Case Western Reserve Law Review

Volume 25 | Issue 4

1975

The Ohio Divorce Reforms of 1974

Robert B. Jones

THE OHIO DIVORCE REFORMS OF 1974

Ohio's divorce law has been reformed by the addition of two new no-fault provisions to the traditional fault grounds for divorce. The author examines the advantages of the newly enacted living apart and dissolution of marriage provisions and considers the benefits of a fault-no-fault system over a pure no-fault approach. He proceeds to analyze the new provisions in order to anticipate some of the problems in statutory interpretation that will arise. Finally, the author suggests that with the adoption of no-fault divorce in Ohio the time may be ripe to make conciliation services more readily available than they are at present.

I. INTRODUCTION

THE OHIO General Assembly has recently enacted major reforms of the state's divorce laws.[1] The legislature has abandoned the traditional pure fault system of divorce in favor of a hybrid system. This new scheme retains the basic fault grounds,[2] as modified by the elimination of the condonation and recrimination defenses,[3] and adds two no-fault grounds. Under the new Ohio no-fault approach, a

---

1. OHIO REV. CODE ANN. § 3105.01 (Page Supp. 1974), *enacted as* Ohio S.B. 348, (110th Gen. Assembly, Regular Sess. 1973-74); §§ 2301.03, 3101.04, 3101.05, 3105.01, 3105.03, 3105.10, 3105.17, 3105.18, 3109.04, 3109.05, 3105.091, 3105.21, 3105.61, 3105.62, 3105.63, 3105.64, 3105.65 *enacted as* Ohio H.B. 233 (110th Gen. Assembly, Regular Sess. 1973-74).

2. OHIO REV. CODE ANN. § 3105.01 (Page Supp. 1974) provides:

> The court of common pleas may grant divorces for the following causes:
>
> (A) Either party had a husband or wife living at the time of the marriage from which the divorce is sought;
>
> (B) Willful absence of the adverse party for one year;
>
> (C) Adultery;
>
> (D) Impotency;
>
> (E) Extreme cruelty;
>
> (F) Fraudulent contract;
>
> (G) Any gross neglect of duty;
>
> (H) Habitual drunkenness;
>
> (I) Imprisonment of the adverse party in a state or federal penal institution under sentence thereto at the time of filing the petition;
>
> (J) Procurement of a divorce without this state, by a husband or wife, by virtue of which the party who procured it is released from the obligations of the marriage, while such obligations remain binding upon the other party . . . .

This section includes six fault grounds: (B), (C), (E), (G), (H), (I); three annulment grounds: (A), (D), (F); and a provision authorizing the court to grant a divorce to any resident party whose husband or wife shall have obtained a divorce in any other state: (J).

3. *Id.* § 3105.10(B).

divorce may be granted to a couple who have lived separate and apart without cohabitation for 2 years[4] or who have agreed to a dissolution of their marriage and have bilaterally settled all financial and child custody issues.[5]

The addition of the two no-fault provisions is the most important of the recent revisions and offers a radically different method of terminating a marriage in Ohio. This fundamental reform reflects a legislative awareness that continuation of marriages that have ceased to exist in fact is against society's best interests.[6] Under the former total fault-based system, if a court could not find one spouse at fault and the other innocent of marital wrongdoing, a divorce would not be granted even though the marriage relationship had completely disintegrated. In order to obtain a divorce decree, the parties often resorted to either migratory divorces or collusive lawsuits.[7] Ohio's new divorce statute now provides two grounds under which evidence of marital misconduct is irrelevant to divorce proceedings and under which the parties, not the court, bear the initial burden of determining whether a divorce is warranted.

These no-fault provisions add greater flexibility to the fault-based structure which was maintained by the legislature. Several options are now open to the parties, who may choose the one best suited to their circumstances.[8] As a result couples seeking to avoid adversary fault-based proceedings will no longer be forced to travel out

---

4. *Id.* § 3105.01(K).

> The court of common pleas may grant divorces for the following causes:
>
> . . . .
>
> On the application of either party, when husband and wife have, without interruption for two years, lived separate and apart without cohabitation, and four years in the case in which one of the parties is continually confined to a mental institution. A plea of res judicata or of recrimination with respect to any provision of this section does not bar either party from obtaining a divorce on this ground.

5. *Id.* § 3105.61 provides: "The court of common pleas may grant a dissolution of marriage." The dissolution of marriage action is covered in full by *id.* §§ 3105.61-.65.

6. *See* Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 U.C.L.A.L. REV. 1306, 1312 (1970).

7. *See* Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 33-35 (1966).

8. One Ohio commentator has noted an increase in the number of ways in which parties can terminate their marriage as a result of the 1974 reforms. Before 1974 there were only three methods of terminating a marriage in Ohio: (1) annulment, (2) divorce upon fault grounds, and (3) death of one of the spouses. Two new no-fault provisions and the statutory abolition of recrimination have increased the number of methods to at least six: (1) annulment,

of state or to perjure themselves in order to obtain divorce decrees. Parties who wish to contest both the divorce and the collateral issues[9] may still resort to a fault-based proceeding.[10] Spouses who do not wish to contest the divorce,[11] but who wish to dispute the collateral issues, may proceed under the living apart provision.[12] Finally, parties who agree to divorce and who agree to all the collateral issues may bring an action for dissolution of the marriage.

II. OHIO'S DUAL DIVORCE SYSTEM: FAULT AND NO-FAULT

A. *Recrimination and the Fault System*

The fault system of divorce in Ohio is similar to that of other states.[13] In an adversary proceeding the innocent plaintiff spouse must prove the guilt of the defendant based upon one of the statutory fault grounds.[14] Certain common law defenses are available to the defendant to combat these charges. Among these defenses are those that allow the defendant spouse to produce evidence that the plaintiff has agreed to fabricate grounds for divorce, consented to defendant's marital wrongdoing, or forgiven an act of marital indiscretion.[15]

The more important defense of recrimination permits proof by the defendant that the plaintiff has engaged in marital misconduct sufficient to constitute grounds for divorce. The effect of this theory, which is an outgrowth of the equitable doctrine of clean hands,[16] is

---

(2) dissolution of marriage by agreement, (3) divorce upon fault grounds, (4) divorce upon mutual fault, (5) divorce without fault by living separate and apart, and (6) death of one of the spouses. J. MILLIGAN, OHIO PRACTICE, Vols. 13 & 14: FAMILY LAW 111 (1975) [hereinafter cited as MILLIGAN].

9. Collateral issues can include any of the following: property division, alimony, child support, and child custody.

10. It is not necessary for two spouses to contest both the divorce and the collateral issues in order to employ the traditional fault procedure. A party may simply choose to contest the divorce itself.

11. There are two meanings that can be given to a "contested" or "disputed" divorce proceeding. The first applies these words to a disagreement over which party was at fault and the second to a disagreement over factual issues without regard to fault. Thus, a complaint based on the living apart provision may be "contested" on the factual ground that the parties have not lived separate and apart for the required period of 2 years, but may not be "contested" on the theory that the plaintiff was at fault.

12. OHIO REV. CODE ANN. § 3105.01(K) (Page Supp. 1974).

13. Rose, *Non-Fault Divorce in Ohio*, 31 OHIO ST. L.J. 52, 55 (1970).

14. *See* note 2 *supra.*

15. *See* note 22 *infra.* For a general discussion of the theories of collusion, connivance, and condonation see H. CLARK, DOMESTIC RELATIONS §§ 12.8-.10, at 358-70 (1968) [hereinafter cited as CLARK].

16. For a discussion as to whether the doctrine of recrimination was

to preclude both parties from obtaining a divorce if each spouse establishes that the other has committed a marital offense.[17] The undesirable result of the recrimination doctrine is that two spouses can be trapped in their marriage with no effective means of legal termination of their obligations.

Recrimination became recognized as a device used unjustly to punish two hopelessly estranged spouses,[18] and the fear arose that it might be applied even more expansively by the courts. If the courts were to apply the doctrine rigidly whenever the opportunity to do so arose, many more dead marriages would be perpetuated. Some state courts, recognizing the potential problems of the recrimination defense, plainly announced their opposition to mechanical application of the doctrine. The California Supreme Court, for example, in 1952 in the landmark case of *DeBurgh v. DeBurgh*[19] stated:

> The chief vice of the rule [of recrimination] . . . is its failure to recognize that the considerations of policy that prompt the state to consent to a divorce when one spouse has been guilty of misconduct are often doubly present when both spouses have been guilty . . . . It is a degradation of marriage and a frustration of its purposes when the courts use it as a device for punishment.[20]

Since *DeBurgh* many state legislatures have abolished recrimination by statute.[21] The Ohio legislature followed this trend by incorporating into its recent divorce reforms section 3105.10(B), which provides that "A plea of . . . recrimination is not a bar to a divorce."[22]

---

rooted in the equitable theory of clean hands in Ohio, see Note, *The Status of Recrimination as a Defense to Divorce Actions in Ohio*, 18 W. RES. L. REV. 1330, 1339-42 (1967).

17. Wadlington, *supra* note 7, at 41. Recrimination has been criticized by questioning whether there can ever be a party totally free from fault in a divorce proceeding. *See* Bradway, *The Myth of the Innocent Spouse*, 11 TUL. L. REV. 377, 383-84 (1937).

18. *Id.*

19. 39 Cal. 2d 858, 250 P.2d 598 (1952).

20. *Id.* at 864, 250 P.2d at 601. At least two Ohio lower courts have recognized the problems inherent in a broad application of the recrimination defense and have attempted to develop limitations to its use on the basis of equitable considerations. Newell v. Newell, 23 Ohio App. 2d 149, 261 N.E.2d 278 (1970); Bales v. Bales, 62 Ohio Op. 2d 387, 294 N.E.2d 252 (C.P. Lake County 1971).

