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Florence W. Kaslow

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STAGES OF DIVORCE: A PSYCHOLOGICAL PERSPECTIVE

FLORENCE W. KASLOW†

I. INTRODUCTION

MANY INDIVIDUALS ENGAGED IN THE PROCESS OF DIVORCING¹ indicate that the personal pain and confusion they experience² are intensified by a seemingly indifferent or condemning society which has made few provisions and established few institutions to assist them.³ Attorneys⁴ and therapists are society's two representatives designated to guide the divorcing couple through this turbulent time. They can provide support, sympathy, and encouragement, or they can escalate the confrontation and heighten the de-

† Dean and Professor, Florida School of Professional Psychology, Miami, Florida (effective November 24, 1980); former Director, Section of Forensic Psychology/Psychiatry, and former Associate Director, Ph.D.-J.D. program, Department of Mental Health Sciences, Hahnemann Medical College & Hospital, Philadelphia, Pennsylvania. A.B., Temple University, 1952; M.A., Ohio State University, 1954; Ph.D., Bryn Mawr College, 1969.

1. Divorce itself has become a pervasive social phenomenon. The number of divorces and annulments increased from 428,000 in 1963 to 1,036,000 in 1975, and the number of children subjected to familial breakdown rose from 562,000 in 1963 to 1,123,000 in 1975. K. SNAPPER & J. OHMS, *THE STATUS OF CHILDREN IN 1977*, at 25 (1978) (U.S. Dept. of Health, Education and Welfare Pub. No. (OHDS) 78-30133). According to these figures, over three million individuals were directly affected by divorce in 1975.

For a discussion of the factors which precipitate divorce, see Kaslow, *Divorce and Divorce Therapy*, in *HANDBOOK OF FAMILY THERAPY* (A. Gurman & D. Kniskern eds. anticipated 1981).

2. For discussions of the effect of divorce on adults, see generally Ackerman, *Divorce and Alienation in Modern Society*, 53 *MENTAL HYGIENE* 118 (1969); Briscoe & Smith, *Depression in Bereavement and Divorce*, 32 *ARCHIVES GEN. PSYCH.* 811 (1973); Briscoe, Smith, Robbins, Marten & Gaskin, *Divorce and Psychiatric Disease*, 29 *ARCHIVES GEN. PSYCH.* 119 (1973).

3. See Kaslow, *supra* note 1, *passim*. See also McDermott, *Divorce and Its Psychiatric Sequelae in Children*, 23 *ARCHIVES GEN. PSYCH.* 421, 426 (1970) (contending that "our society provides a legal system and an arena for obtaining divorce but little help in handling its consequences").

4. Matrimonial attorneys play a central role in the divorce process. See Baum, *A Trial Judge's Random Reflections on Divorce: The Social Problem and What Lawyers Can Do About It*, 11 *WAYNE L. REV.* 451, 454 (1965). Judge Baum writes:

[W]e lawyers are in a more strategic position than any other professional group. Many divorce litigants do not consult marriage counselors, clergymen, psychiatrists, psychologists or social workers. There is always, however, a lawyer, and, more often than not, two lawyers in every one of the half million or more divorce cases filed in the courts each year.

Id.

Despite the attorneys' strategic position, however, they often do not provide the services their clients require. See, e.g., Marshall & Gatz, *The Custody Decision Process: Toward New Rules for Parents and the State*, 7 *N.C. CENT. L.J.* 50, 58 (1975). In fact, "lawyers often unwittingly contribute to escalating the marital conflict, rather than to aiding in its resolution." Beatrice, *Divorce: Problems, Goals, and Growth Facilitation*, 60 *SOC. CASEWORK* 157, 158 (1979).

spair.⁵ Just as it is essential for the therapist who is treating clients contemplating divorce to comprehend the frequently adversarial nature of the proceedings,⁶ so too is it imperative for the matrimonial attorney to understand the psychosocial impact of this life experience on his or her clients.⁷ Mental health professionals treating divorcing couples have begun to crystallize their observations and hypotheses in order to better focus their interventive efforts and to disseminate their findings. Several clinical theoreticians have developed models of varying complexity to describe the stages of the divorce process.⁸ This article discusses these models in order to provide a foundation for viewing divorce within a broad psychological framework. They are analyzed and elaborated upon on the basis of the author's personal observations and professional experience. Included also is this author's "dialectic" model⁹ which differentiates the feelings, behaviors, and tasks which must be worked through in order to resume a satisfying life following divorce. Hopefully, the interdisciplinary approach

5. See generally, Dubin, Buxton & Haller, *Improving the Relationships Between Mental Health Workers and Lawyers*, 2 RESEARCH COM. IN PSYCH., PSYCH. AND BEHAVIOR 27 (1977). See also notes 7, 25 & 27-31 and accompanying text *infra*.

6. There are a number of legal publications which the therapist may use to become conversant with legal intricacies, for example, *The Family Law Quarterly* and *The Journal of Family Law*. For an excellent casebook in this area, see J. AREEN, *FAMILY LAW: CASES AND MATERIALS* (1978).

7. See Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 54, 65 (1969). Professor Watson remarked:

[O]ne must again note that lawyers have a conspicuous lack of understanding of the behavioral sciences. This is not attributable to neglect on their parts, for legal education and training do little to facilitate the gaining of such knowledge. As I have said elsewhere, legal education tends to blunt native ability so far as psychological sensitivity is concerned. Together with this functional "blindness," there is a strong inclination for lawyers to be oblivious to the emotional results of their procedures. They appear to believe that they can conduct a vigorous adversary contest and then have the contestants return to some kind of working rapport.

Id. (footnote omitted).

Some attorneys, however, have begun to recognize the contributions which other disciplines can make to the practice of law. See, e.g., Bodenheimer, *New Approaches of Psychiatry: Implications for Divorce Reform*, 1970 UTAH L. REV. 191, 211 (transformations in psychiatry have great significance for the lawyer); Steinberg, *The Therapeutic Potential of the Divorce Process*, 62 A.B.A. J. 617, 618 (1976) (psychotherapy has much to offer the legal profession); Comment, *Non-Judicial Resolution of Custody and Visitation Disputes*, 12 U. CAL. D.L. REV. 582, 589 (1979) (law school and continuing education courses in counseling, psychology, and human development would all be appropriate).

8. See, e.g., S. KESSLER, *THE AMERICAN WAY OF DIVORCE: PRESCRIPTIONS FOR CHANGE* (1975); Bohannon, *The Six Stations of Divorce*, in *LOVE MARRIAGE FAMILY: A DEVELOPMENTAL APPROACH* 475 (M. Lasswell & R.T. Lasswell eds. 1973); Kaslow, *supra* note 1. For a discussion of the Kessler model, see notes 127-74 and accompanying text *infra*. For a discussion of the Bohannon model, see notes 10-126 and accompanying text *infra*. For a discussion of this author's model, see note 175 and accompanying text *infra*. See also note 127 *infra* (discussing the Wiseman and Froiland-Hozman models).

9. For a discussion of the "dialectic" model, see note 175 and accompanying text *infra*.

utilized in this article will help to enrich and humanize the practices of both the domestic relations attorney and the divorce therapist.

II. BOHANNAN'S SIX STATION MODEL OF DIVORCE

One of the most clearly delineated models developed to date, Paul Bohannan's theory of a six station divorce process¹⁰ captures the complexity, turmoil, and upheaval which characterize the divorce experience. Bohannan emphasizes that on both the individual and societal levels, the customary way to cope with trauma is to attempt to deny it.¹¹ If the trauma does not either disappear or abate, however, the person afflicted must allow it into his or her consciousness slowly so that it is not totally debilitating. Bohannan contends that in divorce the resolution of this trauma occurs as the individual progresses through six distinct stages.¹² Bohannan concludes that the six stations may occur in different order and with varying intensities, but that inevitably each station is experienced during the process of marital dissolution.¹³

A. *The Emotional Divorce*

The "emotional divorce," Bohannan's first station, begins when the couple becomes increasingly aware of its feelings of discontent and dissatisfaction.¹⁴ The husband and wife sense that their marriage is deteriorating and both often stress the negative rather than the positive aspects of their relationship. The level of mutual trust erodes while the level of criticism grows. Frequently, charges and counter-charges of unfulfilled promises are leveled at one another. The process of growing disillusionment may be reversed at this juncture if the spouses jointly air their grievances and accept their respective responsibilities for modifying the irritating behaviors and unrealistic expectations which precipitated their feelings of dissatisfaction. If

10. Bohannan, *supra* note 8, at 475. Paul Bohannan is a Professor of Anthropology at Northwestern University.

11. *Id.*

12. *Id.*

13. Bohannan, *supra* note 8, at 475.

14. *Id.* Bohannan explains this station as follows:

The first visible stage of a deteriorating marriage is likely to be what psychiatrists call emotional divorce. This occurs when the spouses withhold emotion from their relationship because they dislike the intensity or ambivalence of their feelings. They may continue to work together as a social team, but their attraction and trust for one another have disappeared. . . . With emotional divorce, people do not grow together as they grow apart—they become, instead, mutually antagonistic and imprisoned, hating the vestiges of their dependence.

Id. at 475-76.

marital therapy is sought at this point, the parties may be amenable to attempting a reconciliation. However, if the process is not reversed and if the emotional rift widens, the couple will begin to experience the grief that accompanies the loss of a love object.¹⁵

If they continue to live together, the spouses sense of rejection increases as evidence mounts that they are no longer wanted. Frequently, there is a diminution in sexual activity,¹⁶ although not all couples cease sexual relations.¹⁷ A possible explanation of the continued physical involvement may be that it represents a familiar pattern which is difficult to break, or it may reflect a disbelief that the marriage is actually disintegrating. Despite the mutual dislike, some spouses are apparently still sexually attracted to each other and are reluctant to relinquish the physical satisfaction they derive from their relationship.¹⁸ Also, it is this author's experience that it is not atypical for one spouse to use sex in a desperate attempt to preserve the marriage.

B. *The Legal Divorce*

"Legal divorce" is the second station of Bohannan's model.¹⁹ While many states have enacted no-fault divorce laws,²⁰ some juris-

15. Bohannan, *supra* note 8, at 479. Bohannan believes that the grief felt during emotional divorce is comparable to that felt upon the death of a spouse. *Id.* Indeed, two clinical theoreticians have developed models of emotional divorce which are based upon work done by Kübler-Ross in the area of death and grief. See Froiland & Hozman, *Counseling for Constructive Divorce*, 55 PERSONNEL & GUIDANCE J. 525 (1977); Wiseman, *Crisis Theory and the Process of Divorce*, 56 SOC. CASEWORK 205 (1975); note 127 *infra*.

16. Bohannan, *supra* note 8, at 478. Bohannan observes that "[u]sually, when communication between the spouses becomes strained, sexual rapport is the first thing to go." *Id.* This decline in sexual rapport may take the form of abstention, or it may be expressed in the form of frigidity in women, impotence in men, or adultery, which Bohannan believes may constitute "an attempt to communicate something, [even] an unconscious effort to improve the marriage itself." *Id.*

17. *Id.*

18. *See id.*

19. *Id.* at 475.

20. *See generally* Freed & Foster, *Divorce in the Fifty States: An Overview as of August 1, 1979*, 5 FAM. L. REP. 4027 (1979). It is interesting to note in the context of this article that the first criticisms of the fault system came from the social sciences and not from the practicing bar. *See Note, The No-Fault Concept: Is This The Final Stage in the Evolution of Divorce?*, 47 NOTRE DAME LAW. 959, 965 (1972). The reasons for this late emergence are varied, but one commentator has written eloquently about some of the possible reasons:

Perhaps the very nature of family law explains the delay in organizing effectively to improve it. It has been relatively so much simpler to compile and coordinate other branches of the law which can be met with considerable detachment. But in family law one finds emotion, sentimentality, religious dogma, taboos. Here is opened the Pandora's box of psychiatry and psychology and of those elemental drives which make man both a god and a beast.

Isaac, *Family Law and the Lawyer*, 2 J. FAM. L. 43, 44 (1962).

dictions still retain a number of fault grounds for divorce.²¹ Divorce laws based upon marital fault traditionally require that the spouse commencing the divorce action be innocent of wrongdoing and that the other spouse be guilty of same.²² The state, the third party in the divorce proceeding,²³ is responsible for deciding the guilt or innocence of the respective parties. Two people cannot simply consent to a divorce.²⁴ Instead, each spouse must be represented by legal counsel whose role is to protect his or her own client's interests.²⁵ In

The enactment of no-fault divorce laws constitutes a significant reform in the area of domestic relations law. See note 27 *infra*. However, it has not silenced the demands for further change. Two commentators, who advocate a system of consensual divorce, have observed:

Under a grounds system, with or without fault, dead and destructive human relationships are prolonged when divorce is denied. Where the technical grounds cannot be found or manufactured, the parties may both live in abject misery, or an arrangement neither may want but which must be continued, at least in name, by legislative fiat.

