

# On Abolition of Grounds for Divorce: A Model Statute & Commentary\*

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## Introduction

Hardly a legislative session in any state goes by without a proposal to reform admittedly archaic divorce laws. We offer here the working draft of a statute with commentary, which we immodestly call a "model" and which we hope may ease the task of legislatures concerned with divorce "reform."

We propose that the existing "fault" system, whereby one spouse must prove the "misconduct" of the other to obtain or prevent a divorce, be abolished. The statute deals primarily with the process by which spouses may change their legal status from married to single. Although we offer a policy position and procedure which should facilitate a more precise identification of the problems for decisions concerned with child disposition and finances we do not define standards for their resolution. The concepts of "grounds for divorce" and "fault" are sufficiently complex by themselves to warrant separate treatment in a statutory proposal. Furthermore the analytic separability of the process for determining the status of the parties from the processes for resolving issues of finance and child custody is

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recognized both by the so-called "divisible divorce" doctrine<sup>1</sup> and by the courts' traditional jurisdiction to determine and redetermine those issues before and even after divorce is decreed.

We focus, in short, on the process by which parties may change, without the intervention of death, their status from married to single. Consequently, the proposed statute can be enacted without modifying existing guides for decisions concerning property, alimony and children, except to the extent that statute and case-law make any grounds for divorce "relevant" to these issues.

The statute provides that husband or wife, or both, may begin a divorce action by filing a simple Application for Divorce with the court. A waiting period follows, during which the parties may reconsider their decision to divorce, seek counseling, agree to post-divorce arrangements, or, failing agreement, apply to the court for hearings regarding finances and child custody. At the end of the "cooling-off" or "warming-up" period, if they have not changed their minds, they so indicate by filing a petition for a Decree of Divorce. As an inducement for them to negotiate mutually satisfactory financial and child custody arrangements the statute provides that as soon as the parties reach agreement on these matters they may petition for a decree without waiting until the expiration of the statutory period. If at the end of that period agreement has not been reached, the court holds a hearing to determine finances and custody, and embodies its order in the Decree of Divorce. Provision is also made for either or both parties to apply to the court, at any time after the filing of an Application for Divorce, for a hearing to resolve financial and custody disputes. In no event can either party unilaterally prevent the issuance of a Decree of Divorce beyond the statutory period.<sup>2</sup>

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1. See *Estin v. Estin*, 334 U.S. 541 (1948), which recognizes the divisibility of decrees of divorce by distinguishing that part of the decree which terminates the marriage from that part which provides for payment of alimony, and *May v. Anderson*, 345 U.S. 528 (1953), which does the same for custody.

2. By an identical procedure the status of legal *separation* may be established. Separation is retained primarily to provide those who wish to live apart while "married" access to the court for purposes of resolving financial and child custody matters. Limited provision is also made for *annulment* in specified situations merely as a convenience for the parties.

A brief outline of the policies and procedures out of which this proposal grew is found in J. GOLDSTEIN & J. KATZ *THE FAMILY AND THE LAW*, (hereinafter cited as *THE FAMILY AND THE LAW*) 813-814 (1965):

The statute, while in many respects not new, is a fundamental departure from existing law.<sup>3</sup> It follows the rationale which underlies many "reforms" in this area to the point where that reasoning leads when freed of legislative and judicial ambivalence about fixing blame, about the state's interest in marriage, and about the limits of law. Unlike those "reforms" it is not a compromise which leaves substantially unchanged an unsound system. The significantly new feature of the proposed statute is that divorce cannot be denied; that proof of any ground, even desertion, enforced separation or "marriage breakdown" is not

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1. Any married couple or person wishing a divorce shall request the issuance of an application for divorce.

2. If one spouse does not join in the initial request he or she shall be given notice of the request.

3. A state counsellor shall receive notice of the filing of such a request. He shall then offer to arrange a meeting between both spouses to explore the advantages and disadvantages of the proposed course of action.

4. Three (or "?") months from the date of notice there shall be issued to both spouses an application for a divorce decree, unless the initial request for application has been withdrawn.

5. The application for a divorce decree will require the following information: Date of marriage, the name of both spouses, the name and date of birth of each of their children, and whether special proceedings are needed to resolve any disputes about custody or finances. Such proceedings may also be requested by counsel for the children.

6. Failing a private settlement about custody between the spouses and counsel for the children and, prior to the issuance of a decree, the court shall conduct a hearing designed to determine an appropriate disposition. Similarly, failing a private settlement of economic obligations, a hearing shall be held to dispose of that issue. Decisions about children and finances, whether negotiated or judicially determined, shall be part of the divorce decree.

7. Six (or "?") months following the issuance of the application the court shall enter a decree of divorce in favor of both spouses despite the opposition of one spouse unless prior to that time both spouses have advised the court that they do not wish a divorce. [Alternatively, the burden could be on either applicant to petition the court at the end of such a period to issue a decree.]

8. The decree shall restore to each of the parties eligibility for marriage. And see generally Wadlington, *Divorce Without Fault Without Perjury* 52 VA. L. REV. 32 (1966).