21. *See, e.g.*, FLA. STAT. ANN. § 61.044 (Supp. 1974); TEX. FAM. CODE ANN. § 3.08(a) (Vernon Supp. 1974); IOWA CODE ANN. § 598.18 (Supp. 1974).

22. OHIO REV. CODE ANN. § 3105.10(B) (Page Supp. 1974). Condona-

This statutory language makes clear that proof by both parties of the other's wrongdoing is not a bar to divorce. The issue remains, however, what procedure courts should follow when both parties are found at fault. In some jurisdictions where the doctrine of recrimination is not recognized, the theory of comparative rectitude has provided a solution. This theory permits a court to weigh the evidence where both parties are guilty of marital misconduct sufficient to constitute separate grounds for divorce and to grant a divorce to the party who is found least at fault.[23] Several Ohio decisions, however, have rejected this solution.[24] Although these cases were decided while recrimination remained a bar to divorce, they might still be followed in spite of the abolition of the doctrine. If Ohio courts continue to reject this doctrine,[25] a solution, adopted by a number

---

tion, also abolished in Ohio by § 3105.10(B), was another affirmative defense that operated to bar spouses whose marriage had ceased to exist in fact from obtaining a decree of divorce. Condonation meant that a brief period of reconciliation, sometimes even cohabitation for one night, operated to forgive all previous misconduct. *See, e.g.*, Duff v. Duff, 69 Ohio L. Abs. 496, 126 N.E.2d 466 (Ct. App. 1954). The effect of condonation was to prevent the forgiven misconduct from being pleaded as a ground for divorce. *See, e.g.*, Wilson v. Wilson, 14 Ohio App. 2d 148, 237 N.E.2d 421 (1968). The existence of condonation, though the doctrine was rarely invoked by Ohio courts, served to discourage honest attempts at reconciliation.

The abolition of both recrimination and condonation defenses by the legislature is in accordance with the recommendations made by the draftsmen of the Uniform Marriage and Divorce Act. UNIFORM MARRIAGE AND DIVORCE ACT § 303(e).

23. CLARK § 12.12, at 377. *See, e.g.*, Ayers v. Ayers, 226 Ark. 394, 290 S.W.2d 24 (1956); Hendricks v. Hendricks, 123 Utah 178, 257 P.2d 366 (1953).

24. *See, e.g.*, Sandrene v. Sandrene, 67 Ohio L. Abs. 481, 121 N.E.2d 324 (Ct. App. 1952); Keath v. Keath, 78 Ohio App. 517, 71 N.E.2d 520 (1946); Veler v. Veler, 57 Ohio App. 155, 12 N.E.2d 783 (1935); Cowgill v. Cowgill, 84 Ohio L. Abs. 406, 171 N.E.2d 769 (C.P. Highland County), *rev'd on other grounds*, 17 Ohio Op. 2d 138, 172 N.E.2d 721 (Ct. App. 1960).

25. Since the abolition of recrimination marks the demise of the notion that only a party innocent of marital misconduct can be granted a divorce, the main reason why Ohio courts might reject the doctrine of comparative rectitude stems from the problems inherent in trying to assess degrees of marital fault. As the court noted in *Keath*, "Logic cannot permit the weighing of the quantum of guilt and award the divorce to the one less guilty . . . ." 78 Ohio App. 517, 520, 71 N.E.2d 520, 522 (1946).

In spite of this serious problem in quantification, there are some indications that Ohio courts may adopt a theory of comparative rectitude. *See* MILLIGAN, 107 n.11, 111. *See also* the recommendation of the Joint Committee on Domestic Relations, made before the divorce reforms were enacted, that the General Assembly "[a]dopt a 'comparative fault' concept, by abolishing . . . recrimination . . . as [a defense] to divorce." JOINT COMM. ON DOMESTIC RE-

of other states,[26] would be to grant a dual decree of divorce.[27]

B. *The Advantages of the No-Fault System Over Total Fault-Based Divorce*

The problems arising from recrimination are not the only shortcomings of a statutory approach to divorce based entirely upon findings of fault. For example, a list of fault guidelines implies that a marriage can only break down for one of the statutory reasons. In reality, marriages often deteriorate for a variety of reasons not enumerated in a list of fault grounds.[28] Furthermore, reliance on a total fault-based system of divorce may serve to promote the occurrence of marital misbehavior. Denial of a divorce to the parties for failure to prove one of the statutory grounds may lead to desertion or, where the couple decides to continue living together, to extramarital sexual relations, alcoholism, or violent behavior.[29]

No-fault divorce provides a more flexible type of relief for estranged spouses whose marital situation may not fit into the rigid framework of traditional fault-based proceedings. Under the new Ohio approach, the parties may now obtain a divorce by presenting to the court factual evidence that they have lived separate and apart without cohabitation for 2 years or that they have agreed to a resolution of the collateral issues and are applying for a dissolution of their marriage. Neither the parties nor the court need speculate as to why the marriage has broken down in order for a divorce decree to be granted. Once a party proves that his or her marriage is defunct, a divorce decree will be issued. That one of the parties caused the fall of the relationship is immaterial and, hence, not subject to proof.

A second problem inherent in divorce systems in which fault is the sole criterion is that the state alone decides what conduct justifies divorce. The fact that the state makes this decision encourages par-

---

LATIONS, REPORT TO THE 109TH GENERAL ASSEMBLY PURSUANT TO H.J. RES. NO. 38 OF THE 108TH GENERAL ASSEMBLY 2 (1971).

26. *See, e.g.*, Baker v. Baker, 233 Cal. App. 2d 569, 43 Cal. Rptr. 811 (Dist. Ct. App. 1965); Burns v. Burns, 145 Mont. 1, 400 P.2d 642 (1965); Akins v. Akins, 51 Wash. 2d 887, 322 P.2d 872 (1958).

27. Judge Milligan suggests both solutions: "The court is granted enormous direction by § 3105.10(B). Thus, where both parties are guilty of misconduct sufficient to constitute grounds for divorce, the court may grant a divorce to both parties, or one of the parties, even though the other does not want a divorce." MILLIGAN 107 n.11.

28. Wadlington, *supra* note 7, at 82.

29. *Id.* at 83.

ties to think in terms of "Can I get a divorce?" rather than "Should I get a divorce?" Here too, the availability of no-fault divorce grounds has great merit. It forces the parties themselves to weigh the strengths and weaknesses of the marriage before deciding whether to reconcile their differences or to seek a divorce.[30] By shifting a greater share of the responsibility for termination of the marriage onto the parties themselves, no-fault grounds may cause the individuals to study their situations more carefully and thus actually prevent some unnecessary divorce actions from being brought.[31]

Still another problem caused by divorce systems based upon total fault is that of collusive lawsuits and migratory divorces. Since fault grounds do not comprehensively cover the possible situations in which a divorce may be warranted, certain methods of circumventing the fault-based system have become prevalent. There are two types of collusion in which desperate spouses, who may have no other recourse in the courts, normally engage. One type occurs when the parties agree not to contest a divorce action.[32] The second type of complicity arises when one party agrees to commit perjury by pleading guilty to a relatively minor divorce offense.[33] Furthermore, parties who reside in a state with a total fault-based system of divorce may decide that they wish to avoid an adversary proceeding in their own state and may resort to another state's divorce laws to obtain the decree. These migratory divorces are made possible by states with relatively short residency requirements and lenient grounds for divorce.[34]

No-fault divorce laws, however, consider the reasons for marital breakdown to be unimportant and therefore help to eliminate the need for collusive and migratory divorces. Since the no-fault laws focus on the question of whether the marriage has in fact ceased to exist, the gap between legal theory and social reality is considerably

30. Goldstein & Gitter, *On Abolition of Grounds for Divorce: A Model Statute and Commentary*, 3 FAMILY L.Q. 75, 83 (1969).

31. *Id.*

32. CLARK § 12.9. Over 90 percent of all divorce proceedings nationally are uncontested. M. PLOSCOWE, H. FOSTER & D. FREED, FAMILY LAW: CASES AND MATERIALS 344 (2d ed. 1972). Of course, it is impossible to ascertain what percentage of these uncontested cases are collusive.

33. Walker, *Beyond Fault: An Examination of Patterns of Behavior in Response to Present Divorce Laws*, 10 J. FAMILY L. 267, 269 (1971); Zuckman & Fox, *The Ferment in Divorce Legislation*, 12 J. FAMILY L. 515, 525 (1973).

34. M. PLOSCOWE, THE TRUTH ABOUT DIVORCE 151-52 (1955); *cf. In re* Feltman, 51 N.J. 27, 237 A.2d 473 (1968).

narrowed. No-fault actions can be relatively simple, nonadversary proceedings and can discourage parties from turning to extraordinary means for obtaining a divorce. No-fault divorce will eliminate the incentives for much of the perjury and hypocrisy present in total fault-based proceedings and aid considerably in restoring the public confidence in the state courts.

Another shortcoming of total fault-based proceedings is that they often serve to exacerbate the aggressive forces that may already be undermining the family. One marriage counselor has stated that "there is a far greater amount of anger between the parties at the end of the legal proceedings than there was actually at the time they made the decision to divorce."[35] Hostility is an unavoidable element of fault-based proceedings because the stakes are high. The party labeled "at fault" may be subjected to social stigma as well as the loss of property and custodial rights. Given the great risks of being found to be at fault, the pressures inherent in a divorce fault contest may inhibit the development of amicable relationships after the divorce between the spouses as well as between the parents and the children.