Goldstein & Glitter, *On Abolition of Grounds for Divorce: A Model Statute & Commentary*, 3 FAM. L.Q. 75, 79-80 (1969).

Also, the enactment of no-fault divorce laws has not had a significant impact on the adversarial nature of custody adjudications. Many of the laws in this area allow the element of fault to be used as a basis for custody determinations. Derdeyn, *Child Custody Contests in Historical Perspective*, 133 AM. J. PSYCH. 1369, 1372-73 (1976). See, e.g., ALA. CODE tit. 30, § 30-3-1 (1977) (custody may be awarded to either party "as may be right and proper," having regard to the moral character and prudence of the parents); CONN. GEN. STAT. ANN. § 46-42 (West 1977) (the court "may take into consideration the causes for the dissolution of the marriage or legal separation").

21. Raphael, Frank & Wilder, *Divorce in America: The Erosion of Fault*, 81 DICK. L. REV. 719, 729-30 (1977). The most common fault grounds are the following: adultery, desertion, impotency, conviction of a felony, sodomy, habitual drunkenness or addiction to drugs, incurable insanity, pregnancy at the time of the marriage, cruelty, and gross neglect. *Id.*

For discussions on the history of divorce, see Bodenheimer, *Reflections on the Future of Grounds for Divorce*, 8 J. FAM. L. 179, 185-89 (1968); Raphael, Frank & Wilder, *supra*, at 719-22; Comment, *Abolition of Guilt in Marriage Dissolution: Wisconsin's Adoption of No-Fault Divorce*, 61 MARQ. L. REV. 672, 672-77 (1978); Note, *supra* note 20, at 959-63.

22. See *Steinke v. Steinke*, 238 Pa. Super. Ct. 74, 92, 357 A.2d 674, 683 (1975) (Spaeth, J., concurring); Comment, *supra* note 21, at 676.

It is important to note, however, that many jurisdictions with traditional divorce laws include incompatibility as a ground for divorce. See *id.* at 677. The use of this ground does not require proof of matrimonial misconduct and either party can secure a divorce without alleging or proving that the other was responsible for the incompatibility. *Id.* All that is necessary is that a plaintiff establish an existing state of incompatibility. *Id.*

23. See Raphael, Frank & Wilder, *supra* note 21, at 719-20 (explaining that "[t]he state is an 'unnamed third party' in divorce actions because of its overriding interest in promoting the public welfare by encouraging family stability").

24. See *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (upholding power of state to prescribe procedures for obtaining a divorce).

25. See generally CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1978) ("A Lawyer Should Represent a Client Zealously within the Bounds of the Law"). For a criticism of this one-sided approach in divorce cases, see Herman, McKenry & Weber, *Mediation and Arbitration Applied to Family Conflict Resolution: The Divorce Settlement*, 34 ARB. J. 17, 18 (1979) (maintaining that a lawyer's stance will often lead a client "to concentrate on specific legal goals and to abandon any attempt at assessing the total family situation or individual responsibilities"). See also Beatrice, *supra* note 4, at 158; Bodenheimer, *supra* note 7, at 212-17; Johnson, *A Special Code of Professional Responsibility in Domestic Relations Statutes*, 9 FAM. L.Q. 595, 596 (1975); Marschall & Gatz, *supra* note 4, at 58; Pilpel & Zavin, *Separation Agreements: Their Function and Future*, 18 LAW & CONTEMP. PROB. 33, 36 (1953).

this process, however, the spouses' joint responsibility for the divorce is often ignored, although both parties normally contribute to the dissolution of the marriage.²⁶

Frequently, the legal action becomes quite embittered, with the attorneys contributing to the increasing hostilities by unduly emphasizing their clients competing financial interests.²⁷ An attorney may, for example, recommend strategies which ignore his client's emotional requirements.²⁸ For example, in order to reduce pre-divorce expenses, a husband may be instructed to continue cohabitation with his wife, although his continued presence may exacerbate the emotional rift between him and his wife.²⁹ Similarly, in order to

One noted commentator has observed: "Practicing psychiatrists frequently see marriage problems which might possibly have worked out successfully had it not been for the ill-timed and inappropriate invoking of some legal procedure. . . . Legal intervention should be the last, rather than the first kind of professional service offered to unhappy married couples." A. WATSON, *PSYCHIATRY FOR LAWYERS* 275 (1968).

This growing criticism of the attorney's role has prompted several commentators to advocate the adoption of a special code of professional responsibility for matrimonial lawyers. See Bodenheimer, *supra*, at 216; Johnson, *supra*, at 596.

26. See Goldstein & Glitter, *supra* note 20, at 79; Comment, *supra* note 21, at 676.

27. See Green, *The Wickedest War of All*, *PHILADELPHIA MAGAZINE*, Dec. 1978, at 185 (reporting on the personal stories of several individuals who have been embroiled in contested divorces and on the attitudes and tactics of attorneys who represent clients in contested divorce cases).

Note that divorce litigation is itself infrequent. More than 90% of all divorces granted are uncontested. Kleinfeld & Moss, *A Divorce Reform Act*, 5 *HARV. J. LEGIS.* 563, 569 (1968). And, "prior to the 'no contest' plea, at least among middle and upper income spouses, there [is] a period of negotiation." Foster & Freed, *Divorce Reform: Brakes on Breakdown?*, 13 *J. FAM. L.* 443, 446 (1973). And, "[e]ven those [parties] who intend to divorce in a responsible and fair manner find that their best intentions are lost in the adversary negotiating process." Meroney, *Mediation and Arbitration of Separation and Divorce Agreements*, 15 *WAKE FOREST L. REV.* 467, 469 (1979).

In recognition of the effects of the adversary system, 31 states have enacted no-fault divorce statutes. Freed & Foster, *Divorce in the Fifty States: An Outline*, 11 *FAM. L.Q.* 297, 300 (1977); Freed & Foster, *supra* note 20, at 4027. One hoped for effect of the no-fault statutes was a reduction in the animosity engendered by the adversary negotiating process. See Foster & Freed, *Divorce Reform: Brakes on Breakdown?*, 13 *J. FAM. L.* 443, 446 (1973). For further discussion of the negotiating process, see notes 57-63 and accompanying text *infra*.

In addition to substantive changes in divorce law, innovative methods of resolving marital disputes are being formulated and implemented. See notes 44-56 and accompanying text *infra*. Also, a number of commentators have recommended reforms which are designed to effect change within the existing judicial system. See, e.g., Alexander, *The Follies of Divorce: A Therapeutic Approach to the Problem*, 36 *A.B.A. J.* 105, 170 (1950) (conference-type court sessions aided by counselors); Johnson, *supra* note 25, at 596 (special code of professional responsibility for matrimonial attorneys); Steinberg, *supra* note 7, at 618 (psychotherapeutic training for attorneys).

28. See Pilpel & Zavin, *supra* note 25, at 36; notes 60-63 and accompanying text *infra*. For an explanation of why the lawyer adopts this role, see Johnson, *supra* note 25, at 597. Johnson observed: "Lawyers are trained in the adversary process. Their education prepares them for it and presupposes that the courtroom will provide a setting necessitating its use. They are taught to be aggressive, that winning is an important measure of success." *Id.* (footnote omitted).

29. For a general discussion of the importance of separating when it becomes clear that a relationship is not salvageable, see S. JOHNSON, *FIRST PERSON SINGULAR: LIVING THE GOOD LIFE ALONE* 21-48 (1977).

maximize the amount of child support ordered, it is not unusual for a wife's attorney to advise her not to procure employment or to stop working during the proceedings—a tactic which is designed to play on the judge's sympathy.³⁰ The lawyer usually attempts to justify this action to the judge on the ground that the divorce is so upsetting to the female client that she cannot concentrate on work. However, such a maneuver may be demeaning and abhorrent to a woman who chooses not to rebuild her life by manipulating others. Ironically, it is precisely at this critical time that a woman may need the structure and companionship which employment provides. Working not only helps her to maintain some semblance of continuity in her life, but it also constitutes a neutral arena in which adequate or superior functioning by her can serve to repair her damaged sense of self-esteem.³¹ Thus, manipulative ploys may make legal sense, but may be psychologically injurious to the client.

Courtroom tactics, such as having a client appear disheveled, may also cause a client to experience unnecessary psychological stress.³² Their adverse effects should therefore be carefully balanced against their potential value. In representing a man or woman undergoing divorce, a lawyer may find it useful to consult with the therapist so that he or she may better understand the broader implications of the legal tactics being contemplated on the client's behalf.

The psychodynamics of the lawyer-client relationship also merit consideration in any discussion of the legal divorce. It is this author's clinical impression that the sex of the attorney is sometimes a factor in the client's choice of representation. An increasing number of my female patients request the name of a female attorney who practices

30. For a different view regarding the efficacy of this tactic, see R. SHERWIN, *COMPATIBLE DIVORCE* 196 (1969). Sherwin, an attorney, states that "by and large the court is much impressed with the woman who shows her willingness to improve an unfortunate situation [by working]. The court may well demand more, not less, from the husband of a woman who so cooperates." *Id.*

31. See R. SHERWIN, *supra* note 30, at 197. Sherwin explains the value of employment as follows:

In our land of double standards, somehow the failure of a marriage is assumed by the woman. If she were attractive enough or bright enough or inspiring enough or sensitive enough and everything else enough, she would somehow have managed to make the marriage last, or so she thinks. . . .

Getting a job can change her whole outlook. It will shake her out of her lethargy or paralysis, and most of all, get her out of the house. She will suddenly feel what it is to be needed, even if only in a job.

Id. See also S. GETTLEMAN & J. MARKOWITZ, *THE COURAGE TO DIVORCE* (1974). Gettleman and Markowitz, both psychotherapists, consider post-divorce employment for women to be so important that they even argue that women should not request custody of their children "so that they themselves will have more time and energy to devote to education and job training and can, therefore, move more rapidly toward economic self-sufficiency." *Id.* at 218-19.

32. For a discussion of this and other tactics used by some matrimonial lawyers, see Green, *supra* note 27.

matrimonial law. They indicate that they want to avoid the male attorney, believing that he would expect them to acquiesce to his recommendations and to adopt the "traditional female role" in their interactions with him and the judge. They anticipate that they can be more candid with a female lawyer, and that she will have an empathic, as well as intellectual, understanding of their circumstances.³³ Conversely, some of my female patients only request the name of a male attorney, apparently believing that a male is better suited to provide them with emotional support and to protect their interests. No male patient has yet specifically asked me for a referral to a female attorney.

Additionally, an attorney's marital status and personal biases may affect the type of legal representation provided.³⁴ The lawyer may heighten the hostilities between a divorcing couple by unconsciously or unwittingly communicating to a receptive client a sense of bitterness about his or her own emotionally upsetting divorce. Furthermore, an attorney who has strong opinions about appropriate custodial arrangements may successfully dissuade a couple from agreeing to an arrangement that he or she personally dislikes.³⁵ The attorney must therefore be careful to guard against allowing personal problems, prejudices, and values to interfere with the provision of professional services.

Another factor to be considered in relation to legal divorce is the nature of the practice of domestic relations law itself. Bohannan claims that it is low in the hierarchy of legal specialties.³⁶ Legal fees are often less than in other fields of law,³⁷ and despite numerous

33. *But see* N. SHERESKY & M. MANNES, UNCOUPLING: THE ART OF COMING APART 77 (1972). Sheresky and Mannes state:

It is assumed that they [women attorneys] will be more sympathetic to a woman's point of view, but this is often not the case. They are, after all, women who are highly motivated or used to competing with men, sometimes inclined, moreover, to look down at their less independent sisters whose lives as housewives they regard with little respect.

Id.

34. *See id.* at 68. For example:

Curious as it may seem, many lawyers who are extremely effective when representing husbands, do very poorly when representing wives—and the reverse is equally true. A thrice-married lawyer paying significant amounts of alimony is likely to be less sympathetic to a woman's cause than a lawyer with a more fortunate marital background. A happily married lawyer whose wife put him through law school might obviously be less sympathetic to a husband hoping to opt out of all his marital obligations.

Id.

35. For a discussion of the effect of attorneys' attitudes on custody, *see* Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U. CAL. D.L. REV. 473, 505-17 (1979).

36. *See* Bohannan, *supra* note 8, at 481.

