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High-Conflict Divorce and Forensic Therapy: An Intervention Framed in the Paradigm of Therapeutic Justice

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ABSTRACT

Forensic therapy constitutes an auxiliary element of justice framed in the paradigm of therapeutic jurisprudence. In this article, we present the bases that demonstrate the need for this resource and the basic associated characteristics, as well as the differential aspects with respect to other possible interventions. Finally, we propose basic guidelines to be considered by the professionals who assume these interventions.

Divorcio Conflictivo y Terapia Forense: una Intervención Enmarcada en el Paradigma de la Justicia Terapéutica

RESUMEN

La terapia forense constituye un elemento auxiliar de la justicia enmarcada en el paradigma de la justicia terapéutica. En el artículo, se exponen las bases que evidencian la necesidad de este recurso y las características básicas asociadas, así como los aspectos diferenciales respecto a otras posibles intervenciones. Finalmente, se proponen pautas básicas a considerar por los profesionales que asuman estas intervenciones.

Palabras clave

Divorcio
Alto conflicto
Justicia terapéutica
Terapia forense

In Spain, divorce has existed for 40 years, during which time it has been gradually consolidating within society, coming to resemble countries with a greater tradition of divorce. As a result, the number of minors who experience the breakup of their parents every year is high. The latest data from the National Institute of Statistics (INE, 2022) report that in 2021 there were 90,582 cases of annulment, separation, and divorce, of which "45.2% had only minor children, 4.2% had only economically dependent adult children, and 7.4% had economically dependent minor and adult children. Twenty-four point five per cent had only one child (minor or economically dependent adult)" (INE, 2022, p. 3). From these data it can be deduced that more than 150,000 children were involved in these processes; however, this figure leaves out those whose parents separate without a marital bond, which Fariña et al. (2020) established at approximately double the number presumed in the official records mentioned above. Thus, a large number of children and adolescents experience the breakup of their parents' relationship, which is not always well managed by them. Despite the fact that "since 1995 separations—and since 1999 divorces—have been mostly by mutual agreement" (Consejo General del Poder Judicial [General Council of the Judiciary], 2021, p. 171¹), the dissolution of the couple does not solve the family problem. However, as indicated in the *Guide to Criteria for Judicial Action in matters of shared custody*, published by the General Council of the Judiciary, and coordinated by Martínez de Careaga et al. (2020), "there is a percentage of breakups that—whether they were initially channeled through mutual agreement or through contentious proceedings—after a period of time (...), present a high level of conflict, which results in continuous incidents in the execution, (...). Cases with a tendency to conflict are exacerbated if they are resolved by traditional adversarial procedures" (p.357). Also within the forensic environment it can be seen that the relationships between parents reach a high level of conflict, which is usually maintained and increased through the dynamics that are usually established in contentious judicial proceedings (Joyce, 2016), creating a process of triangulation in which the court, other legal agents, and even some of the positive means for conflict resolution can, paradoxically, become a means through which to perpetuate the conflict (Francia et al., 2019). Thus, it is estimated, internationally, that one third of couples separate with a high level of conflict and high judicialization (Fischer et al., 2005), which is maintained over time, even after the time required for the readjustment of the family system (Arch & Fabregas, 2020; Fischer et al., 2005; Mitcham-Smith & Henry, 2007), jeopardizing the well-being of the family. When this occurs, all the members of these families are immersed in a highly traumatic situation for a prolonged period of time, without the established means and systems appearing to offer an effective response that contributes to the adequate protection of the minors.