Ohio's two no-fault grounds will do much to eliminate the courtroom battles characteristic of fault-based proceedings.[36] The dissolution of marriage action is based on a separation agreement signed by both parties. Disagreement may enter the dissolution proceedings only if a party voices dissatisfaction with the agreement at the time of the final hearing.[37] In such a case, further negotiations may be undertaken to work out an amicable resolution of the differences generating the dissatisfaction. In the living separate and apart action, one may dispute[38] whether the parties "have, without interruption for two years, lived separate and apart without cohabitation."[39] While a dispute of this nature may engender some bitterness, it certainly cannot compare with that so frequently resulting from a fault divorce.

---

35. *Hearings on Domestic Relations Before the Assembly Interim Comm. on Judiciary*, California Assembly 42 (Jan. 8-9, 1964), *quoted in* Rose, *supra* note 13, at 57-58.

36. OHIO REV. CODE ANN. § 3105.63 (Page Supp. 1974). Section 3105.62 also provides an indication of the nonadversary nature of dissolutions: "For purposes of service of process, both parties in an action for dissolution of marriage shall be deemed to be defendants . . . ." *Id.* § 3105.62.

37. *Id.* § 3105.63(A).

38. *See* note 11 *supra*.

39. OHIO REV. CODE ANN. § 3105.01(K) (Page Supp. 1974).

C. *The Advantages of Ohio's Fault-No-Fault System*

Instead of completely repealing all fault-based grounds for divorce and enacting a comprehensive no-fault statute,[40] the Ohio General Assembly has appended two no-fault provisions onto the existing fault grounds for divorce. The legislature's reluctance to adopt a total no-fault system can be explained in part by the relatively unproved status of other comprehensive no-fault legislation.[41] One principal reason for a lack of confidence in total no-fault divorce systems is the absence of statutory guidelines for defining the standards by which marital breakdown is to be determined.[42] Furthermore, the continuing emergence of the traditional characteristics of fault-based actions, such as introduction of evidence of marital misconduct[43] or collusion,[44] in no-fault proceedings suggests that total no-fault divorce legislation has not completely eliminated the ills of its predecessor statutes.

Total no-fault divorce also acts to diminish the parties' legal protection. Under a pure no-fault system, serious marital offenders, spouses who may have substantially wronged their marital partners

---

40. A comprehensive no-fault statute refers to a statute similar to *Uniform Marriage and Divorce Act* § 305. For a number of similar statutes see Zuckman & Fox, *supra* note 33, at 558.

41. For a discussion of some of the short-term effects of total no-fault systems see Zuckman & Fox, *supra* note 33, at 581-85.

42. *See* M. RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 385 (1972); Zuckman & Fox, *supra* note 33, at 595. The California example best illustrates the broad discretion given divorce courts in total no-fault divorce jurisdictions. Since 1970, California has required that a decree of dissolution of the marriage relationship be grounded on either "(1) [i]rreconciliable differences which have caused the irremediable breakdown of the marriage" or "(2) [i]ncurable insanity." CAL. CIV. CODE § 4506 (West 1970). "Irreconciliable differences" are defined by statute as "those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved." *Id.* § 4507.

Although California's first ground for dissolution establishes no clear rules or guidelines to aid judicial determination of what constitutes irreconcilable differences, § 4506 has been found not to be unconstitutional because of uncertainty or ambiguity. *In re* Marriage of Cosgrove, 27 Cal. App. 3d 424, 103 Cal. Rptr. 733 (Cal. Ct. App. 1972).

43. *See* Comment, *supra* note 6, at 1318-23.

44. *In re* Marriage of McKim, 6 Cal. 3d 673, 493 P.2d 868, 100 Cal. Rptr. 140 (1972). In *McKim*, the California Supreme Court held that under the California dissolution of marriage statute, it was not proper for parties to present false evidence collusively that their differences were irreconcilable and that their marriage had irremediably broken down. The court reasoned that while the primary goal of the no-fault statute was to make dissolution actions as nonadversary as possible, such proceedings should not become perfunctory because

without provocation, may escape all legal sanctions.[45] Thus, an innocent spouse may be unable to recover the damages he or she has incurred through the malicious activities of the defendant spouse. This undesirable result may account for the avoidance of complete no-fault divorce by most state legislatures.[46]

Ohio's new dual divorce system represents a legislative effort to avoid the problems of a pure no-fault system. While the new Ohio law will produce the usual number of interpretative problems arising from any new statute,[47] no inherently vague standard such as "irreconcilable differences" exists to cause the ever-present problems faced by complete no-fault jurisdictions. The living separate and apart action requires courts to make three relatively straightforward factual inquiries: (1) whether the spouses have lived separate and apart (2) without cohabitation (3) for 2 years.[48] The dissolution of marriage action is essentially a divorce by agreement, only requiring that the procedural rules of the statute be followed.

Ohio's new system of divorce will also deter a spouse from engaging in connubial misconduct injurious to his or her marital partner. Should a spouse seeking a divorce through the dissolution or living apart actions engage in marital misconduct sufficient to constitute fault under the retained grounds, the wronged spouse can easily switch to a cause of action based on fault grounds. For instance, one spouse might decide to take advantage of the last year of the 2-year period necessary for a living apart divorce by engaging in a meretricious relationship. Under Ohio's present mixed fault-no-fault structure, a party would reconsider before incurring the wrath of his soon to be estranged spouse and possibly subjecting himself or herself to guilt in a fault proceeding. Thus, Ohio's combination of fault and no-fault divorce provisions provides a safeguard against possible abuse of its new no-fault provisions and preserves the state's interest in preventing marital misconduct during the cooling-off period.[49]

A final advantage of Ohio's reforms is that the state bench and

---

of the absence of one party unless "exceptional circumstances" justified that party's absence to the satisfaction of the court. *Id.* at 682, 493 P.2d at 874, 100 Cal. Rptr. at 146.

45. *See* Schwartz, *The Serious Marital Offender: Tort Law as a Solution*, 6 FAMILY L.Q. 219, 220-21 (1972).

46. *Id.*

47. For a treatment of the interpretative problems in the living apart provision see notes 75-119 *infra* and accompanying text.

48. MILLIGAN 106 n.6.

49. The cooling-off period for the living apart provision is 2 years. OHIO

bar can be gradually educated in concepts of no-fault through the use of the living apart and dissolution statutes before the state's laws are wholly committed to a total no-fault standard. While many problems remain with total no-fault divorce,[50] it probably represents an important step in the course of divorce law reform.[51] Ohio's addition of no-fault provisions to a fault structure may pave the way for the orderly abolition of fault grounds and the adoption of a comprehensive no-fault statute that has proved reliable elsewhere. Ohio could thus reap the benefits of the experience of other states while avoiding many of the problems associated with the pioneering of total no-fault efforts.

III. THE LIVING APART PROVISION—SUBPARAGRAPH K

A. *Description and Benefits*

Ohio's living apart provision which became effective on May 7, 1974,[52] states that the common pleas court may grant divorces "[o]n the application of either party, when husband and wife have, without interruption for two years, lived separate and apart without cohabitation. . . ."[53] The statute is based upon the theory that proof that a husband and wife have lived apart for a long period of time is the best evidence that a marriage has broken down.[54] Harm to the parties and their children by the forced continuation of a marital bond that has long since ceased to exist in fact is thus avoided.[55]

REV. CODE ANN. § 3105.01(K) (Page Supp. 1974). The dissolution of marriage action requires a waiting period of from 30 to 90 days. *Id.* § 3105.64.

The purpose of the cooling-off period is to provide time for the parties to reconsider their relationship and seek reconciliation. *See* Pashko v. Pashko, 45 Ohio Op. 498, 101 N.E.2d 804 (C.P. Cuyahoga County 1951).

50. For some problems arising under California's no-fault statute see Comment, *supra* note 6, at 1318-31.

51. As of June 1, 1974, only Illinois, Massachusetts, Mississippi, Pennsylvania, and South Dakota maintain total fault-based divorce systems. Freed, *Grounds for Divorce in the American Jurisdictions*, 8 FAMILY L.Q. 401, 421 (1975).

52. OHIO REV. CODE ANN. § 3105.01(K) (Page Supp. 1974).

53. *Id.*

54. The bill's sponsor, Representative Alan E. Norris, has written that "[t]he practical effect of this provision is to define a marriage which is beyond saving; where one spouse has absented himself for two years, the possibility of reconciliation is remote indeed." Norris, *Divorce Reform: Ohio's Alternative to No-Fault*, 48 STATE GOV'T 52, 54 (1975). *See also* Parks v. Parks, 116 F.2d 556 (D.C. Cir. 1940).

55. *See* Collyer, *Separation as a Ground for Divorce*, 44 FLA. B.J. 438, 439 (1967).

Although the provision makes a major departure from past Ohio law, it is not without precedent in other states.[56] The living apart ground has been called "[b]y far the most widespread and influential" no-fault ground found in essentially fault-based systems of divorce.[57] There are, however, a number of statutory variants.[58] The narrowest type of living apart provision permits a divorce only when the parties have obtained a separation or separate maintenance decree and have lived apart under the decree for a prescribed length of time.[59] A second, broader category allows divorce only when the couple has voluntarily agreed to live apart for the statutory period.[60] A third modification of the provision authorizes a divorce only if the plaintiff spouse is innocent of any wrongdoing.[61] Finally, the least restrictive and most widely enacted[62] type of living apart provision grants a divorce upon mere proof that the parties have been disassociated for the requisite period. The new Ohio statute exemplifies this last version.