37. *Id.* For a discussion of the fee structure in domestic relations law, *see* Johnson, *supra* note 28, at 601-03.

hours invested in case preparation, the time an attorney spends in court is frequently brief.³⁸ Even after the divorce and custody proceedings, problems regarding support payments and visitation rights may arise, the resolution of which require the continued services of an attorney who is now embroiled in other legal battles.³⁹ Also, judges who preside in family court have full dockets, precluding them from devoting sufficient time to individual cases.⁴⁰ The attendant delays and feelings of frustration not only contribute to the client's conviction that society is not concerned with his or her predicament, but also discourage some competent attorneys from continuing to practice domestic law.⁴¹

Fortunately, recent changes in family law have rendered some of Bohannan's observations concerning the legal divorce less accurate. The American Bar Association has been instrumental in the movement to reform divorce and custody laws.⁴² Its family law division has inaugurated the *Family Advocate*, whose editorial policy is to facilitate an interdisciplinary approach to the study of domestic law.⁴³ Matrimonial attorneys now meet to discuss their mutual concerns, refine their legal skills, and improve their professional image. Law firms have hired attorneys interested in domestic relations to function as their specialists in this area of law. These attorneys view family law as an important specialty and conduct their practices in a professionally appropriate manner.

In addition to these positive improvements in the area of family law, constructive alternatives to the adversary system have been formulated and are being implemented.⁴⁴ The most innovative new

38. Bohannan, *supra* note 8, at 481.

39. *Id.*

40. *Id.* at 482. For the observations of judges regarding divorce proceedings, see generally Alexander, *supra* note 27; Alexander, *The Family Court—An Obstacle Race*, 19 U. PITT. L. REV. 602 (1958); Baum, *supra* note 4.

41. See generally Johnson, *supra* note 25, at 597.

42. The legal community has been late, however, in joining the movement for legislative and judicial reform of family law. See note 20 *supra*.

43. Stotter, *Why Another Publication?*, FAMILY ADVOCATE, Summer 1978, at 1.

44. One alternative to the traditional adversary method of resolving marital disputes is arbitration. See Meroney, *supra* note 27, at 468; Comment, *supra* note 7, at 591. Broadly defined, "[a]rbitration is an adjudicatory process by which parties agree to submit their dispute to a neutral person or a group of neutral persons, not connected with the courts, whose function is to conduct a hearing and render a judgment. The parties agree in advance that the judgment or 'award' will be binding." Meroney, *supra* note 27, at 473 (footnote omitted).

For discussions on the use of arbitration in resolving marital disputes, see N. SHERESKY & M. MANNES, *supra* note 33, at 158-60; Spencer & Zammit, *Reflections on Arbitration Under the Family Dispute Services*, 32 ARB. J. 111 (1977); Spencer & Zammit, *Mediation-Arbitration: A Proposal For Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 911.

method is Coogler's "structured mediation" approach.⁴⁵ Its stated objective is to improve the quality of family life by offering the divorcing couple a cooperative method of conflict resolution.⁴⁶ The parties work out their own solution under the stewardship of a trained⁴⁷ and impartial⁴⁸ mediator who is not subject to the restriction imposed on the lawyer that he or she represent the interests of only his or her client.⁴⁹

In order to utilize the professional services of the mediator, the spouses must contractually agree to follow certain rules.⁵⁰ These

A second alternative to the adversary method of resolving marital disputes is court-connected counseling programs, known as "Conciliation Courts." See Orlando, *Conciliation Programs: Their Effect on Marriage and Family Life*, 52 FLA. B.J. 218, 218 (1978); Comment, *supra* note 7, at 589-91.

45. See O. COOGLER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENT* (1978); Meroney, *supra* note 27, at 475. Structured mediation is a two-stage procedure under which parties attempt to resolve marital disputes through mediation (stage one), but if the parties to the mediation fail to agree, they resort to arbitration (stage two) to settle their disputes. Comment, *The Enforceability of Arbitration Clauses in North Carolina Separation Agreements*, 15 WAKE FOREST L. REV. 487, 487 n.3 (1979). Coogler, an attorney and marriage counselor, formulated the structured mediation approach in response to his perceived need for an alternative to the adversary method of conflict resolution. O. COOGLER, *supra*, at V, XV. In 1975, Coogler founded the Family Mediation Association (FMA). *Id.* at XV. The FMA operates according to its own rules, the Marital Mediation Rules, and the Marital Arbitration Rules. Meroney, *supra* note 27, at 476. For the text of these rules, see O. COOGLER, *supra*, at 117-29, 131-44.

The essential difference between mediation and arbitration is that mediation is not an adjudicatory process. Meroney, *supra* note 27, at 470. For a definition of arbitration, see note 44 *supra*. Mediation may be defined as a cooperative process by which the parties agree to use the services of a neutral third person whose function is to help them resolve, in a noncompetitive manner, the issues which divide them. O. COOGLER, *supra*, at 2. It is, by definition, "an aid to negotiation." Meroney, *supra* note 27, at 470. Structured mediation differs from ordinary mediation in that it is conducted in accordance with rules which the parties contractually agree in advance to follow. O. COOGLER, *supra*, at 2.

For further discussions of the structured mediation approach, see Kressel, Deutsch, Jaffe, Tuchman & Watson, *Mediated Negotiations in Divorce and Labor Disputes*, 15 CONCILIATION CTS. REV. 9, 9-12 (1977); Kressel, Jaffe, Tuchman, Watson & Deutsch, *An Exploratory Study of Patterns of Divorce: Their Impact on Settlement Negotiations, the Role of a Mediator, and Post Divorce Adjustment* (1979) (unpublished manuscript in Rutgers University Library); Meroney, *supra* note 27, at 475-86.

46. O. COOGLER, *supra* note 45, at XV.

47. *Id.* at 75. A basic requisite for becoming a mediator is either a graduate degree in the behavioral sciences, such as social work, psychology, or psychological counseling, or a law degree, with the latter supplemented by substantial training in the behavioral sciences. *Id.* In addition to academic training in the behavioral sciences, the mediator is required to have three years of full-time counseling experience, two of which are in marriage and family counseling. *Id.* at 76. The rationale for this requirement is that interpersonal communication skills are essential for the mediator's successful functioning. *Id.*

48. *Id.* at 26. The mediator, while impartial, is not passive. He or she "may take an active part in discussion of issues and make affirmative suggestions as to areas of potential agreement." Meroney, *supra* note 27, at 470 (footnote omitted).

49. For a discussion of the lawyer's adversarial role, see note 25 and accompanying text *supra*. Coogler believes that an "essential difference" between the structured mediation approach and the legal adversarial approach is that the former "fosters a cooperative orientation" while the latter "places the parties in competitive opposition." O. COOGLER, *supra* note 45, at 8.

50. Meroney, *supra* note 27, at 476. For a discussion of the Marital Mediation Rules and the Marital Arbitration Rules, see *id.*

rules are theoretically designed to help the spouses establish a mutually acceptable value system,⁵¹ (something most of them have been unable to do during the marriage), and an orderly procedural process for reaching an agreement.

Although still relatively new, the reported success⁵² of the structured mediation model suggests that it has the potential to provide some couples with a viable alternative to the traditional legal-adversarial model of divorce resolution.⁵³ It appears to afford couples the opportunity to resolve their conflicts and reach mutually acceptable settlements through negotiation and compromise. Ostensibly, it facilitates achievement of the psychic divorce⁵⁴ by minimizing the animosities usually engendered in legal divorce. Furthermore, in situations where couples have children, it reduces the potential for future litigation between them⁵⁵ by having both parents accept the responsibility for making custody decisions.⁵⁶

C. *The Economic Divorce*

The "economic divorce," Bohannon's third station, is concerned with the financial issues of the legal divorce, such as property settlement, spousal maintenance, and child support.⁵⁷ Attorneys usually

51. O. COOGLER, *supra* note 45, at 1, 4. This value system is composed of guidelines which are incorporated into the rules of the Association. *Id.* at 1.

52. *Id.* at XV. Coogler reports that in its first 2½ years of operation, the Family Mediation Association mediated approximately one hundred settlement agreements. *Id.* It has also been reported that none of these mediations has proceeded to arbitration, and that none of the written settlement agreements has been challenged as unenforceable in the courts. Meroney, *supra* note 27, at 483. "These statistics reinforce the view that the parties' personal role in shaping the agreement is a strong incentive for them to honor its terms." *Id.*

53. See O. COOGLER, *supra* note 45, at 5. Not all divorcing couples are suitable candidates for the structured mediation approach. One commentator has written:

Mediation and arbitration of marital disputes will not have universal appeal. The processes require that some minimal amount of mutual trust exists between the parties. The processes require a couple who are capable of viewing the psychological and economic realities of marital dissolution, and who honestly desire to reach a fair settlement between themselves.

Meroney, *supra* note 27, at 486.

54. For a discussion of psychic divorce, see notes 121-26 and accompanying text *infra*.

55. See, e.g., Freed & Foster, *The Shuffled Child and Divorce Court*, 10 TRIAL 26, 34 (1974) (one-third of all divorces involving children are followed by further litigation).

56. O. COOGLER, *supra* note 45, at 2. Coogler believes that since "the parties are responsible for the decisions reached" they "are therefore more willing to honor them than when decisions are made by a third party." *Id.* See also Marschall & Gatz, *supra* note 4. Marschall and Gatz state that "[t]he mediation process is ideally suited to resolve custody conflicts" because it fosters a reorientation of the parties by helping them achieve a shared perception of their relationship. *Id.* at 63. On the other hand, "[j]udicial custody decision-making does not achieve such a reorientation of the parties, but rather further polarizes their views and increases their animosity, rendering further disputes between the parents likely." *Id.* at 64.

57. Bohannon, *supra* note 8, at 475, 482-83. For discussions of the substantive law in these areas, see Gold-Bikin & Rounick, *The New Pennsylvania Divorce Code, Symposium: Recent Developments in Pennsylvania Family Law*, 25 VILL. L. REV. 617 (1980); Perlberger, *Mari-*

negotiate the details of the spouses' settlement, without resort to the adversary proceedings of the courtroom.⁵⁸ The manner in which they proceed, however, partially depends upon their clients' willingness to accept a fair distribution of property.⁵⁹

An attorney who is involved in negotiating a property settlement must understand that marital possessions often acquire sentimental value and that parting with them is frequently experienced as a painful loss.⁶⁰ Proper representation of a client's interests thus mandates that consideration be given to factors other than the property's economic value. In order to understand the spouse's underlying feelings, an attorney may find it useful to consult with a therapist since such consultation may help to defuse the hostility of the negotiations and allow them to proceed in a more expeditious and equitable manner.

Other factors which may influence the settlement process include: 1) a husband's or wife's desire to expedite the proceedings due to his or her romantic involvement with another;⁶¹ 2) the accuracy of income tax returns and the possible disclosure of incriminating information;⁶² and 3) a wife's sense of entitlement either because of time

tal Property Distribution: Legal and Emotional Considerations, Symposium: Recent Developments in Pennsylvania Family Law, 25 VILL. L. REV. 662 (1980).

58. Bohannon, *supra* note 8, at 482. Bohannon observed that "[j]udges regard settlement as the province of lawyers, and generally agree that the lawyers have not done their jobs if the matter comes to court." *Id.* See also Wadlington, *Sexual Relations After Separation or Divorce: The New Morality and the Old and New Divorce Laws*, 63 VA. L. REV. 249, 259 (1977). Wadlington stated: "The advent of nonfault breakdown grounds has made divorce increasingly a matter of negotiation rather than litigation. Persons who separate in anticipation of a divorce . . . now tend to define their future financial and social relationships through contract as much as possible." *Id.*

59. It appears that divorcing spouses often have great difficulty accepting the concept of fair distribution of marital property. See, e.g., R. DEWOLF, *THE BONDS OF ACRIMONY* 39-45 (1970); H. O'GORMAN, *LAWYERS AND MATRIMONIAL CASES, A STUDY OF INFORMAL PRESSURES IN PRIVATE PROFESSIONAL PRACTICE* 85 (1963).

60. For examples of property settlements which were jeopardized because of the value the parties placed on economically insignificant objects, see R. DEWOLF, *supra* note 59, at 39-40, 44-45; H. O'GORMAN, *supra* note 59, at 83.

61. See generally N. SHERESKY & M. MANNES, *supra* note 33, at 94. Sheresky and Mannes maintain that "the lawyer whose client is most anxious for divorce is at a disadvantage." *Id.* The reason for this is that such a lawyer is in a weaker negotiating position vis-à-vis the attorney whose client is more willing to engage in protracted negotiations. *Id.* at 94-95.