Thus, marital breakup processes have been considered a risk factor for children, regardless of their gender, and may affect their psychological and physical health (Contreras & Cano, 2016; Gómez-Ortiz et al., 2019; Hengesch et al., 2017; Lamela & Figueiredo, 2016; Larson & Halfon, 2013; Leopold, 2018; Lund et

al., 2006; Lucas-Thompson et al., 2017; Schaan et al., 2019; Yap & Jorm, 2015), and also their adjustment (Corrás et al., 2017; Reuven et al., 2021; Seijo et al., 2016). They can carry the traumatic burden in terms of psychological well-being and social relationships, for years (Geurts & Gutteriswijk, 2021), consequently, it has been categorized as an adverse childhood experience, whose effects can reach into adulthood (Becher et al., 2019; Dube et al., 2003). Moreover, the consequences are amplified and magnified when the parents continuously place children at the center of confrontations (Barrios et al., 2017; Kelly, 2002; Kirkland, 2004) and it is a high-conflict separation (Geurts & Gutteriswijk, 2021). In these cases, they are more likely to suffer hostility, blame, criticism, family violence (Van der Wal et al., 2019), twice as likely to suffer behavioral, social, or emotional problems (Hald et al., 2020; Hashemi & Homayuni, 2017); we should also highlight, as Geurts and Gutteriswijk (2021) do, the involvement in court proceedings and the consequences they have on children.

However, it is not the couple's breakup per se that puts the children at risk, but the parental conflict and lack of positive parenting (Fariña et al., 2022; Van Dijk et al., 2020), before and after the divorce (Cao et al., 2022). Therefore, it is not the separation of their parents that affects them the most, but the parental conflict and the subsequent decrease in family support. In the same vein, the American Academy of Pediatrics (2012) warned that adversity is not the only predictor of maladjustment and maladaptive health patterns in children and adolescents, but the lack of family relationships that provide protection and support (Fariña, 2021). Specifically, in post-divorce situations, interparental conflict causes dysfunctional family dynamics (Van Dijk et al., 2020), affecting the exercise of positive parenting (Fariña et al., 2022). It drains parents of energy, generates negative emotional states, and hinders them from carrying out positive behaviors in their parental role (Van Dijk et al., 2020). Consequently, the different operators who intervene with these families have become aware of the need to favor the adaptation of minors to the new reality, and to prevent, as far as possible, the appearance of health problems or loss of well-being that interfere with their correct development and evolution (Abel et al., 2019; Arch, 2010; Arch & Fabregas, 2020).

In line with what the paradigm of therapeutic jurisprudence (TJ) promotes (Fariña, 2022), more and more professionals believe that contentious procedures are inadequate due to their high emotional and economic cost for all family members, particularly for children and adolescents (Yamada, 2021). This has led, in recent decades, to specialized resources being increasingly designed and promoted with the aim of facilitating conflict resolution and the pacification of family life, primarily for those cases that, due to their special complexity, can have extremely negative psychological effects for those involved (particularly for the children). Among these tools are family mediation, psychoeducational programs, interventions from family meeting points, parental coordination, and forensic therapy, all of which are intrinsically friendly to TJ, and extrinsically so if applied from the perspective of TJ (Fariña, 2021). In Spain and Latin America, of all of these tools, forensic therapy is the least known and used. Accordingly, this article focuses on presenting this resource aimed primarily at the families that require an intense and specific intervention that allows them to get out of the detrimental situation they have been sustaining.

¹ The INE (Spanish National Institute of Statistics, 2022) reports that, in 2021, 78.8% of divorces were by mutual agreement and 21.2% contentious; and with regard to separations, 87.9% were managed by mutual agreement and 12.1% were contentious.

Therapeutic Jurisprudence (TJ)