The primary difference among the four variants of the living apart laws lies in the significance that each attaches to the issue of fault.[63] The type that is based upon a separation decree and a subsequent period of living apart is closely tied to traditional fault concepts since one of the spouses must establish a fault ground before the initial separation decree will be granted.[64] Secondly, the voluntary living apart provision requires that the separation be agreed upon by both of the parties, be continuous from the inception of the statutory period, and be final.[65] A consequence of the mutual consent requirement, however, is that one party, by simply refusing to

56. *See, e.g.*, DEL. CODE ANN. tit. 13, § 1522(11) (Supp. 1970); LA. REV. STAT. ANN. § 138(9) (Supp. 1974); MINN. STAT. ANN. § 518.06(8) (Supp. 1974); N.Y. DOM. REL. LAW § 170(5)-(6) (McKinney Supp. 1974). Some states had statutes with living apart provisions before the turn of the century. *See* Wadlington, *supra* note 7, at 63 & n.139.

57. Zuckman & FOX, *supra* note 33, at 546. In some states, the living separate and apart provision accounts for more than half of all divorces, but in the country as a whole fewer than 10 percent of all divorces are granted on this ground. H. JACOBSON, AMERICAN MARRIAGE AND DIVORCE 125 (1959).

58. Zuckman & FOX, *supra* note 33, at 547.

59. *See, e.g.*, WIS. STAT. ANN. § 247.07(7) (Supp. 1974).

60. *See, e.g.*, DEL. CODE ANN. tit. 13, § 1522(11) (Supp. 1970).

61. *See, e.g.*, WYO. STAT. ANN. § 20-47 (Supp. 1973).

62. *See* note 67 *infra*.

63. CLARK § 12.6, at 352.

64. Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 55 (1966). *See, e.g.*, UTAH CODE ANN. § 30-3-1(8) (Smith Supp. 1973).

65. *See, e.g.*, Sutherland v. Sutherland, 75 Nev. 304, 340 P.2d 581 (1959); Hahn v. Hahn, 192 Md. 561, 64 A.2d 739 (1949); France v. Safe Deposit &

agree, can coerce his or her spouse either into remaining legally married or into making a greater property settlement. Thus, where one party is guilty of some wrongdoing, fault can enter into the negotiations and can be used inequitably to gain a bargaining advantage. Finally, the role played by fault in the third modification, which requires the plaintiff to be innocent of any marital misconduct,[66] is manifest. An inquiry into the plaintiff's fault is central to this approach.

Under Ohio's living apart provision,[67] however, evidence of marital fault is irrelevant, since a divorce will be granted where a period of continuous living apart without cohabitation has been conclusively established by the parties. The statute is designed to facilitate legal termination of marriages that have ceased to function in fact.[68] As one expert has observed, "The best test of whether

---

Trust Co., 176 Md. 306, 4 A.2d 717 (1939). If the spouses part because of necessity, (*e.g.*, if one spouse is imprisoned or required to perform military service) the resulting separation is not a cause for divorce in a jurisdiction where a voluntary living apart provision has been enacted. However, the agreement to terminate a marital relationship can become voluntary during a forced absence if one party expresses the wish that the marriage be terminated. Otis v. Bahan, 209 La. 1082, 1089, 26 So. 2d 146, 148 (1946).

66. Prior to 1969, Vermont had a living apart provision that was interpreted to require the plaintiff to allege and affirmatively establish that he had no part in causing the separation. *See* Krupp v. Krupp, 126 Vt. 511, 236 A.2d 653 (1967); West v. West, 115 Vt. 458, 63 A.2d 864 (1949). The Vermont legislature later enacted § 511(7), which provides that a divorce may be granted where two spouses live apart continuously for a period of 6 consecutive months and "the court finds that the resumption of marital relations is not reasonably probable." VT. STAT. ANN. tit. 15, § 551(7) (1974).

Wyoming is one state that retains a living apart provision wherein the party at fault is barred from obtaining a divorce. The statute provides in part that a divorce may be obtained "when the husband and wife have lived apart for two consecutive years without cohabitation but not upon such ground if such separation has been induced or justified by cause chargeable in whole or material part to the party seeking divorce upon such grounds in the action." WYO. STAT. ANN. § 20-47 (1957). In contrast to the procedure required by the prior Vermont statute, the Wyoming Supreme Court held in Dawson v. Dawson, 62 Wyo. 519, 177 P.2d 200 (1947), that the burden of proof rests with the defendant to prove plaintiff's fault.

67. OHIO REV. CODE ANN. § 3105.01(K) (Page Supp. 1974). At least seven other jurisdictions have enacted statutes with living apart provisions that by express language or by judicial construction are no-fault in nature: ARK. STAT. ANN. § 34-1202(7) (Supp. 1973); IDAHO CODE ANN. § 32-610 (1963); KY. REV. STAT. ANN. § 403.020(1)(b) (Baldwin Supp. 1973); P.R. LAWS ANN. tit. 31, § 321(9) (Supp. 1974); TEX. FAM. CODE ANN. § 3.06 (Vernon's 1973); VA. CODE ANN. § 20-91(9) (Supp. 1974); WASH. REV. CODE § 26.08.020(9) (1961).

68. Norris, *supra* note 54, at 54.

[a] marriage is dead is a suitable period of living apart . . . ."[69] In addition, if the cooling-off period is reasonable,[70] both parties are afforded an opportunity for reconciliation to insure against hasty action.

The major practical problem for Ohio's no-fault living apart provision will be to avoid the injection of fault concepts through the persistence of the traditional thinking of the legislature, the bar, and the courts.[71] Where, as in Ohio, fault grounds are retained, the resurgence of fault in no-fault living apart actions becomes a difficult problem to solve.[72] For example, although the issue of fault will be irrelevant to the award of divorce itself, it will assume major significance in the same proceedings where collateral matters such as alimony must be litigated.[73] Thus, the elimination of the concept of fault from no-fault living apart actions may become, as one commentator has suggested, "a choice between letting the parties reach their own financial agreements or litigating the question of fault separately for alimony purposes."[74] The removal of fault considerations from living apart actions will take place gradually as the judiciary gains awareness and experience in no-fault concepts. The process will, unfortunately, take time.

---

69. Podell, *The Case for Revision of the Uniform Marriage and Divorce Act*, 7 FAMILY L.Q. 169, 171 (1969).

70. *See* text accompanying notes 104-09 *infra*.

71. Walker, *supra* note 33, at 293. This problem is illustrated by the fact that three types of living apart provisions include considerations of fault, wholly or in part. *See* text accompanying notes 64-66 *supra*. As to the fourth (Ohio) type of living apart provision, Walker notes that "[a]lthough it may be too early to draw definitive conclusions . . . it appears that . . . non-fault grounds may have been subsumed by the fault-based orientations of the existing structure they were designed to cure." *Id.* at 293.

72. Bodenheimer, *Reflections on the Future of Grounds for Divorce*, 8 J. FAMILY L. 179, 209 (1968).

73. *See* Zuckman & Fox, *supra* note 33, at 551. Although fault considerations are specifically excluded from child support determinations, fault is still important in alimony and child custody decisions. OHIO REV. CODE ANN. § 3109.05 (Page Supp. 1974). *See, e.g.*, Rabin v. Rabin, 118 Ohio App. 446, 195 N.E.2d 377 (1962) (alimony); *In re* Kincaid, 33 Ohio Op. 311, 45 Ohio L. Abs. 340 (P. Ct. 1946) (fault evidence relevant in child custody disputes only where the fitness of the parent is an issue). Thus, the parties may be granted a divorce on the basis of the living apart provision without regard to marital misconduct, but must still introduce fault evidence in order to obtain a proper alimony award or child custody decision.

74. Wadlington, *supra* note 64, at 79. An alternative solution would be the elimination of all fault concepts from collateral matters.

B. *Problems of Statutory Interpretation*

1. *Retroactivity*

An immediate, although temporary, issue to be faced by Ohio courts will be whether the living apart provision should be applied retroactively so that time spent by parties living apart prior to the enactment date will be included in the statutory period. To date, no Ohio court has confronted this issue.[75] Other states have held that separation periods may begin prior to the effective date of legislation.[76] Such a construction is desirable since it more rapidly effectuates the implicit legislative purpose of legally terminating marriages which are, in reality, dead.[77] The 2-year statutory period is a reliable indication of this marital collapse regardless of when it started. To require that it begin again on the effective date of the legislation would only cause some defunct marriages to be needlessly prolonged.

Constitutional objections[78] to retroactive application may arise on the theory that a spouse would be deprived of certain rights without due process of law.[79] An overwhelming number of cases, however,

---

75. The Ohio Supreme Court has faced a similar issue in Scott v. Scott, 6 Ohio 534 (1834), where it was held that an act of the legislature making habitual drunkenness for 3 years a ground for divorce did not apply retroactively. For other cases that reject retrospective application, see Pierce v. Pierce, 107 Wash. 125, 181 P. 24 (1919); Jarvis v. Jarvis, 3 Edw. Ch. 462 (N.Y. 1841); Sherburne v. Sherburne, 6 Me. 210 (1829).

76. *See, e.g.*, Gerdts v. Gerdts, 196 Minn. 599, 265 N.W. 811 (1936); Schuster v. Schuster, 42 Ariz. 190, 23 P.2d 559 (1933). *See also* note 80 *infra*.

77. The retroactive application of the provision would also be consistent with the grammatical structure of the living apart provision itself. Section 3105.01(K) provides that a divorce may be granted when the parties "*have . . . lived* separate and apart. . . ." OHIO REV. CODE ANN. § 3105.01(K) (Page Supp. 1974) (emphasis added). *See* Note, *Retroactive Application of New Grounds for Divorce Under § 170 Domestic Relations Law*, 17 BUFFALO L. REV. 902, 911 (1968). A Louisiana court has recognized that the statutory period applies both to past years and time since the statute has been enacted where the applicable statute expressly states that a divorce may be granted where the husband and wife *have been living* apart without cohabitation. Hurry v. Hurry, 141 La. 954, 76 So. 160 (1917) (emphasis added). The court observed at one point that "[t]o construe the act to mean what is contended for by the defendant, the legislature should have said, 'That when married persons shall *hereafter* live separate and apart for a period of seven years or more' . . . or words of similar import (emphasis added)." *Id.* at 955, 76 So. at 161.