A divorcing spouse who is romantically involved with a third party may feel the need to expedite the negotiations not only because of a desire to begin a new life with that third party, but because such romantic involvement may have important legal consequences. See generally Wadlington, *supra* note 58, at 251-59. For example, in many jurisdictions, a divorcing spouse's post-separation but predivorce sexual liaison with a third party constitutes adultery because she is legally married until a judicial decree of divorce is rendered. *Id.* at 253. In jurisdictions which have fault-based divorce grounds, the potential practical effect of such adulterous behavior is that he or she may be barred from obtaining either a divorce or support. *Id.* at 253-56. It is therefore to the divorcing spouse's benefit to expedite the proceedings so that the facts of the adulterous behavior do not come to the other spouse's attention.

62. For discussions concerning the use of financial investigations to obtain favorable property settlements, see Green, *supra* note 27, at 276.

periods when she, as the major income producer, supported her husband's educational pursuits or because she sacrificed her own education or career in deference to her husband's wishes.⁶³ It is impossible to enumerate or define all the factors which affect the process of arriving at a property settlement. However, in negotiating such an agreement, a lawyer must remember that both spouses normally place importance on their past financial and emotional contributions to their marriage, on their current lifestyle, and on their desire to live comfortably in the future—*i.e.*, they do not merely concern themselves with the economic valuation of tangible items.

D. *The Coparental Divorce*

The "coparental divorce," Bohannan's fourth station, is concerned with the problems which arise in regard to custody determinations.⁶⁴ The term "coparental" is used in this context to indicate that although divorce terminates the legal bonds of matrimony, it does not terminate the parent-child relationship.⁶⁵ The coparental divorce is often entwined with the economic divorce.⁶⁶ A woman awarded custody, for example, may petition the court for an order terminating visitation in order to compel her ex-husband either to increase the amount of the child support payments⁶⁷ or to reinstate them.⁶⁸ On

63. For a discussion of the issue of the wife's compensation upon divorce for the funds she expended in supporting her husband through school, see Erickson, *Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity*, 1978 WIS. L. REV. 947. In discussing the availability of compensation to wives upon divorce by means of property awards, Erickson breaks down state marital property laws into three main categories: strict common law, modified common law, and community property. *Id.* at 961. She states that in six of the eight strict common law property states "a court cannot repay a wife for putting her husband through school by means of a property division because these jurisdictions do not provide for distribution of property under *any* circumstances." *Id.* at 962 (emphasis in original). As to the other two categories of jurisdictions, Erickson states that compensation is theoretically possible under the statutes, *id.*, but such compensation appears to be rare. *Id.* at 964.

64. Bohannan, *supra* note 8, at 475. Bohannan believes that "[t]he most enduring pain of divorce is likely" to be experienced from the coparental divorce. *Id.* at 484.

65. *Id.* at 484. Judicial recognition of the post-divorce rights and responsibilities which emanate from the parent-child relationship are reflected by child support payments, visitation privileges, and nonpermanence of custody decrees. See Comment, *Joint Custody: An Alternative For Divorced Parents*, 26 U.C.L.A. L. REV. 1084, 1096-98 (1979).

66. For a discussion of the interrelationship between the coparental divorce and the economic divorce, see R. DEWOLF, *supra* note 59, at 56-66.

67. See Weitzman & Dixon, *supra* note 35, at 496 (stating that the typical support award is not sufficient to cover even half the direct cost of raising a child).

68. Bohannan, *supra* note 8, at 484. The situation described in the text (*i.e.*, where the mother has custody and the father pays for support), is the typical pattern, for the major legal responsibility for the financial support of children has traditionally been assigned to the children's father. Weitzman & Dixon, *supra* note 35, at 494-95. Also, noncompliance with child support orders is widespread. "Empirical studies place the range of non-compliance with child support orders after only one year following the divorce decree from 62 percent in Wisconsin to 47 percent in Illinois." Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.

the other hand, a man may withhold child support payments in order to compel his ex-wife to raise the child differently or to bargain for a different visitation arrangement. This relationship between economic and custodial issues provides fertile ground for manipulation and retaliation between the ex-spouses.⁶⁹ It is also the area in which the unresolved emotional conflicts of the spouses most often surface.

The above-mentioned problems are especially disturbing for the children of divorce who need access to both parents.⁷⁰ Since both parents should maintain frequent contacts with their children following divorce, it is incumbent upon the attorney not to advise his client to disparage the other parent during custody litigation or to disrupt visitation. It is particularly important for the attorney not to expose, and to prevent the client from consciously exposing, the child to manipulative ploys during the adjudication.⁷¹ Consider the untenable

CAL. D.L. REV. 523, 563 (1979) (footnote omitted). This percentage of noncompliance increases as the number of years following the divorce increases. *Id.* at 564.

The likelihood of success of a petition to terminate visitation on the basis of noncompliance with a child support order partially depends upon the jurisdiction in which it is filed. Some courts hold that the duty of support and the right to visitation are independent of one another. *See, e.g.,* Raymond v. Raymond, 165 Conn. 735, 742, 345 A.2d 48, 52 (1974); Chaffin v. Grigsby, 293 So. 2d 404, 404 (Fla. 1974); Van Zee v. Van Zee, 302 Minn. 371, 375, 226 N.W.2d 865, 868 (1974); Lundsford v. Waldrip, 6 Wash. App. 426, 429, 493 P.2d 789, 792 (Ct. App. 1972). Other courts hold that the right of visitation may be terminated if the noncustodial spouse does not comply with the child support order. *See, e.g.,* Ervin v. Ervin, 45 Ala. App. 313, 314, 229 So. 2d 813, 814 (Ct. App. 1969); Raible v. Raible, 242 Md. 586, 597-98, 219 A.2d 777, 782 (1965); De Welles v. Dwelle, 214 Pa. Super. Ct. 376, 378, 257 A.2d 594, 596 (1969). The majority view appears to be that the right of visitation is independent of the duty of support. *See* Comment, *supra* note 65, at 1097 n.70. However, there is a trend to legally recognize their interrelationship. Folberg & Graham, *supra*, at 564 n.258.

69. *See* R. DEWOLF, *supra* note 59, at 66.

70. A number of child development specialists are in accord with this author's conclusion that a warm continuous relationship between parent and child is necessary for the child's successful character development. *See, e.g.,* Hetherington, Cox & Cox, *Divorced Fathers*, 25 FAM. COORDINATOR 417 (1976); Wallerstein, *Children Who Cope in Spite of Divorce*, 1 FAM. ADVOCATE 12 (1978); Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the Child in Later Latency*, 46 AM. J. ORTHOPSYCH. 256 (1976); [hereinafter cited as *Experiences of the Child in Later Latency*]; Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the Preschool Child*, 14 J. AM. ACAD. CHILD PSYCH. 600 (1975) [hereinafter cited as *Experiences of the Preschool Child*]. *See also* note 95 and accompanying text *infra*.

71. *See* Comment, *supra* note 7, at 585; Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1131-33 (1978) [hereinafter cited as *Lawyering for the Child*].

In order to protect the well-being of the child, a number of authors have recommended the appointment of legal counsel to represent the child during custody adjudications. *See, e.g.,* Inker & Perretta, *A Child's Right to Counsel in Custody Cases*, 5 FAM. L.Q. 108 (1971); Podell, *The "Why" Behind Adopting Guardians Ad Litem for Children in Divorce Proceedings*, 57 MARQ. L. REV. 103 (1973); Note, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 HASTINGS L.J. 917 (1976). The purpose of separate legal representation is to ensure "that the child's interests are not neglected in divorce custody proceedings." *Lawyering for the Child, supra*, at 1137. As of 1978, 24 states had implemented this procedural reform. *Id.* at 1127. However, as of this date, support in Pennsylvania for such a reform has been less

situation of an adolescent who is asked to testify about a parent's adulterous conduct. If he or she is pressed into bearing witness against a parent, this would constitute an unconscionable disloyalty on the child's part. But if he or she refuses the request, it is a betrayal of the "rejected" parent.⁷² Does anyone have the ethical right to place a child in such a precarious dilemma? Since the marital failure shatters the kinship circle of the child, this is an unsettling period at best and a debilitating one at worst,⁷³ particularly where a custody battle escalates the fray. Regardless of the ethical questions such tactics raise, their use clearly threatens the possibility of an amicable post-divorce, parent-child relationship. Therefore, the attorney must consider whether it is ever advisable to employ such maneuvers in custody litigation.

than enthusiastic. See Bertin & Anthony Klein, *Pennsylvania's Developing Child Custody Law, Symposium: Recent Developments in Pennsylvania Family Law*, 25 VILL. L. REV. 752, 775-76 (1980).

Regardless of the benefits of separate legal counsel, the implementation of this idea, as a reform within the adversary system, cannot constitute a total solution to the problem of exposing children to manipulation during divorce for two reasons. First, approximately 90% of all custody determinations are reached by private agreement between the parents. See Jones, *The Tender Years Doctrine: Survey and Analysis*, 16 J. FAM. L. 695, 735 (1978); Shepherd, *Solomon's Sword: Adjudication of Child Custody Questions*, 8 U. RICH. L. REV. 151, 161 (1974). For an examination of the parental decisionmaking process involved in arriving at consensual custodial agreements, see Marschall & Gatz, *supra* note 4, at 52-61.

Second, children may be exposed to manipulation outside of the context of litigation as pawns in the ongoing emotional battle between the parents. See Harris, *The Child as Hostage*, in CHILDREN OF SEPARATION AND DIVORCE (I. Stuart & L. Abt eds. 1972). Because separate legal representation for children does not effectively deal with these problems, nonadversary approaches—such as conciliation courts, arbitration, and mediation—may offer both more constructive and more adequate methods of preventing parents from using their children as weapons against each other. See Comment, *supra* note 7, at 583, 589-97. See also notes 44-56 and accompanying text *supra*.

72. See *Experiences of the Child in Later Latency*, *supra* note 70, at 264. Wallerstein and Kelly noted that

the central ingredient in the loneliness and sense of isolation these children reported was related to their perception of the divorce as a battle between the parents, in which the child is called upon to take sides. By this logic, a step in the direction of the one parent was experienced by the child (and, of course, sometimes by the parent) as a betrayal of the other parent, likely to evoke real anger and further rejection, in addition to the intrapsychic conflicts mobilized.

Id. (footnote omitted).

73. A number of commentators have reported on the undesirable effects of divorce on children. See, e.g., Benedek & Benedek, *Post-Divorce Visitation: A Child's Right*, 16 AM. ACAD. CHILD PSYCH. J. 256, 268 (1977) (increased incidence of depression); Derdeyn, *A Consideration of the Legal Issues in Child Custody Contests*, 33 ARCHIVES GEN. PSYCH. 165, 168 (1978) (abnormal rates of antisocial behavior); Kalter, *Children of Divorce in an Outpatient Psychiatric Population*, 47 AM. J. ORTHOPSYCH. 40, 40-41, 50 (1977) (increased incidence of delinquency and sexual promiscuity); Kelly & Wallerstein, *The Effects of Parental Divorce: Experiences of the Child in Early Latency*, 46 AM. J. ORTHOPSYCH. 20, 23 (1976) (pervasive sadness and grieving); McDermott, *supra* note 3, at 423 (higher incidence of delinquency); McDermott, *Parental Divorce in Early Childhood*, 124 AM. J. PSYCH. 1424, 1426-28 (1968) (escalation of

The common law, in deciding custody disputes, held that fathers had a natural right to the custody of their minor children.⁷⁴ However, in the middle part of the nineteenth century, courts formulated the "tender years doctrine"⁷⁵ which provided that a child of tender years⁷⁶ belonged with his or her natural mother unless she was determined to be unfit because of moral turpitude or mental illness.⁷⁷ This new decisional standard eventually evolved into a maternal custody preference,⁷⁸ the strength of which rivaled that of the paternal

aggressive behavior); Miller, *Psychotherapy of a Child in a Custody Dispute*, 15 AM. ACAD. CHILD PSYCH. J. 441, 442 (1976) (some children may experience multiple fantasies); Sugar, *Children of Divorce*, 46 PEDIATRICS 558, 589 (1970) (separation anxieties); *Experiences of the Child in Later Latency*, *supra* note 70, at 265, 269 (learning disabilities; sexual precociousness); *Experiences of the Preschool Child*, *supra* note 70, at 606, 615 (loss of self-esteem; learning disabilities); Westman, Cline, Swift & Kramer, *Role of Child Psychiatry in Divorce*, 23 ARCHIVES GEN. PSYCH. 416, 416 (1970) (adverse psychological consequences).