Therapeutic jurisprudence (TJ) began in the field of law in 1970 with a study by Professor Werxler and a group of students who studied the Mental Health Law in Arizona and how it was applied. But officially the concept of TJ was not instituted until 1996, when the same David Werxler and Bruce Winick published *The development of Therapeutic Jurisprudence* (Fariña, 2022). Today TJ is one of the most important legal theoretical developments of the last three decades (Perlin, 2019), already established with paradigm status (Stobb, 2020), it focuses on the humanization of the law (Kawalek, 2020). Its principles are already considered worldwide, the *International Consortium for Court Excellence* even includes TJ in the third edition of its latest assessment tool (International Framework for Court Excellence), published in 2020 (Fariña, 2022). In it, it clearly defines, in a generic way, what TJ represents: "an area of study that focuses on the impact of the law on emotional and psychological well-being. A therapeutic jurisprudence approach considers ways that enhance the well-being of litigants, improve the perception of procedural fairness in the judicial experience, and when appropriate facilitate access to treatment and services" (p. 28). In family law it is appropriate to apply the TJ paradigm (Babb, 1997, Fariña et al., 2017, Werxler, 2015), as it helps professionals to facilitate beneficial outcomes for people in conflict (Babb, 2021), but it is also necessary to implement it if we want to have healthy families and societies. In TJ it is assumed that those involved in processes of separation/divorce not only have the obligation to resolve the issues taking into consideration the best interests of the minor, but also those of the remaining members of the family (Babb, 1997, 2014; 2021; Lund, 2015). And, therefore, they will be able to facilitate more positive family relationships, adequate relational family dynamics, and the wellbeing of the people involved in the process, mainly that of the children and adolescents involved in the case, which may include more than just the children of the separated parents.

Forensic Therapy: a Specialized Intervention Framed Within the Paradigm of TJ

Some courts in Catalonia, in a pioneering manner in Spain, implemented forensic therapies to respond to the cases of families where, after the breakup of the couple, the parents maintained a very high level of conflict and the available therapeutic resources, which could contribute to positively resolve some of these cases, were not adequate (Arch & Fabregas, 2020) or had already failed. The appointment of a specialized forensic psychologist to carry out a therapeutic intervention in the family setting became particularly significant in situations where there was an unjustified and extreme refusal on the part of the child/children to relate to one of the parents and it was considered that this could be due to a process of parental interference. In this sense, it should be noted that some authors (Lampel, 1986; Lund, 1995), from different orientations, explicitly recommended the use of this forensic figure with therapeutic functions as the main element for an adequate approach to cases considered to be of moderate-high severity. However, regardless of the initial trends and the specific field in which this therapeutic task linked to the forensic context arose, with the passage of time, its involvement in conflictive divorces with very

high judicialization has been gradually cemented. For these cases it is necessary to be able to offer a therapeutic resource aimed at both parents and children, given that other measures (e.g., meeting points, parental coordination, or family mediation) are insufficient in themselves, since their function is not to bring about changes of a therapeutic nature (e.g., affective bonds, negative emotions, specific personal problems). Obviously, this type of intervention is not exclusive but rather complementary and/or alternative to other resources, also friendly to TJ. In fact, some authors (e.g., Lebow & Newcomb, 2007) suggest that forensic therapy is especially indicated in the most serious cases of interparental conflict, for which measures such as those mentioned above have not been effective, or in cases in which the aforementioned resources are insufficient, as a more intensive one is needed to bring about the necessary changes in multiple aspects.

Characteristics of the Families

The recipients of these interventions show special characteristics and specific needs (Lebow & Black, 2012). In this sense, it has been appreciated that parents may present a high rate of psychopathological problems. Specifically, Johnston and Campbell (1986) suggested that 64% of these parents involved in highly conflictive divorces met the diagnostic criteria for personality disorder. In some cases, the existence of substance addiction problems was also noted.

It has also been reported that some of these parents often present deficits in several areas, among others: the inability to understand another person's perspective and deficits in parenting skills (Sullivan & Greenberg, 2012); dysfunctional cognitive biases and attributions (Hooper, 1993) and/or personal characteristics that may hinder therapy (defensiveness, hostility, external locus of control) (Ellis, 2000).

It should also be considered that, generally, the parents present very significant difficulties in communication, which tends to be absent or very pathogenic (Grych & Fincham, 1999; Sullivan & Greenberg, 2012). Also noteworthy is the fact that they tend to present a distorted view of the other parent, which may contribute to increase the distortion of their own thinking (Lebow & Black, 2012).