3. Two jurisdictions—District of Columbia and North Carolina permit divorce after voluntary separation for one year, D.C. Code Encyc. § 16-904 (a) 1965; GEN. STATS. NORTH CAROLINA § 50-6 (1965). Hawaii prescribes a period of six months for desertion, REVISED LAWS OF HAWAII § 324-20(b)(1965). Twenty-one other states provide for divorce based upon the ground of separation, M.F. MAYER, *DIVORCE AND ANNULMENT IN THE 50 STATES*, 4, 32 (1967). Virginia courts, furthermore, hold that the spouse who initiates a separation for the statutory period may obtain a divorce, notwithstanding the objection of the "offended" spouse, *Canavos v. Canavos*, 205 Va. 744, 139 S.E.2d 825 (1965). Finally, better reasoned opinions in California have effectively abolished the doctrine of *recrimination* by granting divorce to both parties at "fault." See, e.g., *DeBurgh v. DeBurgh*, 39 Cal. 2d 858, 250 P. 2d 598 (1952).

required as a condition for obtaining a divorce. In order to avoid intrusions upon personal privacy, but more importantly because the evidence obtained through such intrusions is not relevant to any legitimate interest of the state, the statute, unlike recent divorce proposals,<sup>4</sup> does not permit judicial inquiry to determine and assure that the marriage has in fact, "broken down." The invasions of privacy in such proceedings might prove to be even greater than those under current practice, particularly since courts would find it difficult to exclude any evidence as not "relevant," and they might be less inclined, at least initially, to follow the commonplace uncontested divorce ritual.<sup>5</sup> A decision to divorce reached after expiration of the statutory period should be proof enough, if the state has a legitimate interest in such proof, that a marriage has "broken down." By not requiring or inviting public exposure of an individual's personal reasons for wanting or not wanting a divorce the proposed statute serves to safeguard the privacy of all interested parties.

Before presenting the model statute, with annotations, we comment on the policy considerations and choices which prompted its design.

## General Commentary

### *I. The Fault System*

Our initial and paramount concern has been to design a statute which accords with the state's interest in safeguarding the integrity of the family. That concern led inevitably to the recognition that the state's overriding goal is not to preserve "marriages" which are marriages in name only but rather to foster *viable* family relationships and, in the event of divorce, to minimize damage to residual and reorganized family relationships. The concept of "fault," we conclude, and the process by which "fault" is established undermine these state goals and jeopardize other important community values. Furthermore, grounds for divorce,

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4. See the report of Archbishop of Canterbury's Group, *Putting Asunder: A Divorce Law for Contemporary Society* (1966); Kleinfeld & Moss, *A Divorce Reform Act*, 5 HARV. J. ON LEGIS. 563 (1968).

5. From the standpoint of marital privacy, therefore, the present system may actually be preferable to these more "liberal" proposals.

with or without fault, are not relevant to the functions or consequences of divorce—i.e., to decisions concerning the eligibility of an adult to marry, the equitable division of financial resources, and the interests of the children.

#### A. GROUNDS AND THE JUDICIAL PROCESS

Founding the grant or denial of divorce upon a showing of the “fault” of one of the parties places judges in the position of having to fix the blame and decide which party, if either, is the more “deserving” of divorce. But the breakdown of a marriage is seldom the “fault” of one of the partners. It results, rather, from a much more complex interaction between two, and frequently more than two, personalities. Even if “blameworthiness” were taken into account it is often impossible to tell who is the “guilty” party, for one cannot know what conduct, intangible and even unintended, on the part of the “innocent” party may have driven the “guilty” party to his “blameworthy” act. We all know how unjust and useless is the effort to determine “Who started it?” amongst our quarrelling friends or children. For purposes of granting or denying divorce, nothing and no one in the judicial process can make that kind of determination more just or useful. Dramatic examples of the complexity of marital interaction and the difficulty of determining who is the so-called “guilty” party are furnished by *Nims v. Nims*, and *Lesser v. Lesser*.<sup>6</sup> In *Nims*, the wife, accused of adultery, in turn placed the blame on the husband who, she testified, refused to consider her sexual satisfaction, refused to be patient with her, and consistently accused her of frigidity. In *Lesser*, a case litigated for more than seven years at a cost of at least \$15,000 to the taxpayers in court time and not less than \$45,000 to the Lesser family in counsel fees, each party, in turn, accused the other of demeaning his or her religion and religious practices, and in counterpoint each testified to numerous instances of such abuse.

Under a grounds system, with or without fault, dead and destructive human relationships are prolonged when divorce is

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6. Substantial portions of the record are set out in *THE FAMILY AND THE LAW*, *supra* n. 2, at 682-697 & 15 ff-562 (1965). Under the *parsimony-of-footnotes* doctrine we have refrained from specifically citing support for many textual points, support for which can be found in Chapters I & II of *THE FAMILY AND THE LAW*.

denied. Where the technical grounds cannot be found or manufactured, the parties may both live in abject misery, in an arrangement neither may want but which must be continued, at least in name, by legislative fiat.

The state, in fact, has no way to implement a denial of divorce; it cannot force people to establish a meaningful relationship. But courts and legislatures have been unable to accept this fact about the limits of law. Their blindness has led not only to the retention of grounds but also to the development of the absurd and cruel concepts of *recrimination* and *condonation*. Under the doctrine of *recrimination*, despite the fact that each spouse is able to establish a ground for divorce, the state denies divorce to both since neither is free of "fault"; it reaffirms the "marriage" status and thereby denies the right of each to live as a single person under law or to establish a different, perhaps more meaningful legal relationship. Under the doctrine of *condonation*, despite the unsuccessful good faith efforts of one spouse to save the marriage, divorce is denied notwithstanding the other spouse's "fault." In each of these situations the "fault" system forces the parties to remain in unsatisfactory family relationships, forces them to seek illicit ones, forces them to commit fraud upon the court, or forces them to obtain a costly migratory divorce.

The uncontested divorce and the "migratory" divorce, inevitable concomitants of a "fault" system, are often procured on sham grounds with a sham residence. Both demean the legal profession and the judicial system. Parties unable or unwilling to place themselves within the statutory grounds, but who desperately want a divorce, are forced to create the grounds in an uncontested divorce action with largely perjured testimony, or to establish an out-of-state residence for divorce purposes, or to do both. These subterfuge procedures, the uncontested divorce and the migratory divorce, while frequently described as "mockeries of the judicial system," have in fact understandably grown from recognition by practitioners and the judiciary that the concept of "fault" is an unreasonable, unworkable, and irrelevant standard which makes a "mockery of marriage." The respect and standing of the legal community can only benefit by the repeal of a system which produces collusion, perjury, and hypocrisy, and which forces upon judges tasks alien to their special competence.

