrow a perfect analogy from the field of fiduciary relations. A trust fund operated by a bank for the benefit of individuals has something about it of the "status" atmosphere. But it appears that there are various stages of quality to which the term "status" may be applied. The family occupies a position in one of the more refined stages.

The proposed family lawyer and his client will not exist in a vacuum. In time there will grow up around them, perhaps through their efforts and adventures, a body of law related to the family in the same manner as the law of corporations has proliferated. It is in the development of this body of substantive and procedural law that the Section of Family Law should have a field day. Here is an opportunity to do pioneering work and a lot of it.

Consider the number of legal concepts, rules and principles now related to the rights and duties of individual members of families which could be transferred to or enlarged to include the family unit itself. They are like a flock of birds waiting for a place to land. To use an hibernicism, if we give them that landing place we shall be off to a flying start.

Community property now is held by the individual spouses in various ways. It might, under the proposal, be transferred to the family unit. In the field of the common law, tenancy-by-the-entireties could be made a concern of the group rather than an individual holding. In the field of criminal law there is the possibility of requiring the husband and father to pay support to the family unit rather than to some individual member. The result might make the heat of the domestic controversy a little less fiercely personal. In tort law there are occasions in workmen's compensation and wrongful death recoveries where liquidated damages could be paid to the family rather than to individuals. Trust property might be given to a family unit as well as to any other "class". The list of possible developments is lengthy.

One point of legal ethics deserves notice. Under Canons 6 and 37 the lawyer is warned of the undesirability of representing conflicting and adverse interests. In the suggested plan the lawyer for the family would continue to represent the family and the individual members would have their own counsel.

Why Make the Change? . . . The Advantages Summarized

Let us now summarize the benefits to be expected from the adoption of the suggested change. The practicing lawyer will probably have more clients thronging his law office. In terms of enlightened self-interest the benefit will be not merely to him in a material sense. Rather the families themselves will benefit because they will have received more inclusive attention than is now the case. The solutions will tend to be better rounded, more inclusive. Under the suggestion all interests will receive the equal protection of the law.

The legal profession will benefit in a public relations sense from the fact that whatever unsatisfactory implications may have been drawn from the picture of the divorce lawyer will be counteracted, we hope quite reversed, by the more favorable atmosphere arising from a greater professional emphasis on preventive law.

The public will receive benefit because of a trend in the American way of life which if allowed to grow unchecked may involve us in a catastrophe. That is in the relation of the individual and the state to the family.

(Continued on page 866)

John S. Bradway was a Professor of Law at Duke, 1931-1959. This fall he expects to teach at California Western College of Law in San Diego. He received his A.B. in 1911 and his A.M. in 1915, both from Haverford College. He received his LL.B. in 1914 from the University of Pennsylvania and was admitted to the Pennsylvania Bar in the same year. He is a contributor to numerous periodicals.

Room of the Singapore Hotel in connection with the Annual Meeting. The program contemplates the presentation of four economic experts in the morning and a specially selected panel of Section experts in the early afternoon, to be followed by a joint discussion and mutual cross-examination by the two panels in the later part of the program. The subject matter of the panel discussion is "Our Future Natural Resources—The Economic and Legal Problems Ahead".