Finally, it should be noted that these are usually very complex cases that may include unproven or inconclusive allegations of sexual abuse or mistreatment, allegations of family and gender violence, different perceptions regarding the status and needs of the children, or the prolonged absence of a parent in the life of the minor (Sullivan & Greenberg, 2012), aspects that contribute to increase the technical difficulty of approaching the case, since it will require, among other aspects, the re-evaluation of the family situation.

Francia et al. (2019) state as a significant factor involved the mistrust presented by one parent towards the other, which leads them to be permanently on alert regarding the possible motivations of their behaviors or attitudes, this seems to be related, consequently, to various deficits in interparental communication—and the exchange of significant information regarding the child.

In relation to the children, as previously mentioned, adaptive difficulties are common when they are trapped in the enormous interparental conflict involved in this type of "intractable" breakup (Barrios et al., 2017; DuPlooy & Van Rensburg, 2015; Francia & Millea, 2015; Francia et al., 2019).

Mental Health Professionals and Therapy With Families Involved in Family Legal Proceedings With High Conflict

In the context of the judicialized breakup of couples with children, it has been seen that a therapeutic process can bring enormous benefits to the family, however, there have also been warnings that well-meaning therapists without specific training in the forensic environment, due to insufficient specialization and the great complexity that can occur in these cases (e.g., allegations of physical or sexual abuse, gender violence, accusations of neglect towards the children, inconsistent contact history between a parent and the children, etc.) may be carrying out interventions that cause harm to children and their families (Sullivan & Greenberg, 2012). Interventions in a forensic context are difficult (Fidnick et al., 2011), if not impossible, for clinical therapists to address. They have to deal with issues stemming from a complex family environment and specific demands from the court and lawyers, or even expectations or requests from parenting coordination professionals who may be working with the family at the same time as the forensic therapist. Therefore, the forensic therapist must have extensive training and experience not only in clinical/health psychology, but also in forensic family psychology, specifically in the field of divorce.

The Forensic Psychologist and Their Role in Forensic Therapy

The role of the forensic psychologist is mainly associated with his or her functions as an expert witness in judicial proceedings. However, as we have mentioned, in the family setting and in cases that, due to their complexity, require highly specialized attention, some courts have agreed (on their own initiative or at the suggestion of the experts or lawyers) to make a judicial appointment so that the forensic professional, with training in clinical/health psychology, can carry out the therapeutic work required by the family (Arch & Fabregas, 2020). In some cases, this has been very complicated as it is not possible, from a legal point of view, to impose family therapy on the parents (nor to force, for example, participation in family mediation). However, many judges and magistrates, under Article 158 of the Civil Code², consider the referral to a specialized therapeutic process feasible when the purpose is to safeguard the best interests of the minor. In this case, the court may recommend that the family, or some of its members, undergo some treatment, or it may even set the adoption of a certain measure (e.g., changes in the parent-child relationship pattern) as a condition for the acceptance of treatment, in this case forensic therapy.

The intervention of the professional in these cases is specified in what the Guidelines for court-involved Therapy of the Association of Family and Conciliation Courts (AFCC, 2011) defines as the "Court-Appointed Therapist", i.e., the professional who has been appointed directly by the court. Although these guidelines clearly alert professionals to the need for specific knowledge and experience in a forensic setting, it is understood that any mental

health professional could assume this position. This has generated intense academic and professional debate (e.g., Kleinman & Walker, 2014). In our opinion, and in line with what is established in the aforementioned Guidelines (AFCC, 2011), the assignment in these specific cases should undoubtedly be carried out by a forensic psychologist, since they are the ones that have the specialized knowledge essential for the treatment of these cases. However, this professional must also have adequate and solid training at the therapeutic level, as previously mentioned. Likewise, there are several elements that require special attention with respect to the performance of this therapeutic role by forensic psychologists, which are summarized below.

Conceptually, the terms "therapist" and "forensic" suggest a confrontation since the former refers to concepts such as professional secrecy and a relationship of trust, while the latter involves acting in the forum and, therefore, the necessary transmission of results to the court. Therefore, initially, the role of the "forensic psychologist" in interventions of a therapeutic nature may generate confusion for the participants and/or the experience of ethical dilemmas for the professionals.