It is therefore apparent that marital dissolution may have devastating effects upon children. Nonetheless, this does not mean that all children suffer irreparable damage from divorce. See *Lawyering for the Child*, *supra* note 71, at 1128 n.12. It should be noted that the response of children to divorce varies greatly according to their developmental stage. See Kelly & Wallerstein, *Brief Interventions with Children in Divorcing Families*, 47 AM. J. ORTHOPSYCH. 23, 29-30 (1977).

74. See, e.g., *Johnson v. Terry*, 34 Conn. 259 (1857); *Coche v. Hannum*, 39 Miss. 423 (1865); *Magee v. Holland*, 27 N.J.L. 86 (Sup. Ct. 1858); *Commonwealth v. Murray*, 4 Binn. 487 (Pa. 1812).

75. See Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 425 (1977). An early formulation of the tender years doctrine was explicated by a nineteenth century court as follows:

[A]n infant of tender years is generally left with the mother, (if no objection to her is shown to exist) even when the father is without blame, merely because of his inability to bestow upon it that tender care which nature requires, and which it is the peculiar province of a mother to supply.

Miner v. Miner, 11 Ill. 43, 49-50 (1849). Another nineteenth century court similarly stated:

The welfare of the child, considering her tender age, her sex, and the delicacy of her constitution, will . . . be best subserved by leaving her for the present with her mother; and indeed we think that for the present, to take her from her mother is too hazardous an experiment for us to try.

McKim v. McKim, 12 R.I. 462, 464 (1878).

It is difficult to date the actual demise of the paternal preference rule. For example, one commentator characterized it as a fiction as early as 1887. See A. LLOYD, *LAW OF DIVORCE* 242 (1887), cited in Moonkin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROB. 226, 235 (1975).

76. Courts have differed in their determinations of the relevant ages of children for applying the tender years doctrine. For a discussion of the age application of the doctrine, see H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 17.4, at 585 (1968). Most courts have agreed that pre-school-aged children are to be considered of tender years. See, e.g., *Goodman v. Goodman*, 291 So. 2d 106, 107-08 (Fla. 1974); *Yager v. Yager*, 83 S.D. 315, 318, 159 N.W.2d 125, 127 (1968). However, courts have not concurred as to the upper limit of the classification. See, e.g., *Russell v. Russell*, 20 Cal. App. 457, 460, 129 P. 467, 468 (1913) (10-year-old boy not of tender years); *Patton v. Armstrong*, 16 Ill. App. 3d 881, 882, 307 N.E.2d 178, 179 (1974) (11-year-old girl and 14-year-old boy not of tender years).

77. See Roth, *supra* note 75, at 425.

78. See Jones, *supra* note 71, at 696. For an extensive collection of cases adhering to the maternal custody preference, see Roth, *supra* note 75, at 432-34 n.38.

presumption it supplanted. The growing acceptance of this preference reflected the increasing belief among social scientists that men were physiologically and psychologically unsuited for the task of rearing minor children.⁷⁹

In recent years, most states have eliminated both parental preferences, statutorily declaring that parents have equal rights to their children.⁸⁰ These states have replaced the old decisional preferences with the "best interests of the child" standard⁸¹ which provides that the child's welfare, not the sex of the parent, is the determinative factor in adjudicating interparental custody disputes.⁸² However, de-

79. See J. LEVINE, WHO WILL RAISE THE CHILDREN: NEW OPTIONS FOR FATHERS (AND MOTHERS) 29 (1976). As Levine explained:

The social science doctrine was that men and women were "biologically destined" to play not only different but mutually exclusive roles as parents; that an inherent nurturing ability disposes women to be more interested in and able to care for children than are men; and that for their well-being, children need mothers in a way that they do not need fathers.

Id.

80. See, e.g., FLA. STAT. ANN. § 61.13(2)(b) (West Supp. 1977) (upon considering all relevant factors, the father of the child shall be given the same consideration as the mother in determining custody); OR. REV. STAT. § 107.137(3) (1975) (no preference in custody shall be given to the mother over the father for the sole reason that she is the mother); TEX. FAM. CODE ANN. tit. 2, § 14.01(b) (Vernon 1975) (the court shall consider the qualifications of the respective parents without regard to the sex of the parent).

81. See Zuckman & Fox, *The Ferment in Divorce Legislation*, 12 J. FAM. L. 515, 572 (1972-73) (48 states have adopted, in some form, the best interests of the child standard).

In view of the former strength of the maternal preference rule, commentators have suggested two main reasons for its decline. First is the improved status of women in society. See Behles & Behles, *Equal Rights in Divorce and Separation*, 3 N.M.L. REV. 118, 132 (1973); Oster, *Custody Proceedings: A Study of Vague and Indefinite Standards*, 5 J. FAM. L. 21, 26 (1965); Walker, *Measuring The Child's Best Interest—A Study of Incomplete Considerations*, 44 DEN. L.J. 132, 139 (1976). The second reason suggested is contemporary rejection of the purported scientific basis for the former rule. See Podell, Peck & First, *Custody—To Which Parent?*, 56 MARQ. L. REV. 51, 53 (1972); Roth, *supra* note 75, at 449; Comment, *The Tender Years Presumption: Do The Children Bear the Burden?*, 21 S.D.L. REV. 332, 334 (1976). For a statement of the basis of the maternal preference rule, see note 79 *supra*.

Despite the statutory elimination of the maternal preference rule, mothers are still awarded custody of their minor children in the overwhelming number of cases. See Jones, *supra* note 71, at 736 ("custody of minor children is awarded to the children's mother in ninety-five percent of the cases"). The literature suggests a number of reasons for this continued judicial preference for mothers as the custodial parents. See, e.g., *id.* at 734 (the ease of administration and the carryover from widespread acceptance of the maternal preference doctrine); Schiller, *Child Custody: Evolution of Current Criteria*, 26 DEPAUL L. REV. 241, 243 (1977) (judges continue to believe that it is in the best interests of young children to place them in the custody of their mothers).

82. See Folberg & Graham, *supra* note 68, at 523-33. The enunciation of the best interests test is credited to Justice Brewer who, in a nineteenth century decision, emphasized the welfare of the child, not the natural right of the father, in determining custody. See *Chapsky v. Wood*, 26 Kan. 650 (1881). It was in *Finlay v. Finlay*, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925), however, that Judge Cardozo provided the first clear articulation of the best interests of the child standard:

[The judge] does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against anyone. He acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a "wise, affectionate and careful parent" and make provision for the child

spite widespread legal acceptance of the standard, social scientists and therapists are still uncertain as to what actually constitutes the best interests of the child. For example, Goldstein, Freud, and Solnit⁸³ posit that continuity in a child's relationships and environment is essential for his or her normal development.⁸⁴ Based on their view of the importance of this constancy, the aforementioned authors assert that, often, absolute single custody serves the child's best interests.⁸⁵ The component parts of this custodial arrangement are: 1) a permanent and unmodifiable custody decree;⁸⁶ 2) the expeditious

accordingly. . . . He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights "as between a parent and a child" or as between one parent and another. . . . Equity does not concern itself with such disputes in their relation to the disputants. Its concern is for the child.

Id., quoting *Queen v. Gyngall*, [1893] 2 Q.B. Div. 232 (other citations omitted). For a discussion of the best interests standard in Pennsylvania, see Bertin & Anthony Klein, *supra* note 71, *passim*.

83. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973) [hereinafter cited as *BEYOND THE BEST INTERESTS*].

84. *Id.* at 31-32. The importance of continuity was explained by Goldstein, Freud, and Solnit as follows:

Physical, emotional, intellectual, social, and moral growth does not happen without causing the child inevitable internal difficulties. The instability of all mental processes during the period of development needs to be offset by stability and uninterrupted support from external sources. Smooth growth is arrested or disrupted when upheavals and changes in the external world are added to the internal ones.

Id. at 32.

The need for stability and continuity in a child's life has long been recognized as important for normal child development. See, e.g., Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1209 (1969); Foster, *Adoption and Child Custody: Best Interests of the Child?*, 22 BUFF. L. REV. 1, 12 (1972); Watson, *supra* note 7, at 64.

85. *BEYOND THE BEST INTERESTS*, *supra* note 83, at 37-38. The authors maintain: "Once it is determined who will be the custodial parent, it is that parent, not the court, who must decide under what conditions he or she wishes to raise the child." *Id.* at 38. The courts, however, have rejected the concept of absolute single custody as a viable custodial arrangement following divorce. See, e.g., *Pierce v. Yerkovich*, 80 Misc. 2d 613, 623, 363 N.Y.S.2d 403, 412 (Fam. Ct. 1974). The *Pierce* court stated:

[T]he Court totally rejects the specious notion so ingenuously urged . . . that the custodial parent should have the sole right to determine in the name of the best interests of the child whether the noncustodial parent should be permitted or denied association with his own child. Experience and common sense teach that, given the imperfections of human nature from which flow the bitterness and resentment which all too often accompany a marital or illicit love affair breakup, no one parent can, under such circumstances, be safely entrusted with a power so susceptible of abuse.

Id. See also *In re J. & J.W.*, 134 Vt. 480, 484, 365 A.2d 521, 524 (1976).

86. *BEYOND THE BEST INTERESTS*, *supra* note 83, at 37. Goldstein, Freud, and Solnit are opposed to the modifiability of custody decrees because the "absence of finality coupled with the concomitant increase in opportunities for appeal are in conflict with the child's needs for continuity." *Id.*

The nonpermanence of custody decrees has been criticized. See, e.g., L. TESSMAN, *CHILDREN OF PARTING PARENTS* 281 (1978); Watson, *supra* note 7, at 63-64. However, a few commentators are in favor of permanent custody decrees. See, e.g., Benedek & Benedek, *supra* note 73, at 265-66; Foster, *Book Review*, 12 WILLAMETTE L.J. 545, 551 (1976). One reason for the continued support of nonpermanent decrees has been explained as follows: "[M]odification

award of custody to the child's psychological parent (who perhaps may not be a biological parent),⁸⁷ and 3) the absolute control of this parent over the child's upbringing.⁸⁸ In addition, Goldstein, Freud, and Solnit believe that the custodial parent's authority should encompass the exclusive right to grant or deny visitation privileges to the non-custodial parent.⁸⁹ This particular position, which has been subjected to severe criticism from some courts and therapists, is rarely warranted.⁹⁰

A number of commentators espouse an opposing viewpoint.⁹¹ For example, Boszormenyi-Nagy and Spark⁹² assert that invisible

may benefit the child. The custodial parent's ability to provide competent and supportive care may wane; a child's need for one parent at an early stage of development may give way to a need for the greater influences of the other parent at a later state." *Lawyering for the Child*, *supra* note 71, at 1133 (footnote omitted).

This conflict with regard to the relative advantages of both permanent and nonpermanent custody decrees has engendered a compromise position which proposes that a specific minimal period be set before post-decree challenges can be heard. *See, e.g.*, UNIFORM MARRIAGE & DIVORCE ACT § 409(a), reprinted in 9A UNIFORM LAWS ANN. 91, 211 (1979) (noncustodial parent must wait two years after initial decree before moving for modification). Four states have adopted the Act. *See* COLO. REV. STAT. §§ 14-10-101 to -10-133 (1974 & Supp. 1976); ILL. REV. STAT. ch. 40, §§ 101-707 (Smith-Hurd Supp. 1978); KY. REV. STAT. §§ 403.110-.350 (Supp. 1978); MONT. REV. CODES ANN. §§ 48-301 to -341 (Supp. 1977).

87. BEYOND THE BEST INTERESTS, *supra* note 83; at 17-20, 37-38, 46-47. Goldstein, Freud, and Solnit define the term "psychological parent" as follows: "A psychological parent is one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs." *Id.* at 99. The authors recognize that both parents can be psychological parents, but agree that only one parent should be awarded absolute single custody because

[c]hildren have difficulty in relating positively to, profiting from, and maintaining contact with two psychological parents who are not in positive contact with each other. Loyalty conflicts are common and normal under such conditions and may have devastating consequences by destroying the child's positive relationships to both parents. A "visiting" or "visited" parent has little chance to serve as a true object for love, trust, and identification, since this role is based on his being available on an uninterrupted day-to-day basis.

Id. at 38.

Despite their reliance on the concept of the psychological parent, the authors do not provide specific criteria for determining which parent would be so designated in a contested custody case. *Id.* at 153 n.12.

88. *Id.* at 105. Goldstein, Freud, and Solnit believe that "the law, to accord with the continuity guideline, must safeguard the rights of any adults, serving as parents, to raise their children as they see fit, free of intervention by the state, and free of law-aided and law-abetted harassment by disappointed adult claimants." *Id.*

89. *Id.* at 38.