## B. GROUNDS AND FAMILY RELATIONS

Perhaps the most damaging result of a "fault"-based divorce procedure is that it exacerbates the aggressive forces that may be already undermining the family. It dissipates family emotional and financial resources at a time when they are most needed. The hatred, bitterness, and resentment fed by a drawn-out divorce are likely to destroy the possibility of conciliation and distort the negotiations and proceedings designed to resolve the very difficult and emotionally-freighted issues of finances and child custody.<sup>7</sup> Thus, the contest, whether in court or in negotiation, can often prevent the development of amicable relations after divorce—relations essential to the well-being of the children and of the newly reorganized "family."

The adverse effects of such state-sponsored battles are incalculable. The loyalties of the children become sharply divided while each parent attempts to win over each child to his side and attempts to destroy the relation between the child and the other parent. Thus the ties between the adults, and between them and their children are reinforced not by bonds of affection but by the destructive bonds of aggression. Even if the state's provision of an arena for extending conflict could be shown to have a therapeutic value for some, it could not be justified, for the substantive guides for decision in a "fault" system are in no way related to the possible consequences of the decision to be made. There is then no reason in law, morality or therapy for the state to sponsor such battles, to perpetuate a process of decision which so undermines its interest in healthy family life. The least detrimental, if not the healthiest, family arrangement for the children and the adults may often be achieved only through the divorce of parents who no longer wish to be married to each other. It is difficult to understand how denial of divorce to such parties can be beneficial to the parties or the children, let alone the state.

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7. "Fault," as a requirement for divorce or as a means of preventing it creeps into and distorts the resolution of financial and custody matters, diverting attention from the interests and needs of the children, the financial capacities and needs of the parties, and so on. Practising attorneys sometimes urge that "fault" is a useful and necessary negotiating lever by which the "weaker" spouse is able to effect a "better," but not necessarily fairer, financial bargain. With "fault" abolished a more rational procedure may be devised to protect the "weaker" spouse, focusing attention on the function and purpose of financial and child custody arrangements which ought to have nothing to do with punishment or arm-twisting. See n. 20, *infra*.

### C. GROUNDS AND PRIVACY

The requirement of disclosing, in open court or in the lawyer's office, any of the various grounds for divorce such as adultery, intemperance, or cruelty entails a public exposure of the most intimate and often embarrassing details of married life. The casebooks and reported decisions are filled with instances of husband or wife having to reveal—indeed display—the most private personal problems, marital squabbles, petty annoyances, religious beliefs, parental feelings, and sexual difficulties, to inventory a few of the factors that might constitute proof of a ground for granting or denying divorce.

Such exposure and state invasion of private affairs is not only irrelevant to any legitimate state interest but is abhorrent to the community in any other context. In *Griswold v. Connecticut*<sup>8</sup> the United States Supreme Court struck down a statute involving a much lesser state invasion of marital privacy. The Court held unconstitutional Connecticut's birth control law as an invasion of the privacy of the marriage relationship in flagrant disregard of our most cherished traditions and values:

Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>9</sup>

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The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the right to marital privacy . . . are of similar order and magnitude as the fundamental rights specifically protected [by the Bill of Rights.]<sup>10</sup>

The invasions of privacy in divorce contests are far greater than those struck down in *Griswold*; they can only demean the marriage relationship, humiliate the parties, and damage the

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8. 381 U.S. 479 (1965).

9. *Id.* at 485-86.

10. *Id.* at 495, (Concurring opinion of Mr. Justice Goldberg).

residual family relationships, whatever the outcome of the contest.<sup>11</sup>

#### D. GROUNDS AND ADULT RESPONSIBILITY

In establishing statutory grounds the state, not the individuals directly concerned, decides what conduct justifies divorce. If one partner has committed some statutory misconduct the other partner may obtain a divorce without ever facing the real question of whether the marriage *should* be terminated. Neither party need confront the crucial questions: "Should I get a divorce?"; "What would be the consequences of divorce for me and my family?" Instead he may seize on the statutory grounds, blame his partner for the breakup of the marriage, and use the misconduct to exploit the negotiations or proceedings on financial matters and custody of children, asking only the superficial questions, "Can I get a divorce?" or "Can I prevent my spouse from getting a divorce?"

Abolition of state-created excuses leaves responsibility for the difficult decision where it really belongs—with the adult parties who must live with it—and serves the state's interests of protecting and preserving the integrity of family relationships. Of course it is a legal fiction to assume that all adults are "adult" and capable of making the "right" decision. But the opposite fiction—that adults are children incapable either of reaching decisions or of seeking help when they want it, rather than when some government official thinks they need it—is alien to a democratic society and rests on still another fiction—that the court has the capacity to effectively manage the day-to-day relationships of those it insists must live together. Adoption of such a fiction would further undermine the fundamental right of each individual to be free from government intrusion in the ordering of his personal affairs. That right, another aspect of the right of privacy, rests to a large degree on the presumption that all adults are "adult."<sup>12</sup>

Moreover, the notion that elimination of legal "fault" somehow makes it easier for people to decide to divorce is a myth. It is, as Nora Johnson conveys, a difficult and awesome decision:

11. Divorce practice may compromise other constitutional values. See *Schwaber v. Schwaber*, 36 L.W. 2469 (Balt. City Ct., Feb 6, 1968) where the wife was denied a divorce when the husband refused to testify to his alleged adultery on Fifth Amendment grounds.

12. But like children, adults should be entitled to make a mistake without encountering the enormous resistance of the state when they try to correct it.

The moment when it first becomes apparent that one's marriage was a mistake is the beginning of probably the longest, darkest period in the human lifetime. It sets in motion the profound thinking that should have taken place during the easier and happier time, the engagement, when all the trouble really started, and it brings into the situation many more people—children, if there are any, funereal parents, doctors, lawyers, marriage counselors, psychiatrists, and well-meaning friends, each of whom makes it his personal business to rush in and try to save the marriage.