In general terms, from the forensic field, there is no doubt that the professional's obligation regarding the clarification of the confidentiality rule consists of explaining clearly and in detail to the user that there will be no secrecy and that any information that the judge or court requires will necessarily be exposed by the psychologist (Echeburúa et al., 2011). However, it should be noted that, in all areas of psychology, the rule of confidentiality to which psychology professionals are subject is not absolute and can and should be circumvented by legal requirements, the issue at hand being one of those clearly included in this possibility. Therefore, it is evident that, in these interventions, they must clearly inform the participants that they will inform the court in the terms that it may determine.

Some authors (e.g., Dwyer, 2012) have warned of the influence of this aspect on the therapeutic alliance that the forensic professional must establish with the participants, due to the adverse effects that the latter may consider that it will have in relation to their interests in the judicial procedure. Despite this, it has been pointed out that it must be clearly stated that non-participation or boycott of the intervention may have risks as well, derived from the judicial resolutions that may be adopted in such a case. Thus, before the necessary explanation of confidentiality, it is understood that the professional must openly inform of all the risks for the interests of the participants, always demonstrating the positive effects for the family—especially for the children—that the success of the therapy will entail, for which their active participation in the therapy is required.

Likewise, it has been argued that users who have been forced by the court to participate in treatment cannot provide true informed consent since this type of therapy, with some exceptions, lacks the element of voluntariness (Melton et al., 2007). However, authors such as Dwyer (2012), support the idea that alerting adult participants about the effects that may result from choosing not to participate actively in the therapeutic process (e.g., limited access to their children, loss of parental rights, intervention of child protection systems) is conducive to a greater willingness on the part of parents to become involved in therapy.

Warnings are also made about the need to work on the adequate awareness of clients regarding the need for intervention. In this

2 Article 158 of the Civil Code establishes a mechanism to guarantee the rights and interests of the children. It establishes that the judge, will dictate, ex officio or at the request of the child him- or herself, any relative, or the public prosecutor's office, among other particularities "1st: The appropriate measures to assure the provision of alimony and to provide for the future needs of the child, in case of breach of this duty by their parents. 2nd: The appropriate provisions in order to avoid harmful disturbances to the children in cases of change of guardianship."

sense, treatment is derived from court orders, usually after forensic evaluations (Greenberg et al., 2012) or proposals from a parenting coordination professional, who has identified treatment goals that one or both parents may not agree with at the beginning, especially if the proposal comes from the forensic expert. It is common for both parents and children to be fearful of the changes that may result from the intervention. Therefore, professionals cannot resort to traditional models of therapy that have been developed for people who voluntarily choose to undergo treatment. The right approach can only be facilitated from a forensic perspective with a comprehensive and highly structured intervention design from the beginning of treatment (Sullivan & Greenberg, 2012).

Concluding Remarks

TJ aims to humanize the law and resolve court cases by eliminating the cause that motivates them and seeking the wellbeing of the people involved (Fariña, 2019). In contentious separations, to achieve these objectives, the intervention of jurists is not enough; de facto, professionals from other fields such as mediation or parental coordination are required. When it comes to separations of very high conflict with high judicialization that require—of some member or the whole family—changes that involve interventions of a necessary psychotherapeutic nature (e.g., presence of active psychopathology), forensic therapy should be used.

However, although the potential benefit of forensic therapy for families is clear, particularly for the children and adolescents involved, the fact is that the existing resources in the Spanish health care system do not seem to be able to deal adequately with these specific cases, either due to a lack of specialized training of health psychologists or because they do not have the time required for these interventions. For this reason, it is necessary to consolidate a protocol that directs these families to a specialized resource, thus also contributing to decongest the services destined to other problems of a fundamentally clinical nature.

Conflict of Interest

There is no conflict of interest.

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