90. *See, e.g.*, *Pierce v. Yerkovich*, 80 Misc. 2d 613, 623, 363 N.Y.S.2d 403, 412 (Fam. Ct. 1974); *In re J. & J.W.*, 134 Vt. 480, 484, 365 A.2d 521, 524 (1976); Foster, *supra* note 84, at 551; note 85 *supra*. Foster states:

In short, at the whim of the custodial parent, all contact with the other parent would be foreclosed. Such a position ignores the child's needs and desires, as well as those of the other parent, and in the name of continuity and autonomy encourages spiteful behavior. Given such power, one can visualize the blackmailing, extortion and imposition which might be visited upon the non-custodial parent who wants to maintain contact with his or her child.

Foster, *supra* note 84, at 551.

91. *See* notes 85 & 90 *supra*; notes 92-97 and accompanying text *infra*.

92. I. BOSZORMENYI-NAGY & G. SPARK, *INVISIBLE LOYALTIES* (1973).

loyalties are inherent in parent-child relationships and that these loyalties are permanent and inviolate.⁹³ Thus, they believe that continued access to both parents benefits a child's well-being and that liberal visitation privileges are in his or her best interest.⁹⁴ My own clinical experience verifies that a child normally benefits from a meaningful relationship with both divorced parents.⁹⁵ Therefore, assuming both parents are capable of child-rearing, a critical factor in awarding primary custody should be which parent is better able to permit the noncustodial parent to maintain a relationship with the child.

Visitation, however, may not always be in the child's best interest, such as when the noncustodial parent is severely disturbed, alcoholic, or sadistic. Here, protecting the child from possible exploitation or brutality is clearly of greater value than fostering the invisible loyalties inherent in a parent-child relationship. But, it is the court that should make this important determination,⁹⁶ not the custodial parent who, for personal reasons, may selfishly exaggerate the ex-spouse's aberrant behavior.⁹⁷

Joint custody,⁹⁸ a relatively new arrangement, has emerged as an alternative to the more traditional forms of custody.⁹⁹ It allows both

93. For a discussion of the authors' concept of loyalty, see *id.* at 37-52. For an opposing viewpoint, see note 87 *supra*.

94. State codes also support the liberal visitation concept. See, e.g., CAL. CIV. CODE § 4601 (West 1970) ("Reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child"); ILL. ANN. STAT. ch. 40, § 607 (Smith-Hurd Supp. 1978) (noncustodial parent entitled to reasonable visitation after hearing determining that visitation would not seriously endanger the child's well-being); TEX. FAM. CODE ANN. tit. 2, § 14.03(c) (Vernon 1974) ("Court may not deny . . . access to a child to either or both parents unless it finds that parental . . . access is not in the best interests of the child and . . . would endanger the physical or emotional welfare of the child").

95. *Accord*, Wallerstein & Kelly, *Divorce Counselling: A Community Service for Families in the Midst of Divorce*, 47 AM. J. ORTHOPSYCH. 4, 15 (1977) (visitation can be crucial to a child because of the intense longing that many children feel for the noncustodial parent). See also note 70 *supra*.

96. Note that the courts evidence a reluctance to curtail or terminate a noncustodial parent's visitation privileges. See, e.g., *People ex rel. Edwards v. Livingston*, 42 Ill. 2d 201, 211, 247 N.E.2d 417, 422-23 (1969); *Radford v. Matczuk*, 223 Md. 483, 488-94, 164 A.2d 904, 907-10 (1960); *Hotze v. Hotze*, 57 A.D.2d 85, 88, 394 N.Y.S.2d 753, 755-57 (1977). The courts, however, have taken such action when a child's emotional and psychological health is found to be threatened by continued visitation. See, e.g., *Neblett v. Neblett*, 274 Wis. 574, 578, 81 N.W.2d 61, 63-64 (1957); *Hill v. Hill*, 423 S.W.2d 943, 945-46 (Tex. Civ. App. 1968); *Thompson v. Thompson*, 9 Wash. App. 930, 935-36, 515 P.2d 1004, 1006-07 (1973).

97. See Wallerstein & Kelly, *supra* note 95, at 12 (describing situations in which embittered parents used children in order to vent their angers against noncustodial parents).

98. It is difficult to posit a precise definition of joint custody. See *Dodd v. Dodd*, 93 Misc. 2d 641, 403 N.Y.S.2d 401, (Sup. Ct. 1978). The *Dodd* court stated that "[t]here has been no uniform application of the term 'joint custody' and no single arrangement which results when a joint award is made." *Id.* Its distinguishing characteristic is that both parents retain legal responsibility and authority for the care and control of the child. See Folberg & Graham, *supra* note 68, at 528-29.

parents to retain equal legal responsibility for the care and control of their children; and although in the strict sense it does not address the issue of physical custody,¹⁰⁰ it does provide parents with greater flexibility to determine the physical custody arrangements appropriate to their situation. A variety of living arrangements are available under joint custody, including split weeks¹⁰¹ and alternating weeks or months with the children.¹⁰² The children may also continue to reside in the family home with the parents themselves taking turns living there.¹⁰³ However, the essence of joint custody lies not in the parent's equal division of the children's time, but in their joint responsibility for making decisions which affect the children's lives¹⁰⁴ and in being involved in salient ways with the children.

While proponents of joint custody argue that it serves the best interests of the child,¹⁰⁵ this custodial arrangement seems to serve the parents' interests as well. For example, noncustodial fathers ordinarily have great difficulty in maintaining normal paternal interaction

For discussions on the topic of joint custody, see generally M. ROMAN & W. HADDAD, *THE DISPOSABLE PARENT: THE CASE FOR JOINT CUSTODY* (1978); Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978 (1977); Brah, *Joint Custody*, 67 KY. L.J. 271 (1979); Folberg & Graham, *supra* note 68; Lowe, *Joint Custody Orders and Maintenance*, 127 NEW L.J. 184 (1977); Ramey, Stender & Smaller, *Joint Custody: Are Two Homes Better Than One?*, 8 GOLDEN GATE U.L. REV. 559 (1979); Comment, *supra* note 65.

99. See Folberg & Graham, *supra* note 68, at 523-24. Folberg and Graham observed: "Increasing numbers of parents are attempting to continue their joint role as parents following divorce by exercising joint custody over their children". *Id.* at 523. Nevertheless, divorced parents who formally obtain joint custody decrees remain a relatively small minority. *Id.* at 523 n.1. Sole custody, also known as single or exclusive custody, is still the most common form of custodial arrangement. See Comment, *supra* note 65, at 1095. Under sole custody, "[t]he non-custodian, by informal agreement, may have a voice in important decisions affecting the child, but ultimate control and legal responsibility rest with the custodial parent." Folberg & Graham, *supra* note 68, at 526.

100. See Comment, *supra* note 65, at 1088. Accordingly, courts have awarded both parents legal custody, but only one parent physical custody. See, e.g., *Perotti v. Perotti*, 78 Misc. 2d 131, 355 N.Y.S.2d 68 (Sup. Ct. 1974); *Zinni v. Zinni*, 103 R.I. 417, 238 A.2d 373 (1968). However, joint custody is increasingly coming to connote a division of physical custody as well as shared legal custody. See Comment, *supra* note 65, at 1088.

101. See M. ROMAN & W. HADDAD, *supra* note 98, at 129; Holly, *Joint Custody: The New Haven Plan*, MS. MAGAZINE, Sept. 1976, at 70; Pick, *Father Knows Best*, STUDENT LAW., May 1978, at 42; Roman & Haddad, *The Case for Joint Custody*, PSYCH. TODAY, Sept. 1978, at 100.

102. For examples of this type of joint custody arrangement, see M. GALPER, *CO-PARENTING* 33-34 (1978).

103. For examples of this residential joint custody arrangement, see 1 FAM. L. REP. 2708, 2709 (1975).

104. See Folberg & Graham, *supra* note 68, at 528-29; Comment, *supra* note 65, at 1088-89, 1104-05. This concept of joint custodial rights and responsibilities is embodied in Wisconsin's new joint custody statute. See WIS. STAT. ANN. § 247.24 (West Supp. 1978-1979) ("Joint custody . . . means that both parties have equal rights and responsibilities to the minor child and neither party's rights are superior"). *Id.*

105. See Comment, *supra* note 65, at 116-17.

with their children,¹⁰⁶ and the loss of such interaction appears to compound the problems they experience following divorce.¹⁰⁷ Mothers awarded sole custody also appear to suffer severe consequences, including physical and emotional exhaustion,¹⁰⁸ as well as social isolation¹⁰⁹ and financial hardship.¹¹⁰ Therefore, by enabling divorced fathers to retain active parental roles, and by making it feasible for mothers to share the parental responsibilities, joint custody may be less disruptive than other custodial arrangements for all parties involved.¹¹¹

Nevertheless, joint custody may not always be appropriate,¹¹² and, thus, criteria for its designation must be enunciated. My experience suggests that the following factors must be present in order for joint custodial arrangements to function without serious disruptions: 1) commitment by both parents to the concept that a child's continued relationship with both of them is vital to the child's well-being; 2) a willingness to live in the same geographic locale;¹¹³ 3) a willingness not to relocate; 4) reasonable flexibility and cooperation on the part of both spouses in their relationship with each other; 5) a will-

106. See, e.g., E. ATKIN & E. RUBIN, PART-TIME FATHER 29 (1976); M. ROMAN & W. HADDAD, *supra* note 98, at 83; Hetherington, Cox & Cox, *supra* note 70, at 421; Wallenstein & Kelly, *supra* note 95, at 10; Comment, *supra* note 65, at 1113-14. A common reaction to this situation among noncustodial fathers is to decrease or terminate their visits with their children. See Hetherington, Cox & Cox, *supra* at 427. The reason for this reaction has been explained as follows: "[The fathers] could not endure the pain of seeing their children only intermittently and by two years after divorce had coped with this stress by seeing their children infrequently although they continued to experience a great sense of loss and depression." *Id.*

107. Regarding the adverse effects of minimal post-divorce interaction between father and child, see M. ROMAN & W. HADDAD, *supra* note 98, at 1-21, 81-83; Benedek & Benedek, *supra* note 73, at 262; Derdeyn, *Children in Divorce: Intervention in the Phase of Separation*, 60 PEDIATRICS 20, 22-23 (1977); Grief, *Fathers, Children and Joint Custody*, 49 AM. J. ORTHOPSYCH. 311, 316-17 (1979).

108. See M. ROMAN & W. HADDAD, *supra* note 98, at 79; Folberg & Graham, *supra* note 68, at 553.

109. See Folberg & Graham, *supra* note 68, at 553; Comment, *supra* note 65, at 1115.

110. See Comment, *supra* note 65, at 1114-15.

111. See Folberg & Graham, *supra* note 68, at 536-37. Folberg and Graham maintain that "[t]he least disruptive custody arrangement following divorce is likely to be the one most resembling the custody and control exercised before divorce." *Id.*

112. See Folberg & Graham, *supra* note 68, at 576. For example, a number of commentators concur that joint custody is not an appropriate arrangement when severe antagonism exists between the divorced couple. See, e.g., M. ROMAN & W. HADDAD, *supra* note 122, at 117; Henszey, *Visitation by a Non-Custodial Parent: What is the "Best Interest" Doctrine?*, 15 J. FAM. L. 213, 231 (1977).

113. For further discussion of physical proximity as a requirement for joint custody, see Folberg & Graham, *supra* note 68, at 561-62. Folberg and Graham suggest that the importance of geographical closeness depends upon a number of factors, namely "age of the child, school arrangements, location of other members of the child's network of supporters (grandparents, cousins, friends), ease and availability of transportation, and the family's financial resources." *Id.* at 561. The authors further state that geographical proximity is not essential if both parents are committed to acting in their child's best interests. *Id.* at 562.

ingness to integrate the child into the social structure of a subsequent marriage and new family; and 6) a willingness not to intrude into the aspects of the former spouse's private life which are not of direct relevance to the child's upbringing. Thus, in short, it requires great maturity and a lack of animosity between the parents for joint custody to be a successful arrangement.

In conclusion, the complexity of custodial arrangements and the split loyalties that often result make emotional adjustment to post-divorce familial relationships both difficult and time consuming. This adjustment constitutes part of the process of restabilization which divorced families must undergo. It further comprises part of the divorce experience which both attorneys and the courts must be familiar with and must understand, even though this adjustment often occurs after formal legal involvement has ended.