The exhaustive and completely personal search for what is right can be carried on in only one mind at a time, in an atmosphere of privacy, something hard to come by in a land where the virtuous voices of Main Street keep repeating themselves with the typically American predilection for noisy morality. Being such a nation of faith healers, we really think that we can solve others' problems from our own pedestals of perfection, and what we like to call an objective point of view. I doubt if there is one married person on earth who can be objective about divorce. It is always a threat, admittedly or not, and such a dire threat that it is almost a dirty word.

Admittedly, there must be forbearance on both sides when a marriage is under strain. [The idea that] two people . . . are simply running out, are not facing the problem, and are being generally irresponsible [is] based on the fantastic but popular assumption, probably dreamed up by unhappily married people, that leaving is easier than staying.<sup>13</sup>

Finally, for those who do find the decision to divorce an easy one, we would ask whether any and what state interest is undermined when they are allowed to divorce or separate without substantial legal impediments.

## *II. Guides for Legislative Decision*

For the above reasons we would abolish grounds and the concept of "fault" as bases for the grant or denial of divorce. Recognizing the limits of the law and the conflict between actual practice and the state's goal of safeguarding the family and protecting the dignity of each of its members, we urge instead the following principles as guides in the drafting of any new divorce procedure. A divorce statute, like all legislation regarding private and personal arrangements, must follow a policy of minimum state intervention

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13. Nora Johnson, *A Marriage on the Rocks*, 210 ATLANTIC MONTHLY 48-50 (July, 1962).

consistent with the state's overall goals. It must respect the privacy and integrity of the marriage relationship and of all the individuals involved.

A divorce statute must leave the decision to divorce or remain married with the adults involved. A divorce procedure must acknowledge the inability of the law to order highly personal human relationships and recognize that:

The law doesn't really divorce husbands and wives. It seems to think it does, but in fact they "divorce" themselves . . . [T]he law by making guilt the index of marriage failure and by placing so much emphasis upon grounds or forms of guilt has contributed to its own failure in its avowed purpose to preserve marriage and the family. It is not preventive; it is punitive. It does not conserve; it disserves.<sup>14</sup>

A divorce statute must protect the parties from coerced decisions. It must safeguard the interests of the children, and provide the adult partners with an opportunity to avoid "rash" decisions.

A divorce statute must neither discourage cooperation and good-faith efforts to resolve the difficult issues of finance and custody, nor aggravate the tensions and hostile emotions that accompany the breakup of a marriage.

Divorce procedure must facilitate, or at least not undermine, the development of sound reorganized family relationships.

A divorce statute must make divorce equally available to people who, because of financial incapacity, are unable to meet counsel and court costs or other expenses including those of a migratory divorce.

A divorce statute must realistically recognize the laws' limits in order to safeguard the integrity of the bar and judicial system.

There are probably many statutory designs which could conform to these guiding principles.<sup>15</sup> Therefore, before presenting our

14. P. Alexander, *The Follies of Divorce*, 36 A.B.A.J., 106-07 (1950).

15. These views accord with those adopted by the Citizens' Advisory Council on the Status of Women which offered the following principles as guides to revision of state divorce laws.

"1. Where it is contemplated that a marriage is to be broken, there should be a sufficient time lapse before a divorce is granted, regardless of the cause of break-up, to permit the respective parties to reconsider, seek counseling if they wish, and perhaps change their minds.

"2. Marriage is basically a private relationship which should not be manipulated by government, absent an overriding interest.

design, we briefly note some of the implications of these principles for certain problems of decision that are likely to arise in the drafting or administration of any divorce code.

#### A. UNILATERAL DIVORCE

The court should not be empowered to deny divorce because one spouse or a child of the marriage objects. Granting divorce, even over objection, best serves the state's goal of maximizing individual freedom. Denial of divorce means that both parties, though no longer a viable marital unit, are denied the freedom to establish meaningful new as well as residual family relationships. Granting divorce, on the other hand, frees each individual to decide to marry or not to marry, even to decide to remarry one another. This policy—that no marriage must be *maintained* without the full and free consent of husband and wife—is but a concomitant of the state's unassailable policy that no marriage can be *established* without the full and free consent of the parties.<sup>16</sup>

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"3. The concept that there must be a guilty party to any divorce is unrealistic and unnecessarily creates hostility between the parties, which is often detrimental to their children." REPORT OF THE TASK FORCE ON FAMILY LAW AND POLICY 52 (April, 1968).

And the presiding judge of the marriage court for the Archdiocese of New York, Msgr. Stephen J. Kelleher, proposed that Catholics involved in " 'intolerable marriage' be permitted to decide for themselves whether they are morally free to remarry." *The Problem of the Intolerable Marriage—A Call for Substantial Changes in Ecclesiastical Laws and Courts Dealing with Marriage Cases*, AMERICA, p. 178, Sept. 14, 1968.

16. See the United Nations Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages [Annex to General Assembly resolution 1763A (XVII) of November 9, 1962.]

"Full and Free Consent. The principal provision of the Convention (Article 1(1)) reads as follows:

'No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presences of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.'

"Such 'full and free' consent must be in existence at the moment of the celebration of the marriage, i.e., when it is to be expressed by both parties in person in the presence of the authority and of witnesses. A consent expressed previously but no longer in existence at the moment of the celebration is not sufficient. The fact that the parties had earlier made a 'contract to marry,' have become 'engaged,' does not meet the requirements of the Convention if either party to the engagement has changed his or her mind in the period between engagement and marriage ceremony.