78. An early Supreme Court case decided that the marriage contract is technically a status and therefore is not covered by the Constitution under the impairment of the obligations of contract clause. Maynard v. Hill, 125 U.S. 190 (1888).

79. U.S. CONST. amend. XIV, § 1.

suggests that no real constitutional obstacle remains to retroactive application of living apart provisions.[80] While no Ohio court has yet faced this issue, the logic used in cases elsewhere is equally applicable in Ohio. In the case of *Fuqua v. Fuqua*,[81] for example, the Alabama Supreme Court, in interpreting a statute that provided for the conversion of a limited divorce decree into an absolute divorce after more than 4 years' separation, held that marital status was not a vested right protected from retroactive application by the state constitution.

In addition to marital status, certain property rights arising out of the marriage may be affected by the retroactive application of the living apart provisions. If such property rights are not vested however, there appears to be no valid constitutional objection. In *Gleason v. Gleason*,[82] retroactive operation of New York's conversion statute[83] was challenged on the ground that such a construction would eliminate social security, pension, and inheritance benefits that the wife would otherwise obtain. The plaintiff argued that a conversion of her separation decree into one of absolute divorce was a taking of property without due process of law. The court found that the right of inheritance did not vest until the death of the husband and that prospective social security and pension benefits were also inchoate rights. Because the state had the power to limit or abolish rights of succession that had not vested directly,[84] the court reasoned that the state could restrict inchoate rights indirectly by creating a new ground for divorce.[85] Since no vested rights of the defendants had been affected adversely, the court concluded that there was no denial of due process.[86]

2. *Retention of the Willful Absence Fault Ground*

The retention of the willful absence ground[87] may cause some dif-

80. *See, e.g.*, Tipping v. Tipping, 82 F.2d 828 (D.C. Cir. 1936); White v. White, 196 Ark. 29, 116 S.W.2d 616 (1938); Stallings v. Stallings, 177 La. 488, 148 So. 687 (1933); Campbell v. Campbell, 174 Md. 229, 198 A. 414 (1938); State *ex rel.* Progress v. Court, 53 Nev. 386, 2 P.2d 1048 (1931); McGinley v.McGinley, 295 S.W.2d 913 (Tex. Civ. App. 1956).

81. 268 Ala. 127, 104 So. 2d 925 (1958).

82. 26 N.Y.2d 28, 256 N.E.2d 513, 308 N.Y.S.2d 347 (1970).

83. N.Y. DOM. REL. LAW § 170(5) (McKinney Supp. 1974).

84. *Cf.* Simons v. Miami Beach Nat'l Bank, 381 U.S. 81., 85 (1965).

85. 26 N.Y.2d 28, 41, 256 N.E.2d 513, 520, 308 N.Y.S.2d 347, 356 (1970).

86. *Id.*

87. OHIO REV. CODE ANN. § 3105.01(B) (Page Supp. 1974). The ground

ficulty for Ohio courts presented with the problem whether to apply the living apart provision or the willful absence provision. The issue might arise when a defendant spouse files a counterclaim of willful absence to the plaintiff's petition for divorce based upon the living apart provision. If such were to occur, should the defense of willful absence be entertained at all? Policy considerations supporting the no-fault ground dictate that the counterclaim be dismissed because the determination of whether a divorce should be granted on living apart grounds should not be tainted by evidence of fault.[88] One Ohio commentator on divorce law has written in this regard that: "The critical issue is whether the parties have lived separate and apart without cohabitation for the required period of time. If they have done this, the Legislature is satisfied that the marriage is finished 'in fact' and should not be continued over the protestation of the adverse party."[89]

Thus, where a 1-year willful absence ground continues to co-exist with a 2-year living apart requirement, a spouse who has been deserted may sue for divorce on the fault ground anytime between the first and second years following the separation. After 2 years have elapsed, however, either spouse may sue on the no-fault ground, but the willful absence defense should be prohibited.[90] This result is just, since it grants the deserted spouse ample time to bring a fault action, while it also preserves the no-fault element of the living apart provision.

3. *The Factual Inquiries*

By the terms of the living apart provision of the new law, a di-

---

of willful absence for 1 year involves five main elements: (1) a continuous (2) cessation of cohabitation, (3) with intent, (4) against the wishes of the other spouse, (5) without sufficient cause. Mason v. Mason, 30 Ohio Op. 27, 42 Ohio L. Abs. 286 (C.P. Tuscarawas County 1945). The fault lies in the adverse party's leaving or constructively evicting the other party. An adverse party must have "continuously absented himself from the home of the parties and from plaintiff and, without cause, refused [neglected] to return." C. MEIER, OHIO FAMILY LAW 646 (1963). Ohio courts have also applied the willful absence ground where there has been no communication of one party's intention to separate, under circumstances that may constitute gross neglect of duty. Porter v. Lerch, 129 Ohio St. 47, 193 N.E. 166 (1934).

88. *See* Canavos v. Canavos, 205 Va. 744, 139 S.E.2d 825 (1965); MILLIGAN 106 n.6.

89. MILLIGAN 106 n.6.

90. According to its sponsor, Ohio's no-fault living apart statute was enacted to deal in part with the situation where one spouse with punitive intent is able to entrap a spouse who has been absent for a number of years by threat-

vorce may be granted to either spouse who can prove that husband and wife have lived separate and apart without cohabitation for two years.[91] While these issues of fact appear clear in the abstract, this clarity disappears when applied to specific situations. It remains for the courts to define these terms more precisely.

There are several tests that can be used to define the "separate and apart" criterion. One view is that a divorce can be granted only when one spouse has been physically removed from the marital dwelling for the requisite period.[92] The foundation for this rule is the common law notion that all appearances to the community of a union must be extinguished.[93] An Alabama court applied this strict approach to deny a divorce sought under a living apart ground where the spouses continued to live in the same house, but occupied separate rooms and did not have sexual relations.[94] The court defined living separate and apart as constituting "a complete cessation of all marital duties and relations between the wife and the husband, and their living separate and apart in such a manner that those in the neighborhood may see that they are not living together."[95]

The primary advantage of this so-called separate roofs doctrine is the minimization of evidentiary problems in court. However, the rule can be challenged on the theory that it discriminates against impoverished couples. Poor spouses often cannot afford to move from under the same roof, especially if they live in an area where housing is scarce. In response to this potential challenge, some courts have rejected the separate roofs test in favor of a separate lives test.[96] Under this standard, a court may grant a divorce even though the parties live in the same house if there is no evidence of marital relations having taken place during the prescribed period and if there are no prospects for the reconciliation of the parties.[97]

---

ening to bring a fault action. Norris, *supra* note 54, at 54. If the living apart statute were to be construed to permit counterclaims based on willful absence, not only would its no-fault application be eliminated, but a spouse with a valid willful absence ground could continue to threaten the guilty spouse to remain legally married.

91. OHIO REV. CODE ANN. § 3105.01(K) (Page Supp. 1974).

92. *See, e.g.*, Oxford v. Oxford, 237 Ark. 384, 373 S.W.2d 707 (1963); Ratliff v. Ratliff, 312 Ky. 450, 227 S.W.2d 989 (1950).

93. *See* Adams v. Adams, 89 Idaho 84, 403 P.2d 593 (1965).

94. Rogers v. Rogers, 258 Ala. 477, 63 So. 2d 807 (1953).

95. *Id.* at 477, 63 So. 2d at 808.

96. *See, e.g.*, Hawkins v. Hawkins, 191 F.2d 344 (D.C. Cir. 1951); Hurd v. Hurd, 179 F.2d 68 (D.C. Cir. 1949); Boyce v. Boyce, 153 F.2d 229 (D.C. Cir. 1946).

97. The court in Pedersen v. Pedersen, 107 F.2d 227 (D.C. Cir. 1939),

The separate roofs and separate lives tests are not mutually exclusive. One could view the separate lives rule as a specific exception to the separate roofs doctrine. The primary test would allow a divorce where the parties prove that they have lived in different houses. The exception would then allow a divorce where special circumstances justified the parties' living in the same residence, where all other evidence indicated that the marital relationship had ended. By means of such an approach to the interpretation of living separate and apart, both the goals of requiring reliable but easily presentable evidence and of eliminating any special burdens on the poor would be effectuated.

The definition of "without cohabitation" also poses substantial policy considerations for the courts. Generally, for the purposes of proof, living apart for the required period establishes a prima facie case for the plaintiff that the marital problems in question are beyond resolution.[98] Once the fact of separation is established, the burden shifts to the defendant to show the requisite degree of interruption necessary to rebut plaintiff's case.[99] If the defendant can show that the statutory period has not been met, the court cannot grant a divorce decree to the plaintiff.

Courts have held that sexual relations between parties seeking divorce during the statutory period constitutes cohabitation and tolls the separation period.[100] The rationale behind such a holding is the alleged state interest in discouraging clandestine rendezvous between spouses.[101] Such a state interest is wholly contradictory to the concomitant state desire to encourage genuine attempts at reconciliation,

---

said in approving this doctrine that "[c]ontinued occupancy of the same house may be evidentiary either of harmonious . . . relations or of compelling necessity on the part of one or both of the parties." *Id.* at 232.

98. *See, e.g.*, Adams v. Adams, 89 Idaho 84, 403 P.2d 593 (1965).

99. *See, e.g.*, Varnell v. Varnell, 207 Ark. 711, 182 S.W.2d 466 (1944).