Leading off the discussion on behalf of the Economic Panel will be Dr. Bruce Netschert, Senior Research Associate, Resources for the Future, Inc. Dr. Netschert is particularly qualified to speak on the economic outlook for coal, oil and natural gas, in view of his prior service as a staff member of the President's Materials Policy Commission and as consultant to both the National Security Resources Board and the Office of Defense Mobilization. Dr. Netschert is the author of the recent book *The Future Supply of Oil and Gas*. Speaking on the subject of minerals and public lands will be Dr. Joseph C. McCaskill, Office of the Assistant Secretary for Mineral Resources, U. S. Department of the Interior. Dr. McCaskill was formerly Director, Division of International Activities for the Interior Department, as well as Director of Planning and Development, Bureau of Indian Affairs. An economic forecast with respect to atomic energy will be presented by Philip Mullenbach, Vice President, Growth Industry Shares, Inc., and Growth Research, Inc. Recently, Mr. Mullenbach was an economist on the staff of the Atomic Energy Commission and has been Research Director of the National Planning Association's project on the productive use of nuclear energy. He was also Research Director of a study undertaken by The Twentieth Century Fund on the economic aspects of nuclear power policies. The final economic panelist is Irving K. Fox, Director of the Water Resources Program, Resources for the Future, Inc., who will give views on the economic outlook for water resources. Mr. Fox was formerly the representative of the U. S. Department of the Interior on the interagency survey of the Arkansas, White, and Red River basins. In addition he has served as a staff member of the U. S. Commission on Organization of the Executive Branch of the Government.

The Section on its part has named the following lawyers to present the Section's outlook on the future of natural resources: Atomic Energy—Harold P. Green, Washington, D. C.; Water Resources—Raphael J. Moses, Alamosa, Colorado; Hard Minerals—William A. Evans, Phoenix, Arizona; Public Lands—J. Reuel Armstrong, Rawlins, Wyoming; Coal—Rolla D. Campbell, Huntington, West Virginia; and Oil and Natural Gas—Gene M. Woodfin, Houston, Texas. This portion of the program will be presented in the afternoon, on Tuesday, August 25, at 2:00 P.M. At 3:00 P.M., the Economic and Section Panels will be thrown together for cross-discussions and questions from the floor. This phase of the program will be moderated by Oren Harris, Chairman of the House Interstate and Foreign Commerce Committee.

The Section will establish hospitality and information headquarters on the mezzanine-balcony of the Singapore Hotel, which will be in operation most of the time from Sunday afternoon, August 23, until noon on Wednesday, August 26. The hospitality area will be under the supervision of Mrs. Clair M. Senior, of Salt Lake City, wife of the Section's Second Vice Chairman. A selected Ladies Committee to be named by Mrs. Senior will assist. A reception and cocktail party has been scheduled on the mezzanine-balcony, beginning at 6:00 P.M. on Monday, August 24, for the Section members and their wives.

The program will be rounded out by the holding of a Council Meeting on Monday morning, August 24, with the annual business meeting of the Section scheduled at 2:00 P.M. in the Malayan Room on the same day. There will be no program Wednesday morning, but there will be a breakfast meeting on Wednesday at 8:00 A.M. in the Malayan Room for the new Council members and Section officers, as well as Committee Chairmen.

The Family Lawyer

(Continued from page 833)

The modern individual needs the family for his own protection. He needed it in primitive civilization. He needs it perhaps even more now. To assume that the state will always be benevolent is naïve in the light of historic events in the past quarter century. To allow the family to lull itself into a condition of impotence so that when trouble arises it is a mere pushover for a totalitarian regime is certainly no kindness. The present suggestion should remind the family that it has a significant part to play in protecting the individual members from a state which should not be permitted to develop interests conflicting and adversary if not actually hostile.

Similarly the state needs the family. It needs some agency which will perform certain services of a peculiarly intimate sort. For example: there must be some place for an orderly meeting of the sexes; some agency to handle property interests of people living in the domestic relation; some group which can attend properly to the rearing of children, particularly small children. So far as we know there is no agency which can perform these services so well as the family.

There are two main prerequisites for any suggestion such as the one now described. They are: it should operate on the national level so as not to interfere with what is already going on on the state and local levels. It should not unduly overlap or duplicate other national activities. This plan passes both these tests. It is national in its scope. The only other national organization which might be thought of as overlapping is the Association of American Law Schools. That agency is now interested through its Committee on Family Law in a journal, a cooperative endeavor. Other national organizations like the Commissioners on Uniform State Laws and the American Law Institute seem to be doing nothing directly along the suggested lines. If there is danger of collision on details the Section need not take an exclusive position.