"The Convention is the outcome of a recommendation adopted in 1956 by the

## B. CONCILIATION

Nothing in the guiding principles suggests the necessity or even the desirability of a state-sponsored conciliation service. If, however, such conciliation services are deemed appropriate, they must be voluntary, not mandatory; they must be confidential, not public; and they must be assigned the task, not of bringing parties together, but rather of assisting them to clarify for themselves what they really wish to do. This may mean reconciliation. But it may just as well mean separation or divorce. The criteria of success of such a service would not be the percentage of reconciliations achieved but, rather, the percentage of individuals who were able to clarify what they wished to do and how they wished to do it. Whatever the function assigned to such a service it must not become another vehicle for the public stripping and personal invasions of privacy eliminated with the abolition of grounds and "fault." Finally, any incentives beyond the statutory waiting period to encourage the use of conciliation services must avoid that degree of compulsion which would reintroduce "fault" by, for example, providing for the denial of divorce to any spouse who refused to use a conciliation service.<sup>17</sup>

## C. CHILDREN AND FINANCES

While agreements between husband and wife concerning the disposition of property and children must be presumed valid in accord with the goal of minimal state intervention, procedures must be devised to assure that such agreements reflect the informed and free consent of the parties. In accord with the

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Conference which drew up the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery." Schwelb, *Marriage and Human Rights*, 12 AM. J. OF COMP. L., 337, 351 (1963).

Marriage perceived as only a contract leads us to the same conclusion. See 6 CORBIN ON CONTRACTS § 1204 (1964):

"It is almost universally held that a contract for personal services will not be specifically enforced, either by an affirmative decree or injunction." *Id.* at 398;

There are several different kinds of reasons that have been given for refusing specific enforcement of personal service contracts. One of these is the difficulty of enforcing the decree and of gauging the quality of the performance rendered." *Id.* at 400;

"A second reason is that we have a strong prejudice against any kind of involuntary personal servitude. We insist upon liberty even at the expense of broken promises." *Id.* at 401.

17. For a collection of materials dealing with the issues raised by conciliation services, see FAMILY AND THE LAW *supra* n.2, at 122-171.

societal mode that assigns responsibility for the growth, development, and support of children to their parents, the presumption should be in favor of incorporating such agreements in any divorce decree. Since experience suggests, however, that husband and wife may use children and finances as tools of coercion in negotiations, granting children party status and representation by counsel may be advisable. Once all parties, including children, are adequately represented in negotiations, judicial scrutiny of agreements should be kept to a minimum.

Failure of the parents to agree on matters concerning children thrusts upon the state responsibility for decisions ordinarily left to parents. Under such circumstances, party status and separate representation for the substantial interests of the children become imperative. The primary function of such representation should be to assure an informed decision by the court as to who should be designated "parent." In accord with the legislative guides set forth above, such custody decisions should be final and place the newly designated parent in the same legal position as any other parent with responsibility for the care of a child. The courts should not fashion decrees which allow intrusions upon the private day-to-day relations between the child and the newly designated parent. The newly established parent-child relationship should be subject only to those intrusions which are or should be authorized for all parent-child relationships—as in education, child abuse and neglect statutes.<sup>18</sup>

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18. This position agrees with psychoanalytic findings on child development: "Anna Freud's work . . . demonstrates the need of every child for unbroken continuity of affectionate and stimulating relationships. Her formulation pours content into that aspect of the law's standard which is concerned with psychological wellbeing. It calls into question decisions which split the custody of a child between two parents or which provide a non-custodial parent with the right to visit or to force the child to visit. It casts doubt upon traditional procedures which never finalize a custody decision in divorce but instead allow the court to retain jurisdiction to modify and remodify custody. Such official invitations to discontinuity in the life of a child are but illustrative of the many decisions in law which persistently run contrary to the professed purpose of the decisions themselves—to serve the child's best interest." J. Goldstein, *Psychoanalysis and Jurisprudence*, 77 *YALE L. J.* 1053, 1073-4 (1968).

On party status for children see *FAMILY AND THE LAW*, *supra* n.3, at 281-299; *KLEINFELD & MOSS* *supra* n. 21, at 573-579, 582-585; and *TASK FORCE ON FAMILY LAW*, *supra* n. 15, at 23-24. On finances, see note 20, *infra*.

## Proposed Statute Annotated

### Section I. Application for Divorce or Separation

Any married person or couple may file an Application for Divorce or Separation with the Court [having jurisdiction over the area in which either of the spouses resides]. In case only one spouse files an application hereunder, the other spouse shall receive notice thereof in accord with Section IX. If within one year of the filing of an Application, no Petition for Divorce or Separation has been made under Section II, the Application shall cease to remain in force; and no Petition can be made under the next section until a new Application is filed.

The Application for Divorce or Separation shall contain the names of the parties to the marriage, the date and place of the marriage, the date and place of birth of each child of the marriage, and the current residence of each party.

#### *Comment*

The initiating document is called an "Application" to distinguish it, and the entire procedure, from the practice of requiring pleadings, a cause of action, and plaintiff and defendant. The procedure is designed to allow cooperation between the parties and reduce unnecessary tensions and fighting, although it retains adversary proceedings to resolve disputed questions concerning children and finances. Either or both parties may apply for a divorce or separation by filing an Application.

The notice provision here refers to the form of notice required by Section IX, *infra*. The goal throughout is *actual* notice to the other party. Where the issues and consequences to both partners are as important as they may be in a divorce, every reasonable effort must be made to effect actual notice. Actual notice is especially important at this stage of the procedure since the waiting period is designed to provide an opportunity for conciliation, discussion, and agreement.

The Application lapses one year from the date of filing. This is designed to prevent, for example, a spouse who files an Application from keeping it in reserve indefinitely and ready to file a Petition so as to defeat the purposes of the waiting period. The data required on the form are for ordinary administrative purposes.

## Section II. Decree of Divorce or Separation

a) Six months after the filing of an Application for Divorce or Separation, either spouse or both spouses may petition the court for a Decree of Divorce or Separation. If the spouses have concluded mutually satisfactory financial arrangements and custodial arrangements for their children, they may petition the court for either Decree three months after the filing of an Application.