The *Varnell* decision illustrates the inequity of such a strict construction of the "without cohabitation" requirement. Mr. and Mrs. Varnell separated in 1934. A 3-year living apart ground was enacted by the Arkansas Legislature in 1939. Because the husband and wife spent two nights together in an attempted reconciliation in July 1942, Mr. Varnell's suit for divorce in 1943 on the basis of living apart for 3 years was denied. The court held that the separation was not without cohabitation as required by statute. *Id.* at 712, 182 S.W.2d at 467.

100. *See, e.g.*, Adams v. Adams, 89 Idaho 84, 403 P.2d 593 (1965).

101. Occasional weekend visits by a husband who told his wife that after a divorce was granted they could live together as common law spouses was held to toll the separation period. Ross v. Ross, 213 Ark. 742, 213 S.W.2d 360 (1948).

an interest that would certainly be furthered by permitting meetings of the parties. A better approach to the "without cohabitation" issue is that occasional short visits, even if accompanied by sexual intercourse, do not toll the statutory period of separation.[102] This test provides the flexibility necessary to foster good faith attempts to resolve the marital dispute, but it does not prolong the marriage should those attempts fail.[103] Although the problems of proof are increased by such a test, the value of encouraging reconciliation and allowing legal termination of marriages that are in fact beyond repair is well worth the increased judicial effort. The more rigid alternative would require the continuation of a dead marriage for an indeterminate period, a result detrimental to the best interests of both society and the parties.

The third factual issue, that of the 2-year mandatory separation period, presents no problems of interpretation for the courts. There is no room for variance in the language of the provision. There are, however, important policy considerations that should be evaluated in the light of the statutory waiting period. The living apart requirement must be long enough to encourage reconciliation but not so long as to promote the development of meretricious relationships. In addition, if the statutory period is excessively long, grounds that afford speedier relief, accompanied by the problems inherent in fault-based litigation, may supersede living apart actions.[104] Marital experts believe that increased delay in a divorce action in which there is little likelihood of reconciliation tends to increase the parties' frustration and to aggravate their situation.[105] As a result, states with living apart provisions have displayed a trend toward decreasing the duration of living apart requirements.[106] The District of Columbia, for instance, has enacted a 1-year statutory rule,[107] and Vermont has adopted a 6-month requirement.[108] In view of this trend, the Ohio legislature should consider adopting a shorter living apart requirement.[109]

102. *See, e.g.*, Ayala v. Ayala, 182 La. 508, 162 So. 59 (1935), where the evidence disclosed that the husband visited his wife during the statutory period only for the purpose of requesting her to be lenient on account of his inability to pay alimony. Divorce was granted to the husband on the basis of a 4-year separation provision.

103. *See* Thomas v. Thomas, 58 Wash. 2d 377, 363 P.2d 107 (1961).

104. Bodenheimer, *supra* note 72, at 208.

105. *See* M. WHEELER, NO-FAULT DIVORCE 101 (1974).

106. Wadlington, *supra* note 64, at 85.

107. D.C. CODE ANN. § 16-904(a) (1966).

108. VT. STAT. ANN. tit. 15, § 551(7) (1974).

109. Should Ohio lower its living apart requirement to 1 year, the statutory

4. *The Unilateral Nature of the Living Apart Provision*

The language of the living apart provision implicitly recognizes that a party has the power to withdraw from the marriage unilaterally and obtain a divorce decree upon presentation of the proper evidence even though the other spouse does not want to end the marriage. Once a plaintiff has proved that the couple have lived separate and apart without cohabitation for 2 years, a divorce should be granted. The only additional requirements for applying such an interpretation would be that the party act freely and intend to end the marital relationship.[110] This rule effectuates the underlying policy of no-fault divorce to terminate marriages that have failed in fact. Where one party, although acting unilaterally, wishes to discontinue the marriage, it is logical to conclude that the marital unit has no chance of survival.[111] This unilateral construction will allow a plaintiff who may be guilty of acts that constitute grounds for a fault divorce to bring an action based on the living apart statute.[112] Even if the innocent defendant spouse wishes to remain married, the divorce should be granted, since evidence of fault is irrelevant to the no-fault proceeding.

Unilateral application of the living apart ground eliminates many of the problems that might arise in those situations where divorce is the preferable solution to marital deterioration caused through no fault of the parties and where a bilateral dissolution[113] of the marriage would be unduly difficult to obtain. Such a situation arises where one spouse is declared insane and is committed to an institution. To require the remaining partner to continue the marriage against his or her wishes would be unfair. A fault-based divorce is not available, insanity not being a statutory ground for fault divorce.[114] Furthermore, the spouse declared insane is incompetent to give the consent necessary to fulfill the bilateral dissolution re-

---

period would be equal to that of the willful absence ground. If this change ever came about, the willful absence provision should be repealed to eliminate any conflict. *See* text accompanying notes 87-90 *supra*.

110. *See* Otis v. Bahan, 209 La. 1082, 26 So. 2d 146 (1946).

111. *See* Goldstein & Gitter, *On Abolition of Grounds for Divorce: A Model Statute and Commentary*, 3 FAMILY L.Q. 75, 86 (1969).

112. A Wisconsin court in Rooney v. Rooney, 186 Wis. 49, 202 N.W. 143 (1925), disapproved of allowing a guilty spouse to divorce an innocent plaintiff: "The contention that a spouse who has thus violated his marital obligations may convert his own offense into grounds for divorce at his suit . . . is preposterous." *Id.* at 50, 202 N.W.2d at 144.

113. *See* notes 120-46 *infra* and accompanying text.

114. OHIO REV. CODE ANN. §§ 3105.01(A)-(J) (Page Supp. 1974).

quirements.[115] The Ohio legislature has provided for this situation, where a couple may be living apart because a spouse is confined to a mental institution, by making insanity a ground for divorce under the living apart provision.[116] The statutory period of 4 years is longer than the usual living apart requirement because of the difficulty of proof, the extreme nature of the disability, and the possibility of recovery.[117]

Not all absences automatically make the use of the living apart provision available. Involuntary absences, such as for active military duty, have not been regarded as triggering the statutory period. The bare fact that one spouse has been separated from the other for the statutory period does not constitute a ground for divorce.[118] It has been held, however, that the statutory period is not tolled when the marriage deteriorates during a period of military duty.[119]

IV. THE DISSOLUTION OF MARRIAGE ACTION

A. *Description and Benefits*

The Ohio General Assembly has enacted a second no-fault remedy that gives the county common pleas court authority to grant a dissolution of marriage.[120] The dissolution provision, which

115. *Id.* § 3105.63.

116. *Id.* § 3105.01(K). Prior to this enactment, insanity was a defense. *See* Heim v. Heim, 35 Ohio App. 408, 172 N.E. 451 (1930).

117. *See* CLARK 328-29 (1968). For an illustration of the problems of proof inherent in determining whether insanity has become incurable in a given case, see GA. CODE ANN. § 30-102, at ¶ 11 (Supp. 1974).

118. *See* Caye v. Caye, 66 Nev. 83, 211 P.2d 252 (1949).

119. *See* Benson v. Benson, 66 Nev. 94, 204 P.2d 316 (1949). In that case, a Nevada statute required a 3-year separation, and the parties had lived apart for 5 years. The court held that the fact that the husband had served in the Armed Forces for approximately 6 months during that time was not grounds for denial of divorce. *Id.*

120. OHIO REV. CODE ANN. §§ 3105.61-.65 (Page Supp. 1974).

> Sec. 3105.61. The Court of Common Pleas may grant a dissolution of marriage.
>
> Sec. 3105.62. One of the spouses in an action for dissolution of marriage shall have been a resident of the state at least six months immediately before filing the petition. Actions for dissolution of marriage shall be brought in the proper county for commencement of actions pursuant to civil rules. For purposes of service of process, both parties in an action for dissolution of marriage shall be deemed to be defendants and subject to service of process as defendants pursuant to the Civil Rules.
>
> Sec. 3105.63. A petition for dissolution of marriage shall be signed by both spouses, and shall have attached and incorporated a separation agreement agreed to by both spouses. The separation

represents a unique approach in American jurisdictions, allows a couple to petition the court to terminate their marriage legally if they have resolved the collateral issues of property division, alimony, child support, and child custody.[121] This provision places the burden of resolving these problems on the parties themselves; the court merely determines whether the agreement is satisfactory to both spouses and then gives its final approval. Once approved by the court, the final agreement has the same legal effect as a decree of divorce.[122]

The mechanics of this "divorce by agreement"[123] are simple. Once the separation is complete, it is incorporated into the petition for dissolution. Both spouses and their attorneys must then sign the petition.[124] By local rule, the court may require that the petition include a waiver of service of process on the parties, thus vesting the court with immediate jurisdiction.[125] Upon receipt of the petition, the court will schedule a final hearing for not less than 30 nor more than 90 days after the filing date.[126] The 30-day minimum

agreement shall provide for a division of all property and, if there are minor children of the marriage, for custody of minor children, alimony, child support, and visitation rights. An amended separation agreement may be filed at any time prior to the hearing on the petition for dissolution of marriage. Upon receipt of a petition for dissolution of marriage, the court may cause an investigation to be made pursuant to Civil Rules.

Sec. 3105.64. Not less than thirty nor more than ninety days after the filing of a petition for dissolution of marriage, both spouses shall appear before the court and each spouse shall acknowledge under oath that he has voluntarily entered into the separation agreement appended to the petition, that he is satisfied with its terms, and that he seeks dissolution of the marriage.

Sec. 3105.65. (A) If at the time of the hearing either spouse is not satisfied with the separation agreement, or does not wish a dissolution of the marriage, the court shall dismiss the petition and refuse to validate the proposed separation agreement.