E. *The Community Divorce*

Bohannon's fifth station is entitled the "community divorce and the problem of loneliness."¹¹⁴ This stage is concerned with the change in the divorced person's social community.¹¹⁵ Married friends of a divorced couple tend to remain friendly with only one of the ex-spouses¹¹⁶ and they themselves may no longer feel comfortable with their still married friends.¹¹⁷ For example, because they no longer live in the world of the married, divorcees often feel awkward when invited to social functions attended only by married pairs.

Married friends may try to arrange dates for the ex-spouse, but they usually know few eligible single persons. Single and married people, for the most part, simply frequent different places and move in different social circles.¹¹⁸ Thus, until he or she meets other unattached people, the recently divorced person customarily experiences a transitional phase of feeling lonely—of being uprooted.¹¹⁹ Gradually, the person's overwhelming sense of loneliness begins to lessen and emotional energy becomes available to construct a new social network.

114. Bohannon, *supra* note 8, at 475, 487-88.

115. *Id.* at 475. Bohannon remarks that "[d]ivorce means 'forsaking all others' just as much as marriage does, and in about the same degree." *Id.* at 487.

116. *Id.* at 487.

117. *Id.* Bohannon observes: "The biggest complaint is that divorcees are made to feel uncomfortable by their married friends." *Id.*

118. *Id.* Bohannon suggests that "[l]ike newly marrieds, new divorcees have to find new communities. They tend to find them among the divorced." *Id.*

119. *Id.*

To help the divorced person establish new relationships, the therapist and attorney must first understand that many divorced persons find it psychologically difficult to attempt to meet others in their own age category who share similar interests. This problem is compounded by the fact that they often do not know where to go or what to do once there. The singles scene has probably changed markedly since they were last unattached, and they do not understand its expectations and conventions. In order to assist the client who is ready to socialize, the therapist and attorney may want to recommend to the client some of the popular books about divorce and its aftermath so that the client can understand that his or her reactions are normal.¹²⁰ The therapist may also want to indicate the types of problems the client is likely to encounter in trying to establish new social attachments, and point out that others have undergone similar experiences and survived. So that he or she may advise the client about social opportunities, the attorney and therapist alike may also want to be knowledgeable about local social clubs and the type of clientele they attract, apartment complexes popular with single adults, and community-based, self-help groups which sponsor organized activities for the newly single.

F. *The Psychic Divorce*

Bohannon's final station is the "psychic divorce,"¹²¹ the stage during which the problem of gaining individual autonomy is confronted and resolved.¹²² This is the most difficult station of divorce to experience¹²³ since it involves both the separation of the self from the ex-spouse's personality and influence, as well as the acceptance of full responsibility for one's own thoughts and actions.¹²⁴ Essentially, no longer is there a partner to rely on or to complain about.¹²⁵

120. The more popular of such books include the following: J. BLOCK, *BACK IN CIRCULATION* (1969); M. CHANPAGNE, *FACING LIFE ALONE, WHAT WIDOWS AND DIVORCEES SHOULD KNOW* (1964); D. FREDI, *LOVE THE SECOND TIME AROUND* (1969); M. HUNT, *THE WORLD OF THE FORMERLY MARRIED* (1966); L. HUTTON, *THE SINGLE WOMAN: HER ADJUSTMENT TO LIFE AND LOVE* (1962); S. JOHNSON, *supra* note 29; H. LYMAN, *SINGLE AGAIN* (1971); L. ROHNER, *THE DIVORCEE'S HANDBOOK* (1967); B. STEINZOR, *WHEN PARENTS DIVORCE: A NEW APPROACH TO NEW RELATIONSHIPS* (1969).

121. Bohannon, *supra* note 8, at 475. Bohannon defines psychic divorce as follows: "[It] means the separation of self from the personality and the influence of the ex-spouse" *Id.* at 488.

122. *Id.* at 476.

123. *Id.*

124. *Id.* at 488. Bohannon explains that the divorced person "must regain . . . the dependence on self and faith in one's own capacity to cope with the environment, with people, with thoughts and emotions." *Id.*

125. *Id.*

The successful resolution of the divorce experience¹²⁶ occurs, in the view of this author, when the divorced person has achieved a reasonable understanding of the reasons why he or she entered into the marriage, the factors which contributed to his or her choice of the spouse, the unresolved intrapsychic problems which led to the marital strife, and the combination of factors which caused the actual divorce.

III. KESSLER'S SEVEN STAGE MODEL

Professor Bohannan is not the only theorist who has developed a stage model of divorce.¹²⁷ Another significant model is the one developed by Dr. Sheila Kessler.¹²⁸ This model details the stages of emotional divorce,¹²⁹ the gradual process by which the emotional relationship between two persons dies and each gains or regains his or her emotional independence.¹³⁰ Kessler's model differs from Bohannan's model in that it begins its analysis at an earlier point in the process of marital dissolution. Thus, it will give the attorney a greater understanding of the process itself.

A. Disillusionment

Kessler's first stage, "disillusionment," marks the spouses' dawning awareness that their expectations of marriage do not coincide with

126. Bohannan summarizes his view of a successful divorce as follows:

A "successful" divorce begins with the realization by two people that they do not have any constructive future together. That decision itself is a recognition of the emotional divorce. It proceeds through the legal channels of undoing the wedding, through the economic division of property and arrangement for alimony and support. The successful divorce involves determining ways in which children can be informed, educated in their new roles, loved and provided for. It involves finding a new community. Finally, it involves finding your own autonomy as a person and as a personality.

Id.

127. Several other clinical theoreticians have developed models which delineate the stages of the emotional divorce. See Froiland & Hozman, *supra* note 15, at 525-29; Wiseman, *supra* note 15, at 205-12. Wiseman's model identifies five stages in the divorce process: 1) denial; 2) loss and depression; 3) anger and ambivalence; 4) reorientation of lifestyle and identity; and 5) acceptance and integration. See *id.* at 206. Similarly, the model developed by Froiland and Hozman identifies five stages in the divorce process: 1) denial; 2) anger; 3) bargaining; 4) depression; and 5) acceptance. See Froiland & Hozman, *supra*, at 525-26.

Both models are based on the five-stage loss model developed by Kubler-Rose to delineate the grieving process which occurs in response to the death of a loved one. See E. KUBLER-ROSS, *ON DEATH AND DYING* (1969). In addition to Professor Wiseman and Professors Froiland and Hozman, a number of commentators conceptualize the divorce process as similar to the process of coping with death. See generally E. FISHER, *DIVORCE: THE NEW FREEDOM* (1974); M. KRANTZLER, *CREATIVE DIVORCE: A NEW OPPORTUNITY FOR PERSONAL GROWTH* (1974). See also note 15 *supra*. But see W. GOODE, *WOMEN IN DIVORCE* 185 (1956) (comparisons between divorce and death are not theoretically fruitful for analyzing the trauma of divorce).

128. S. KESSLER, *supra* note 8, at 19-44.

129. *Id.* at 5. As discussed *infra*, the stages are as follows: 1) disillusionment; 2) erosion; 3) detachment; 4) separation; 5) mourning; 6) second adolescence; and 7) hard work. *Id.*

130. See generally *id.* 19-44.

the realities of married life.¹³¹ This awareness initially may assume the form of unexpressed disappointment, but if the emotional tension being felt is not discussed, conscious uncertainty about the union's continued efficacy normally develops.¹³² As their doubts about the relationship multiply and surface, the spouses' disgruntlement is increasingly likely to be expressed verbally. Such expression may still be suppressed, however, due to either an inability to communicate innermost feelings or a fear of the consequences of open confrontation.

B. Erosion

If the discontent and dissatisfaction are not discussed and resolved, the couple will eventually enter into what Kessler calls "erosion," the second stage.¹³³ During this period, the spouses' disenchantment is manifested in both overt and covert verbal and non-verbal behavior,¹³⁴ including searing criticism and sarcasm directed toward the other spouse, noncompliance with requests, withdrawal from contact and conversation, and infidelity.¹³⁵ In addition, the emotional hostility and decrease in caring characteristic of this stage may be transformed into physical problems,¹³⁶ such as sexual inadequacy,¹³⁷ dysmenorrhea,¹³⁸ or ulcers.¹³⁹

131. *Id.* at 20. Kessler explains the beginning of the disillusionment process as follows: It starts "when you begin to undress the spouse psychologically. One spouse will take off his or her blindfold of romantic involvement and see the real differences." *Id.* at 20. Kessler believes, however, that this disillusionment is "easily reversed if [the] two people are willing and able to admit differences and modify their habits for one another while accepting the unchangeable." *Id.* at 22. Kessler also maintains that experiencing this stage can be beneficial to a marriage for it may integrate "the expectations of two people with reality. Every spouse needs to go through the process of meshing and differentiating his or her real spouse with the ideal spouse." S. KESSLER, *supra* note 8, at 22. For a more detailed discussion of the "disillusionment" stage, see *id.* at 20-22.

132. S. KESSLER, *supra* note 8, at 21-22.

133. *Id.* at 22. Kessler explains the use of the word "erosion" by stating: "Erosion is the wearing away of marital happiness." *Id.* The individuals who progress to this stage are those who "have stockpiled negative emotions so long that it becomes necessary to purge them." *Id.* For further discussion of the erosion stage, see *id.* at 22-26.

134. *Id.* at 23.

135. *Id.* at 23-25. With respect to infidelity, Kessler states that "[t]he extramarital affair by itself does not destroy the marriage" but "[w]hat does gnaw at the existing marriage is the guilt of the roving partner." *Id.* at 24.

136. *Id.* at 23-24.

137. *Id.* at 24. Sexual inadequacy, namely impotency in men and frigidity in women, "expresses [the spouse's] frozen anger." *Id.*

138. *Id.* at 23. Dysmenorrhea is the condition of "[d]ifficult or painful menstruation." BLAKISTON'S NEW GOULD MEDICAL DICTIONARY 320 (H. Jones, N. Hoerr & A. Osol, eds. 1953).

139. S. KESSLER, *supra* note 8, at 23-24.

My experience has indicated that some couples remain in the erosion stage for a prolonged period of time, maintaining an uneasy and unsatisfactory status quo, living in a quandary yet unwilling to extricate themselves from their marriages.¹⁴⁰ Nonetheless, despite this emotional dilemma, the discontent characteristic of this state is reversible,¹⁴¹ and reconciliation is still possible if therapy is sought.¹⁴²

C. Detachment

Kessler's third stage, "detachment," delineates the demise of the couple's emotional commitment to the marriage.¹⁴³ Increasing boredom, not intensifying conflict, marks this stage, as the relationship now lacks the qualities necessary to keep it vital.¹⁴⁴

A major problem confronted by a divorcing couple is that often both spouses do not reach this stage concurrently.¹⁴⁵ However, once one partner's commitment to the marriage is substantially diminished,

140. My clinical experience has been that these couples are unwilling to terminate their marriages for one or more of the following reasons: 1) personal abhorrence of divorce; 2) refusal to admit mistakes in the selection of their mate; 3) refusal to believe that, although they were initially a good pair, with the passage of time the relationship has worn thin; 4) the belief that divorce constitutes failure; 5) reluctance to humiliate or disappoint parents or incur their censure; 6) the desire to preserve the family unit for the children's benefit; 7) the fear of assuming complete responsibility for thoughts and actions; 8) religious opposition to divorce; 9) the fear of financial hardship; and 10) inability to discard the socially imposed concept of a perfect marriage.

141. S. KESSLER, *supra* note 8, at 25. Kessler asserts that erosion is more difficult than disillusionment to reverse because "[e]rosion instills habits that also acquire payoff values"—such as a spouse's feeling of superiority engendered by the public ridicule of his or her partner—and because "[g]iving up these payoffs is more difficult than compromising expectations." *Id.* Nonetheless, reconciliation is still possible because "the couple are still very much involved with each other." *Id.* at 25-26.

142. My experience has been that couples may also seek legal assistance at this stage. The attorney should, therefore, be familiar with the types of intervention available to assist couples who are interested in preserving their marriages. For a general discussion of contemporary therapeutic strategies available for treating the divorcing, see Kaslow, *supra* note 1, *passim*. See also note 156 *infra*. Such knowledge will enable the attorney to more properly advise prospective clients about the available alternatives to legal action.

The attorney must be aware, however, that therapy may destroy the possibility of reconciliation if only one of the two spouses is willing to enter into treatment. See generally Whitaker & Miller, *A Re-evaluation of "Psychiatric Help" When Divorce Impends*, 126 AM. J. PSYCH. 57 (1969). In recognition of the problems associated with individual therapy, several commentators recommend conjoint marital intervention. See, e.g., Kaslow & Lieberman, *Couples Group Therapy: Rationale, Dynamics and Process*, in A HANDBOOK OF MARRIAGE, MARITAL THERAPY AND DIVORCE (P. Sholevar ed. 1981); Markowitz & Kadis, *Short Term Analytic Treatment of Married Couples in a Group by a Therapist Couple*, in PROGRESS IN GROUP AND FAMILY THERAPY (C. Sager & H. Kaplan eds. 1972). For further discussion of the relative values of individual and conjoint therapy, see Kaslow, *supra* note 1, *passim*.