Upon proof that the spouses have reached informed, voluntary and economically reasonable agreement on financial matters and custodial arrangements for their children, the court shall issue a Decree of Divorce or Separation, which shall include the terms of the spouses' agreement. When the spouses do not reach agreement, or whenever only one spouse appears before the court, or whenever the children object to the agreement through their representative, the court shall decide the financial and custody issues in Special Proceedings as provided in this statute, and its order shall be made part of the Decree of Divorce or Separation; provided, however, that the objections of one of the parties shall not prevent issuance of the Decree prior to a final resolution of the financial and/or custody issues.

b) In any case where only one spouse files a petition for Decree of Divorce or of Separation, the other spouse shall receive notice of said Petition in accord with Section IX. Likewise, where only one spouse appears at the issuance of the Decree of Divorce or Separation, the other spouse shall receive such notice and a copy of the Decree.

c) Whenever it appears that a spouse has not received actual notice of a Petition for Decree of Divorce, a Decree shall not be issued except upon proof by the petitioning spouse that the nonpetitioning spouse has been absent, or his or her whereabouts has been unknown, for six continuous months from the time of application, time served in the armed forces excluded.

### *Comment*

This section is the heart of the procedure. It reflects a desire to minimize the kind of state intervention which allows one individual to force his or her will on the other. Six months after the filing of an Application either or both spouses may *petition* the court for a decree of divorce or separation. The burden is placed on one or both of them to petition after expiration of the statutory period in order to assure that one or both of them still wish to divorce or separate.

The husband and wife may petition three months after filing of the Application if they have concluded mutually satisfactory arrangements for the custody of their children, property settlements, and alimony. The purpose of allowing a shortened waiting period for partners who agree on custody and finances, is to encourage those who know they want a divorce to reach

agreement on these matters. Although they are not immune from mistake they are probably the most competent people to make these decisions for their family; what goals they share, and what resources are available to them. And they retain, of course, the right to ask the court to help them decide or, if need be, decide for them. Somewhat paternalistically, a three-month waiting period is provided to increase the likelihood that their decision is not hastily made. And only if they agree to obtain a divorce may it be effected in less than six months. If either partner is unsure about wanting a divorce, the statute insures that he will have the full waiting period to attempt a conciliation. Once that period ends, however, the objections of one spouse cannot prevent divorce. If either husband or wife desires divorce, the court must grant it.

Enforced separation is sometimes required in some reform proposals as an essential condition for the grant of a divorce to assure the state that the marriage has in fact "broken down," and that the decision to divorce is not a hasty one. But a personal decision to divorce, reached after a statutory "cooling off," or "warming up," period, not only provides the desired assurances but also allows opportunity for conciliation and counseling, for any who wish to seek such assistance. Moreover, the statute allows the marriage partners to remain together while considering divorce. It avoids forcing them to assume the extra and often intolerable financial burden of two abodes and allows them to face the consequences of their decision together if they wish, instead of forcing them to run away from it.<sup>19</sup>

The waiting period, which might be somewhat shorter or longer, is designed to serve a number of functions. First, it gives the spouses time to reconsider whether they really want to be divorced. During this period they may discuss their decision, seek counseling, contemplate the consequences of divorce, and make up their minds. Second, if the partners are firmly decided on a divorce or separation, the waiting period provides an opportunity

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19. Advocates of enforced separation as "proof" of marriage breakdown must have in mind an image of the suburban husband who can go live at his club or his city or summer residence for a few weeks while awaiting a divorce. For many people, especially the poor, there is simply no place to which they can temporarily retreat for an enforced separation. See text accompanying n.4 *supra*.

for them carefully to arrange their post-divorce "family" life. They may seek guidance on the best arrangements for their children. They may negotiate about property or alimony. Or, they may make use of the courts in settling their dispute under Section VII which provides for special proceedings to hear and resolve disagreements about finances and custody.

If the husband and wife reach agreement on custody and finances, the agreement is ratified upon proof that it is "informed," "voluntary," and "economically reasonable," and its terms are incorporated into the divorce or separation Decree. By allowing incorporation into the Decree of mutually agreed upon financial and custody arrangements, the statute restricts inquiry by the court normally to a finding of mutuality of the agreement. When all parties, including children, are adequately represented, "voluntariness" and "reasonableness" of the agreement should be rebuttably presumed, and the court's scrutiny should not go to the terms of the agreement except through general doctrines of fairness in contracts such as fraud or duress. When all parties are not adequately represented judicial scrutiny should go further and insure that the agreement meets whatever standards the state has adopted for child disposition and financial arrangements—e.g., "best interest of the child," "least detrimental to the child" or "economically reasonable."<sup>20</sup> The requirement that the parties'

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20. Since "fault" plays no part in the divorce proceedings, judicial inquiry here should not entail the enormous invasions of privacy of current practice. We do oppose any standards for awarding custody and resolving economic disputes which would reintroduce "fault," though privacy may well have to be sacrificed to the extent very personal matters can be established to be relevant to the best interest of the children, or to a determination of financial need or financial capacity to pay.

As to alimony, we generally share the view of the Citizens' Advisory Council on the Status of Women, see TASK FORCE ON FAMILY LAW, *supra* n. 15 at 7-22.

"Whether, how much and for how long alimony should be paid in a given case necessarily involves consideration of a variety of factors. The task force suggests the following as being among the criteria which are consistent with the economic partnership view of marriage.

"1. In the traditional family, where the husband has been the chief source of income, the contribution of the wife to the economic partnership of marriage may have been great, as in a marriage of many years in which she was devoted to her family's well-being, or it may have been minimal, as in a marriage of brief duration. Alimony should recognize a contribution made by a spouse to the family's well-being which would otherwise be without recompense.