(B) If, upon review of the testimony of both spouses, and of the report of the investigator pursuant to civil rules, the court approves the separation agreement and any amendments thereto agreed upon by the parties, it shall grant a decree of dissolution of marriage incorporating the separation agreement. A decree of dissolution of marriage has the same effect upon the property rights of the parties, including rights of dower and inheritance, as a decree of divorce. The court has full power to enforce its decree, and retains jurisdiction to modify all matters of custody, child support, visitation, and periodic alimony payments.

121. *Id.* § 3105.63.

122. *Id.* § 3105.65(B).

123. MILLIGAN 111.

124. OHIO REV. CODE ANN. § 3105.63 (Page Supp. 1974).

125. *See* Norris, *Divorce Reform: Ohio's Alternative to No-Fault*, 48 STATE GOV'T 52, 55 (1975).

126. OHIO REV. CODE ANN. § 3105.64 (Page Supp. 1974). Judge John R. Milligan has written with respect to scheduling that "automatic assignment of

serves primarily as a cooling-off period during which the parties may make further attempts at reconciliation. If minor children are involved, the hearings probably will be held more nearly to the 90-day limit to allow time for child custody investigations ordered pursuant to Ohio civil rule 75(D).[127] Where child custody investigations are not ordered, a chief sponsor of the new divorce laws, State Representative Alan E. Norris, suggests that courts should try to schedule hearings closer to the 30-day limit to expedite the proceedings and to encourage spouses to settle their differences prior to filing.[128]

After filing of the petition and the appended separation agreement, the court may appoint an attorney as a referee to review the settlement.[129] Both the parties and the referee may then amend the agreement prior to the final hearing.[130]

The final hearing itself should be "brief and to some more civilized than under present practice."[131] At the hearing the parties will appear before the judge and affirm that: (1) they voluntarily entered into the separation agreement, (2) they are still satisfied with its terms, and (3) they want to dissolve their marriage.[132]

The Ohio dissolution statute is similar to a model statute proposed in 1969[133] which was drafted with "a desire to minimize the kind of state intervention which allows one individual to force his or her will on the other."[134] The theory of the dissolution statute is that the parties themselves can best explore the viability of their own marriage relationship and the possibility of reconciliation. As the draftsmen of the model statute observed, the parties are not immune from mistake, but they are probably the most competent people to make these decisions for their family. They can best

---

the case exactly six (6) weeks from the date of filing at 10:00 a.m. puts the matter on a track that eliminates much extra effort by court employees and attorneys." Memorandum from Judge Milligan on the dissolution of marriage, *Fresh Air in Family Court* (undated).

127. OHIO R. CIV. P. 75(D). For a general discussion of discretionary child custody investigations in Ohio, see 25 CASE W. RES. L. REV. 347 (1975).

128. *See* Norris, *Divorce Reform, Ohio Style*, 47 OHIO BAR 1031, 1034 (1974).

129. Norris, *supra* note 125, at 55.

130. OHIO REV. CODE ANN. § 3105.63 (Page Supp. 1974).

131. Norris, *supra* note 128, at 1034. For the procedure followed in one Ohio court see Milligan Memorandum, *supra* note 126, at 4.

132. OHIO REV. CODE ANN. § 3105.64 (Page Supp. 1974).

133. *See* Goldstein & Gitter, *supra* note 111, at 90-93.

134. *See* text following note 34 *supra*.

evaluate what goals they share and what resources are available to them.[135]

The primary benefit of the dissolution remedy is that it adds necessary flexibility to Ohio's divorce remedies. Many couples who want a divorce may be unwilling to bring a fault action or may be unable to live apart for the required statutory term. The dissolution statute reduces the disparity between legal theory and social reality by permitting divorce by agreement.[136] The provision relies on the logical assumption that a bilateral agreement constitutes excellent prima facie proof of the failure of a marriage. Certainly, if both parties have undergone the sobering experience of drawing all their affairs to a close and have divided their marital property, the potential for reconciliation is minimal.

In dissolution proceedings the state's involvement will be significantly less than in traditional divorce actions. The judge acts as "monitor and overseer, rather than decision-maker"[137] because the parties have full control over their separation agreement. In support of this minimization of judicial intrusion, Judge John R. Milligan of Stark County, one of the creators of the concept of the dissolution of marriage action, has written that "[t]his preference is consistent with the prevalent psychological notion that people's actions are always more committed and accepted if they are the result of agreement, as opposed to imposed or inflicted judgment."[138] When parties can bilaterally resolve the wide range of issues associated with traditional contested divorce, there is simply no need for extensive court intervention. Less judicial participation also means that judges will have more time to devote to other matters. Because collateral issues in divorce consume much of the time and energies of the

135. Goldstein & Gitter, *supra* note 111, at 91.

136. Some commentators have characterized marriage itself as a contractual relationship. *See, e.g.*, Rieke, *Dissolution Act of 1973: From Status to Contract?*, 49 WASH. L. REV. 375 (1974); Sheresky & Mannes, *A Radical Guide to Wedlock*, SATURDAY REVIEW, July 29, 1972, at 33. This approach offers a radical departure from the traditional view of marriage as a status. *See, e.g.*, Maynard v. Hill, 125 U.S. 190 (1888). If society can accept the contractual marriage concept, it is arguable that divorce can be treated in a similar manner. Where parties are permitted to adopt relationships by their own preference, they should also be empowered to terminate them, provided that both parties are satisfied with the termination agreement and that they have made a good faith effort to seek conciliation.

137. Milligan Memorandum, *supra* note 126, at 2.

138. *Id.*

domestic law bench and bar, use of dissolution actions could mean significant savings in time and expense.[139]

B. *Criticisms of the Dissolution of Marriage Action*

The dissolution of marriage provision has been subjected to both valid and ill-founded criticism. A prime example of the accurate criticism of the provision is the fear that its bilateral nature, when combined with what amounts to absolute veto power in both parties, may lead to considerable inefficiencies in the divorce process. The separation agreement must be accepted by both parties. If one spouse has evidence that the other has engaged in acts that would constitute grounds for a fault divorce, that spouse might use the evidence as leverage to obtain a more favorable settlement. If either spouse is dissatisfied with the agreement, for instance because the party with the damaging evidence does not feel he or she took full advantage of it or because the other party feels that the evidence was used to coerce an unfavorable settlement, objection may be made at the final hearing. The court must then dismiss the petition and refuse to validate the agreement.[140] Since dismissal of the petition is mandatory, much time and expense have been wasted and the parties still do not have a divorce.

The potential for inefficiency is clear. A partial solution to the problem is available, however, should the legislature choose so to act. To deter parties from making frivolous objections, the legislature need only change the language of the statute to make dismissal discretionary rather than mandatory upon objection of one of the parties.[141] Such an amendment would increase the number of completed dissolution agreements greatly with a minimum amount of damage to all relevant considerations of fairness.

A second meritorious criticism of the dissolution provision is that the mechanism reduces the opportunity for reconciliation because the cooling-off period is shorter than for either the fault-based proceedings or the living apart actions.[142] In answer to this criticism, it can be argued that the legislation implicitly recognizes that when the

139. Judge Milligan suggests as an additional method of saving time and money that an amended petition for dissolution be allowed when agreement has been reached in a pending contested case. *Id.* at 3.

140. OHIO REV. CODE ANN. § 3105.65(A) (Page Supp. 1974).

141. Address by Judge John V. Maxwell, Administrative Judge of the Division of Domestic Relations, Court of Common Pleas of Cuyahoga County, at Cuyahoga County Bar Association Domestic Relations Seminar, Oct. 2, 1974.

142. *See* note 49 *supra.*

parties file for dissolution, they have passed the point of possible reconciliation. The waiting period does not take into account the time before the filing of the petition during which the parties negotiated the initial agreement, a negotiation period that by its very nature provides the time and subjective environment for reconciliation. Nevertheless, critics of the statute's brief cooling-off period may have a valid complaint. To insure that parties beginning the dissolution process have not reached their decision too hastily, however, conciliation services should be made more readily available. Trained experts might determine through initial screening and, if desired, further intensive counseling whether reconciliation is possible.[143]

Perhaps the most unfounded of the criticisms directed at the new dissolution law is that its terms actually serve to encourage divorce and discourage alternate, less radical methods of resolving marital problems.[144] Although dissolution may provide a simple procedure for obtaining a divorce, the requirement that the parties agree on numerous difficult issues should dispel any notion that it makes divorce easy. The realities of making financial arrangements necessary to terminate a marriage should be an effective check against hasty decisions to plunge into dissolution. Furthermore, it is not necessarily true that couples will work harder to make their marriage succeed if a state makes divorce more difficult to obtain. Other nonlegal factors are often more important in the success or failure of a marriage:

> Realism impels us to acknowledge that statutory provisions have minimal impact upon the stability of marriage and that economic conditions, psychological tensions, the increasing independence of women, changes in religious attitudes, high mobility, urban anonymity, and other factors,

143. *See* notes 147-61 *infra* and accompanying text.

144. A number of marital experts disagree with the notion that provisions such as the dissolution of marriage statute will alter the way in which those who marry view their relationship. They point out that a public belief in the existence of fairly easy divorce and public acceptability of divorce as an institution has already come into being in the United States. One national magazine comments that, "It is broadly conceded that divorce is moving toward the status of 'normal' in the thinking of Americans." U.S. NEWS AND WORLD REPORT, Jan. 13, 1975, at 43. One commentator observes in this regard that "fairly easy availability of divorce has become part of the consciousness of the people." Bodenheimer, *Reflections on the Future of Grounds for Divorce*, 8 J. FAMILY L. 179, 187 (1968).