"2. Alimony should provide recompense for loss of earning capacity suffered by either spouse because of the marriage. For example, where a wife interrupts her career because of homemaking and child rearing.

agreement must be "informed," and "voluntary" and "economically reasonable" is designed to protect the unrepresented spouse, uninformed of the law and of his or her rights, who is coerced by a domineering spouse into an agreement which he or she will soon regret.

Whenever the couple has been unable to reach an agreement on custody and finances after six months have lapsed, whenever only one spouse to the marriage is present, or whenever the children object to those parts of an agreement which directly affect them, the court holds a hearing on its own motion (under Section VII) to determine custody and/or financial awards, which become part of the Decree. In the absence of an agreement the court issues the Decree immediately after Petition, in accord with the Proviso in Subsection (a), but retains jurisdiction to decide the custody and financial questions.

### Section III. Residence Necessary for Divorce or Separation

The petition for a Decree of Divorce or Separation shall contain affidavits or other documentary evidence that one of the parties to the marriage has resided continuously within this State for one year prior to the filing of an Application under Section I. If neither spouse has continuously resided in the State for one year next before the filing of the Application, the Petition for Decree of Divorce or Separation shall be dismissed. For purposes of this section, any applicant who was domiciled in the State at the time of marriage and has returned to the State before filing the Application with the intention of permanently remaining, or any applicant who has served or is serving with the armed forces, or the merchant marine, and who was a resident of the State at the time of his entry shall be deemed to have continuously resided in this State during the time he was absent.

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"3. If either spouse upon divorce is in financial need, some continuing responsibility on the part of the other spouse to meet such need may be recognized for a period of time after the dissolution of a marriage. One of the determinants of the proper period may be the duration of the marriage; another might be whether the dependent spouse can or should establish some other means of support, and if so, the time likely to be required to do so.

"Alimony payments are sometimes used as a means of redressing wrongs suffered by either spouse at the hands of the other. The spouse who is found at fault may be required to pay more or to accept less. This encourages actions for divorce or separation to explore the relative faults of the parties and is virtually certain to have undesirable consequences for any future relations between the couple. Alimony should not be used as a way of awarding compensation for damages."

*Comment*

A residence requirement of more than one year would be unfair to new residents, particularly those who cannot afford a migratory divorce. At the same time a shorter period might make divorce a major industry as it is in Nevada.

The requirement of documentary evidence of residence obviates the necessity of diverting judicial time from important issues. Where the documentary evidence is defective on its face, or missing, for example, the clerk could send the applying person a form letter dismissing the Petition for reasons stated. Only where there is a serious question about residence should the matter be brought before the court, either by the other spouse, or by the court on its own motion.

**Section IV. Divorce After Separation**

At any time not less than three months after a Decree of Separation has been issued, either spouse or both spouses may petition the court for a Decree of Divorce. Upon proof of the prior Decree of Separation, the court shall issue a Decree of Divorce. The terms of the Separation Decree regarding finances and custody of children shall be incorporated into the Divorce Decree, unless any of the parties requests to proceed as under Sections II and VII.

*Comment*

No waiting period is required here because the Decree of Separation may issue only after the waiting period. It is contemplated that in most instances the terms of the Decree of Separation will be incorporated into the divorce Decree. However, all the parties, including children (in the matters of custody and finances of concern to them), must so agree. If they do not, then by the procedure of Sections II and VII the court resolves disputes over custody and finances, and its order is incorporated in the final Decree.

**Section V. Effect of a Decree of Divorce**

The Decree of Divorce shall restore to each of the spouses the status of being single and unmarried.

*Comment*

The primary consequence of the status of being single is the right of each spouse to remarry, including the right to remarry one

another. No change in existing law on the consequences of singleness is intended or contemplated.

### **Section VI. Effect of a Decree of Separation**

The Decree of Separation shall enable the spouses to live separate and apart under whatever arrangements have been mutually agreed upon or have been ordered by the court in special proceedings under Sections II and VII and shall enable them to use the facilities of the court in special proceedings to conclude arrangements regarding finances and the custody of children. The spouses' married status, however, shall not be terminated under a Decree of Separation.

#### *Comment*

Legal separation is retained to offer those who wish to remain married but to live apart, for any reasons they might have, an opportunity to utilize the facilities of the court to make financial and custody arrangements. The procedure for obtaining a Decree of Separation is identical with the procedure for a Divorce Decree.

### **Section VII. Special Proceedings and Temporary Relief**

a) SPECIAL PROCEEDINGS. In case the parties to a marriage have not agreed on mutually satisfactory arrangements regarding finances or the custody of children, or both, any party, or all parties, may, at any time after the filing of an Application for Divorce or Separation, petition the court for a hearing designed to resolve the disputes. The Court may hold a hearing regarding finances or custody of children on its own motion whenever such hearing is required or allowed under this statute. Any orders or settlements arising out of hearings under this section, except for temporary orders, shall be made part of any Decree of Divorce or Separation.

b) TEMPORARY RELIEF. At any time after Application for Divorce or Separation, the court is empowered, upon motion of any party, to order temporary custody, support, alimony, exclusion of a party from the marital domicile, and whatever other temporary relief the circumstances justify, *pendente lite*.

Such orders terminate upon the expiration of the Application, or the entry of a Decree of Annulment, Divorce, or Separation, whichever first occurs. If within one year of the lapse of the Application, a party reapplies, the orders are reinstated as of the date of the Re-application.

#### *Comment*

This section should be read in conjunction with Section II. Under Subsection (a) any of the parties, including the children through their representatives, may request the court to settle their disputes regarding finances and custody at any time after an Application

for Divorce or Separation has been filed. The court is *required* to hold a hearing on these matters whenever only one spouse is present or when all the parties have failed to reach agreement within six months of the filing of the Application. The court would be guided by standards elsewhere established by the state for disposition of children and financial awards.

It is contemplated that children of the marriage may have independent representation and that the representative for the children will be present at the proceedings to make the court aware of any information deemed relevant to protect the interests of the children.