> all have more to do with marriage stability and the incidence of divorce than does the statutory framework.[145]

In short, the purposes of divorce law should be to promote family stability rather than to make the procurement of a divorce difficult. These arguments suggest that the dissolution statute will not cheapen the status of marriage, nor will it open the courts to a flood of divorce requests.[146]

V. CONCILIATION OF MARITAL CONTROVERSIES

The General Assembly also enacted a provision to make conciliation services more easily available to parties in a divorce, annulment, alimony, or dissolution proceeding.[147] It provides that the court, on its own motion or by motion of one of the parties, may order conciliation for a period not to exceed 90 days.[148] While most experts recognize that conciliation courts represent an effective device to allow

---

145. Foster, *Divorce Reform and the Uniform Act*, 7 FAMILY L.Q. 179, 184 (1973). *See* M. RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 307 (1972); Isaacs, *The Urban Family: Urban Marriage and Divorce*, 1 FAMILY L.Q. 39 (1967).

146. The statistics for Cuyahoga County from September 23, 1974, the date of enactment, to April 1, 1975 show the following number of petitions for dissolution filed for each month since the statute has been enacted:

September	30
October	120
November	111
December	160
January	162
February	133
March	146

Interview with Teresa Carpinelli, Assistant Deputy Divorce Commissioner of the Divorce Assignment Bureau of Cuyahoga County, Cleveland, Ohio, April 18, 1975.

147. OHIO REV. CODE ANN. § 3105.091(A) (Page Supp. 1974) provides that:

> At any time after thirty days from the service of summons or first publication of notice in an action for divorce, annulment, or alimony, or at any time after filing a petition for dissolution of marriage, the Court of Common Pleas, upon its own motion or the motion of one of the parties, may order the parties to undergo conciliation for the period of time not exceeding ninety days as the court specifies. The order requiring conciliation shall set forth the conciliation procedure and name the conciliator. The conciliation procedures may include without limitation referrals to the conciliation judge as provided in Chapter 3117 of the Revised Code, public or private marriage counselors, family service agencies, community health services, physicians, licensed psychologists, or clergymen. The costs of any conciliation procedures shall be paid by the parties.

148. Courts should allow the cooling-off period to extend beyond 90 days if the parties require more time to discuss their problems. Courts should not

spouses "to back away from a hasty decision,"[149] judges in Ohio are reluctant to use their discretionary power to order conciliation because the parties are required to pay for the service.[150] In fact, no county has used conciliation courts since their inception in 1969.[151]

Ohio's two new no-fault grounds for divorce have placed the conciliation issue in a different light by changing the decision whether the parties should be granted a divorce from one made primarily by the court to one made primarily by the parties. The dissolution provision in particular allows the parties a great deal of discretion in deciding whether to terminate their marriage, provided they can agree on the collateral issues. Experts believe that some form of mandatory conciliation should be required in states with no-fault provisions to protect the spouses from hastily made divorce decisions.[152] For example, much of the criticism of the Uniform Marriage and Divorce Act, which adopted a no-fault standard[153] similar to California's standard of irretrievable breakdown, has been directed toward its failure to include detailed provisions for counseling and conciliation services.[154]

Ideally, the conciliation courts could assume a new role to meet this changing need for their assistance. Not only might their intervention prevent premature divorce, but their function would serve the interest of the state in preserving viable marriages. This interest requires that all possibilities be explored before divorce. Through the conciliation courts, the state can inquire more thoroughly into the condition of a marriage.

---

hasten the termination of a relationship that has the slightest chance of reconciliation. The former chairman of the Family Law Section of the American Bar Association has written in this regard that "[i]t has been proved to my satisfaction without any doubt that delay coupled with a reconciliation inquiry is the single most important factor available which can lead to reconciliation in divorce proceedings." Podell, *The Case for Revision of the Uniform Marriage and Divorce Act*, 7 FAMILY L.Q. 169, 172 (1973). A similar maximum cooling-off period is set forth in UNIFORM MARRIAGE AND DIVORCE ACT § 305(a).

149. WHEELER, *supra* note 105, at 116.

150. OHIO REV. CODE ANN. § 3105.091 (Page Supp. 1974).

151. Norris, *supra* note 128, at 1038. *See, e.g.*, OHIO REV. CODE ANN. §§ 3117.01-.08 (Page Supp. 1974).

152. *See, e.g.*, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1971 MIDYEAR REPORT AND RECOMMENDATION OF THE FAMILY LAW SECTION TO THE ABA HOUSE OF DELEGATES ON THE UNIFORM MARRIAGE AND DIVORCE ACT, 5 FAMILY L.Q. 133, 165 (1971).

153. UNIFORM MARRIAGE AND DIVORCE ACT § 305.

154. Zuckman & Fox, *The Ferment in Divorce Legislation*, 12 J. FAMILY L. 515, 577 (1973).

Parties to a divorce or dissolution action may themselves be ignorant of the types of assistance available to meet their individual problems.[155] The conciliation courts can serve as clearinghouses to inform parties of the availability of counseling resources. Furthermore, marital discord often involves subtle and complex psychological factors, which usually cannot be recognized by disputing spouses. Conciliation courts, by referring a spouse to a counseling specialist who can identify these hidden problem areas, can help arrest the momentum that a divorce action can gain, often independent of the true wishes of the parties. Because of these benefits conciliation courts should be made more available to spouses who are uncertain in their desires regarding divorce or who are ignorant of the kinds of assistance available to them.

It is not suggested that mandatory conciliation be imposed on all parties who desire a no-fault divorce. The resources of the state cannot be wasted on financing conciliation efforts where the chances for a marriage's revival are small. Some means must be employed to concentrate conciliation efforts on couples who have the best chance of reconciling their differences.

What is needed in Ohio is an initial screening process.[156] This procedure may consist of a group meeting, a personal interview, a questionnaire, or a combination of these. Michigan, for example, has a procedure that requires the attorney to complete a form with his divorce complaint.[157] The form is then forwarded to the county counseling service, where it is examined and categorized by the parties' general area of residence. When 1,000 forms in any one area have accumulated, a letter is sent to each couple inviting them to attend an orientation meeting where the available conciliatory services will be explained.[158] The success of these efforts is well-documented. Eight out of ten people attending the group orientation meeting expressed interest in further counseling. Six out of ten felt that the meeting itself shed new light on their prior thinking and

155. *See* Alexander, *The Family Court—An Obstacle Race?*, 19 U. PITT. L. REV. 602, 607 (1958).

156. *See, e.g.*, CAL. CIV. CODE § 4505 (West 1970).

157. When filing a complaint for divorce in Wayne County, Michigan, an attorney fills out a short form stating: (1) Name, address and age of plaintiff and defendant; (2) date of marriage; (3) number of children; (4) name and address of plaintiff's attorney. Staniec, *Ninety Seconds Relieve Divorce Strain*, 52 MICH. ST. B.J. 295, 296 (1973).

158. *Id.*

caused them to question the advisability of continuing the court divorce action.[159]

Properly employed, these screening procedures can guard against unthinking continuation of divorce actions. They constitute the best solution to the criticism that no-fault statutes permit divorces to be granted too quickly and with too little judicial control. In addition, the screening process can be relatively simple and inexpensive and can accurately identify those who will benefit from the conciliatory services.

The goal of the screening procedure is to encourage people who need the counseling to obtain it. The optimum result of such services is to have the parties resolve their differences so that they can remain married. However, even if reconciliation cannot be attained, the conciliation process may produce a number of benefits for individual couples. The counseling can help the parties agree on certain collateral matters such as alimony, child support, child custody, and property division, so that the couple may enter the divorce proceeding with a more rational frame of mind. Personal benefits may result from close self-examination, so that parties may place their problems in perspective and adapt more easily to uncertain futures.[160] Finally, the conciliatory efforts may have a postdivorce effect of preparing the spouses for a difficult adjustment period after the marriage has been terminated.

Opponents of screening procedures might object to intrusions into the spouses' privacy. However, initial screening efforts to discover those marriages that are capable of being preserved will not involve extensive inquiries into private matters because the courts do not wish to coerce the parties into reconciling their differences. The key concept is screening, not therapy. As one expert explains: "[This] system does not force . . . a party to stretch out on the psychiatric couch . . . or to endure brainwashing."[161] The purpose of the initial screening process is to induce parties who wish to question their decision to seek divorce to take advantage of conciliation services.

VI. CONCLUSION

Ohio's divorce system has been considerably strengthened by the

159. *Id.* at 297.

160. *See* M. RHEINSTEIN, *supra* note 145, at 441; Staniec, *supra* note 157, at 296.

161. M. WHEELER, NO-FAULT DIVORCE 102 (1974).

adoption of the 1974 reforms. The broad aim of a society's divorce laws should be to adapt to changing social mores and conditions. The Ohio General Assembly has approached such a goal by wisely and carefully adopting these reforms. Each of the new reforms, with the exception of the dissolution of marriage action, has been tested in other states.

The disparity between theory and social reality has been significantly diminished by these wide-ranging provisions. Nowhere is this more evident than in the abolition of recrimination as a bar to divorce. The adoption of two no-fault remedies adds increased flexibility to Ohio's previously rigid fault-based divorce structure. Several new types of divorce are available to cover the various marital situations that may arise. While the reforms specifically focus on a large number of potential problem areas, Ohio's judges will still have sufficient discretion to deal with new problems not covered by the statutes in light of the policies expressed by the reforms.

Several additional changes might be enacted, most notably the establishment of conciliation screening services, and the lowering of the living apart requirement to 1 year. Fortunately, the divorce structure is flexible enough to allow for these future changes. The legislature has adjusted the balance between the state's interest in preserving the integrity of marriage and its interest in giving parties freedom to begin new lives if their relationship has truly dissolved.

ROBERT B. JONES