Subsection (b) empowers the court to make temporary orders for support, alimony, custody, separation, etc. No residence is required to invoke this power since residence is required only when *petition* for divorce or separation is made. Temporary orders terminate upon either divorce or the expiration of the Application. If no Decree of Divorce or Separation has been granted before the Application expires, the statute provides that the terms of the temporary orders may be renewed upon the renewal of the Application within one year after it has lapsed. Any payments required under the terms of the temporary orders begin again as of the date of re-application. The person making the payments is not required to pay for the period during which the Application was not in force.

### Section VIII. Annulment

An action to declare a marriage null and void shall be commenced and proceed with the same procedure as for a Decree of Divorce or Separation. Such actions shall be maintainable for the following reasons only:

a) *Incestuous Marriage*—By either spouse, in case the marriage falls within the forbidden degrees of consanguinity under [the relevant statutory provision].

b) *Bigamous Marriage*—By either spouse where one of the spouses, at the time of the marriage, is validly married to some other person.

c) *Non-age*—By the spouse under the legal age for marriage, or by the spouse or by his or her personal representative if a minor.

Provided, however, that nothing in this section shall affect the initial invalidity of incestuous or bigamous marriages. Actions under Subsection (c) of this section must be commenced not later than six months after the spouse reaches legal age for marriage.

Financial matters and custody of children shall be decided or resolved as under Sections II and VII.

### *Comment*

This section provides for judicial declarations of the nullity of certain marriages which may be void initially or voidable by statute. Under certain circumstances it might be useful, and perhaps necessary, for the parties to a void or voidable marriage to obtain a judicial declaration of the nullity of that relationship without becoming "divorced." For example, a party to a void incestuous marriage is sued out-of-state for support, bigamy, adultery, etc. and seeks to defend on the grounds of the nullity of the incestuous marriage. Without a judicial declaration of the nullity of that marriage, it may be more difficult to prove the nullity in a later action.

Annulment is limited to situations in which the marriage is deemed initially invalid by specific statute and in which the "grounds" for annulment are matters easily ascertained, without invasion of individual privacy.

A short statute of limitations is provided in the case of non-age to encourage those who have an intolerable relationship to use the non-fault divorce procedures.

### **Section IX. Notice**

Whenever notice is required under this chapter it shall be by personal service, in the manner required under [the relevant statutory provisions]. If the noticed party resides outside the State, or if personal service fails, the court shall order such other notice as is most likely to effect actual notice under the circumstances, and may withhold any decree until its order is complied with.

### *Comment*

This section should be tailored to the practice of the individual state regarding service and notice. The emphasis should be on actual notice. Every reasonable effort must be made to effect notice since many provisions of this proposal depend upon it.

### **Section X. Costs**

If any applying or petitioning party is financially unable to pay the court entry fee, other court costs, and sheriff's fees, and upon the filing of an affidavit to that effect with the clerk of the court, such costs shall be paid out of the general funds of the court.

*Comment*

Many people are effectively barred from divorce because they are financially unable to pay court costs and filing fees. For those on welfare, whose assets generally are negligible, and whose state welfare payments do not include money for legal expenses, the cost is an insurmountable burden. Not only is this burden manifestly unfair in requiring wealth for access to the judicial process, but it raises serious constitutional questions under the Equal Protection clause of the Fourteenth Amendment.<sup>21</sup>

Waiver of costs is effected under this section by a simple affidavit of financial inability to pay.<sup>22</sup> Inquiries into financial status have been universally found expensive, time-consuming, and ineffective;<sup>23</sup> they are, in addition, an unnecessary affront to the dignity of the people involved.

**Conclusion**

The statute substantially limits the role of the state in divorce, as in marriage, to a declaratory record-keeping, as opposed to an adjudicatory, function. The statute does not, as has been noted, include proposals for revising existing provisions concerning property, alimony, support, child custody, or conciliation services.

21. See, e.g., Brief of Plaintiffs, *Boddie v. Connecticut*, (D.C. Ct., May 7, 1968).

22. The phrase "financially unable to pay" is intended to convey the concept adopted with respect to federal criminal cases in the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, *POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE*, (1963):

"It is apparent that a total absence in the accused of all means and resources cannot be [an adequate definition] . . . Rather, the criterion appears to be a lack of financial resources adequate to permit the accused to hire his own lawyer. Reflection led the Committee to the conclusion that the poverty of the accused must be measured in each case by reference to the particular need or service under consideration . . . A problem of poverty arises . . . when at any stage of the proceedings lack of means in the accused substantially inhibits or prevents the proper assertion of a right or claim of right." *Id.* at 7-9.

23. Numerous state studies have tested the possibility of using affidavits in place of detailed investigation in making welfare grants. These studies have shown that fraud increases infinitesimally, administrative costs are reduced greatly, and, of course there is much less invasion of privacy and subjection to indignities. Currently Alabama, California, Colorado, Iowa, Maine, Michigan, New York, Pennsylvania, Rhode Island, Washington (state), Utah, Virginia and Wisconsin are testing projects or are using an affidavit system statewide. For a discussion of the success of some of these projects, see Note, *Eligibility Determination in Public Assistance: Selected Problems and Proposals for Reform in Pennsylvania*, 115 U. PA. L. REV. 1307 (1967).

It may be enacted without major amendments to existing statutory provisions in those areas. However, it is hoped that adoption of such a proposal will lead to a full-scale reexamination not only of procedures and policies for resolving disputes about children and money but also of what may be the most promising opportunity for safe-guarding marital and family relationships—the policies and procedures for issuing licenses to marry. Rather than licenses to establish sexual relationships, marriage licenses may become in law, as they seem to be in fact, licenses to establish families, that is licenses to bear and, more importantly, rear children.<sup>24</sup>

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24. See K. Keniston, *Youth, Change and Violence* 37 THE AMERICAN SCHOLAR 227, 232 (1968).