143. S. KESSLER, *supra* note 8, at 20. For a detailed discussion of this stage, see *id.* at 26-29.

144. *Id.* at 27.

145. See *id.*

it is extremely difficult for the still committed spouse to rekindle the detached partner's interest in the marriage.¹⁴⁶ My experience has been that the non-detached spouse's reaction to the other spouse's psychologically threatening revelation may assume a variety of forms, including the substitution of a child for the partner as the primary love object,¹⁴⁷ somatization of the distress into functional ailments, the channeling of energies into work, sports, hobbies, or volunteer activities, and involvement in extramarital affairs.

D. Physical Separation

"Physical separation," Kessler's fourth stage,¹⁴⁸ occurs when the spouses find the marital situation no longer tolerable. If not done with an intent to merely intimidate the other spouse into a desired course of action, moving out is a decisive step in formalizing the marital breach.¹⁴⁹ It is also the most traumatic stage in the emotional divorce.¹⁵⁰

Reflecting the greater social and economic autonomy of men, as well as the popular conception of appropriate conduct, the husband has traditionally been the spouse to leave. However, in response to the emerging financial and social independence of women, some wives now are the ones to move out. This action may be psychologically beneficial to the woman¹⁵¹ but the decision's legal consequences must be carefully considered, for desertion is a ground for divorce in a number of states.¹⁵²

Reconciliation following separation is usually unlikely.¹⁵³ The therapeutic task at this stage is to help the divorcing parties deal with

146. *Id.*

147. The psychological term for using a third party to stabilize a shaky dyadic relationship is "triangulation." For a discussion of this mechanism, see M. BOWEN, *FAMILY THERAPY IN CLINICAL PRACTICE* (1978).

148. S. KESSLER, *supra* note 8, at 20. For further discussion of the physical separation stage, see *id.* at 29-36. For a general discussion of the problems associated with separation, see S. JOHNSON, *supra* note 29, at 21-81.

149. S. KESSLER, *supra* note 8, at 29.

150. *Id.* Kessler believes that this is the most traumatic stage because the divorcing person must face "loneliness, anxiety, confusion and formation of a new identity." *Id.* See also S. JOHNSON, *supra* note 29, at 21. With respect to the formation of a new identity, four areas of identity must be restructured during the divorce process: personal, vocational, sexual, and social. Wiseman, *supra* note 15, at 209. For a discussion of the restructuring of sexual identity, see note 168 *infra*.

151. See S. KESSLER, *supra* note 8, at 30. Kessler explains one of the beneficial results of moving out: "The person who has taken the initiative has a distinct advantage . . . [for] the person who actually makes the move towards separation and/or divorce preserves his or her own integrity." *Id.* However, the person who moves out does not escape emotionally unscathed, for he or she "often feels guilty about leaving." *Id.* at 31.

152. See note 21 *supra*.

153. See R. SHERWIN, *supra* note 30, at 90.

their volatile and debilitating emotions, and to assist them in achieving constructive divorces.¹⁵⁴ Also, in this stage of the divorce, the parties most often consult with an attorney. Therefore, the attorney might do well to consider the ideas offered in this article's discussion of Bohannan's legal divorce stage,¹⁵⁵ for an attorney who is cognizant of the psychosocial implications of divorce may facilitate the accomplishment of the therapeutic task.¹⁵⁶

E. Mourning

Kessler's fifth stage, "mourning,"¹⁵⁷ marks the period in which the divorcing person experiences a sense of loss, together with its emotional outgrowths of anger¹⁵⁸ and depression.¹⁵⁹ These feelings are understandable for the party may lose one or more of the following: a spouse, a sex-partner, a helpmate, children, in-laws, friends, a house, possessions, and a way of life. In addition, if the spouse did not anticipate, or valiantly tried to prevent, the dissolution of the marriage, the sense of loss he or she experiences may be intensified by the feeling of rejection.

The death of a marriage is, in many ways, more difficult to mourn than the death of a spouse, since the divorcing person lacks the sense of finality which accompanies the physical death of a

154. See Kaslow, *supra* note 1, *passim*. Regarding the concept of constructive divorce, see note 126 and accompanying text *supra*. For a discussion of the criteria used to measure the constructiveness of divorce, see Kressel & Deutsch, *Divorce Therapy: An In-Depth Survey of Therapists' Views*, 16 *FAM. PROCESS* 413 (1977).

155. See notes 19-56 and accompanying text *supra*.

156. See Kaslow, *supra* note 1, *passim*. My experience has been that an attorney who is knowledgeable about the psychosocial impact of divorce is better equipped to reduce or eliminate some of the psychologically injurious practices currently, and perhaps unknowingly, engaged in by some members of the legal profession. In order to become knowledgeable about divorce, the attorney should be willing to both consult with the therapist and acquaint himself with the pertinent literature. The interested attorney is therefore referred to the following books and articles for discussions of specific types of therapeutic strategies which are used to treat the divorcing and the divorced: E. FISHER, *supra* note 127 (a combined crisis intervention and ego supportive approach); S. JOHNSON, *supra* note 29 (a combined rational-emotive and cognitive behavioral model); Goldman & Coane, *Family Therapy After the Divorce: Developing a Strategy*, 16 *FAM. PROCESS* 357 (1977) (family therapy approach); Granvold & Welch, *Intervention Postdivorce Adjustment Problems: The Treatment Seminar*, 1 *J. DIVORCE* 81 (1977) (seminar format using a cognitive-behavioral treatment approach); Leader, *Family Therapy For Divorced Fathers and Others Out of Home*, 54 *SOC. CASEWORK* 13 (1973) (family therapy approach); McKinney, *Look, Ma! She (He) Likes Me!*, 4 *TRANSACTIONAL ANALYSIS J.* 26 (1974) (transactional analysis approach); Morris & Prescott, *Adjustment to Divorce Through Transactional Analysis*, 4 *J. FAM. COUNSELING* 66 (1976) (transactional analysis approach). For a discussion of some of these therapeutic strategies, see Kaslow, *supra*, *passim*.

157. S. KESSLER, *supra* note 8, at 20. For a detailed discussion of the mourning stage, see *id.* at 36-40.

158. *Id.* at 37. Regarding the types of anger experienced in the mourning stage, see *id.* at 37-39. See also Froiland & Hozman, *supra* note 15, at 526-27.

159. S. KESSLER, *supra* note 8, at 39-40.

spouse.¹⁶⁰ In addition, the periodic communications between ex-spouses which normally occur during the divorcing process serve to reactivate the sense of loss which they feel.¹⁶¹ In representing the best interests of the client, it is important that the attorney understand the inhibitory effect which such continued contact may have on the mourning process, for the client's well-being is dependent upon the completion of this process.¹⁶² Recovery hinges on accepting the end of the marriage and the many losses it entails so that one can stop living in the past and achieve the release of emotional resources necessary to allow the person to live with some degree of optimism.¹⁶³

F. *Second Adolescence*

Kessler's sixth stage, "second adolescence,"¹⁶⁴ is a time of rejuvenation in which the divorced person begins to feel free of the conflict and pain which has burdened him or her during the emotional divorce.¹⁶⁵ It is also a period of adjustment in which the divorced person attempts to reevaluate his or her needs and interests and to redefine his or her position within the social community.¹⁶⁶ However, in reentering the larger world, divorced persons often overreact to their newly found independence.¹⁶⁷ For example, the divorced person may rigorously pursue previously forbidden actions, such as sexual experimentation with different partners.¹⁶⁸ Others

160. See Beatrice, *supra* note 4, at 160. Beatrice suggests that in order to provide a sense of finality, divorcing couples may find it useful to mark the dissolution of the marriage by some form of ceremony which is attended by close friends and relatives. For a discussion concerning the therapeutic use of such ceremonies, see Kaslow, *supra* note 1, *passim*.

161. See S. JOHNSON, *supra* note 29, at 30.

162. S. KESSLER, *supra* note 8, at 36. Kessler believes that this "psychic cleansing is essential. Mourning helps you rid yourself of the ghost [of the ex-spouse]. If the process does not happen following separation or divorce, chances are it will appear unexpectedly at a later point in time." *Id.* at 36-37. Accord, Beatrice, *supra* note 4, at 160.

163. See Kaslow, *supra* note 1, *passim*. For further discussion of the beneficial effects of the mourning process, see M. KRANTZLER, *supra* note 127, 71-102.

164. S. KESSLER, *supra* note 8, at 20. For a detailed discussion of the second adolescence stage, see *id.* at 40-43.

165. *Id.* at 41.

166. *Id.*

167. *Id.* Kessler believes that one reason for this overreaction is that the moral restraints and time constrictions previously imposed on the divorced person by family and friends are now gone. *Id.*

168. *Id.* See also Wiseman, *supra* note 15, at 209-11. Wiseman posits that the restructuring of sexual identity is a necessary step in achieving a successful emotional divorce: "The sexual aspect of identity is the one that most frequently needs reworking. . . . The need to experiment sexually at this time is of vital importance to many divorcing persons." *Id.* at 209. This need to experiment sexually often takes the form of transient relationships: "Many divorcing persons seek a variety of sexual experiences with a series of partners to whom they have little emotional

may devote an inordinate amount of time to long-deferred activities, such as education, travel, and hobbies.¹⁶⁹ Overreaction is a natural step in the divorced person's reintegration of self. Eventually as the process of personal growth continues, the excesses in lifestyle characteristic of this stage lose their attractiveness and are supplanted by a more balanced way of life.¹⁷⁰

G. Hard Work

"Hard work," the last stage in Kessler's model,¹⁷¹ is where the newly single person completes the arduous tasks of integrating the varied experiences of the divorce, expressing his or her new identity and values in self-selected choices and actions, and assuming responsibility for the future direction of his or her life.¹⁷² The successful completion of this stage requires self-confidence and resiliency, qualities which are present only if the divorcing person has sufficiently recovered from the psychic trauma of the dissolution.¹⁷³ At some point during this final stage of the emotional divorce, the person regains the capacity to maturely cope with the demands of his or her life and to enter into new emotional commitments.¹⁷⁴

IV. THE "DIACLECTIC" MODEL OF THE DIVORCE PROCESS

The two stage theories previously discussed view the process of divorce from somewhat different perspectives, yet neither differentiates the feelings, behaviors, and tasks which must be worked through in order to achieve a constructive divorce. In an effort to rectify this conceptual oversight, a "dialectic" model¹⁷⁵ of the di-

commitment and with whom they feel there is little potential of a long-term relationship." *Id.* at 210. Wiseman suggests three reasons for this behavior: 1) the need to rebuild a damaged self-concept; 2) the need to avoid serious emotional commitment; and 3) the need to compensate for a lack of sexual experience. *Id.*

169. S. KESSLER, *supra* note 8, at 41.

170. *Id.* at 41-42. Concerning the end of this sexual experimentation period, *see* Wiseman, *supra* note 15, at 211. Wiseman states: "As feelings of depression and anxiety about closeness begin to abate, there is a move from casual and transitory relationships to those which involve one other person for a longer period of time and with a deeper degree of emotional commitment." *Id.*

171. S. KESSLER, *supra* note 8, at 20. Kessler describes this stage as a time of personal growth: "Wiser, more aware of self and others, more effective in his or her dealings with others, the person in this last stage has capitalized on the pain of divorce and transformed it into strength." *Id.* at 45. *See also* M. KRANTZLER, *supra* note 127, at 27.

172. *See generally* S. KESSLER, *supra* note 8, at 43-44.

173. *Id.* at 44.

174. *Id.* at 43.

175. The dialectic model was first presented in an earlier article. *See* Kaslow & Lieberman, *supra* note 142. For a more detailed discussion of this model, *see* Kaslow, *supra* note 1, *passim*.

voiced process is presented herein. This author invented the term "dialectic" to convey the fact that her model draws *eclectically* from several sources and that a new, more meaningful, *dialectic* approach to synthesizing the feelings, behaviors, and tasks which must be worked through to achieve a constructive divorce is attempted. This formulation is presented in the following table.

Dialectic Model of Stages in the Divorce Process

Divorce Stage	Feelings	Actions and Tasks
	Disillusionment Dissatisfaction Alienation	Sulking and/or crying Confronting partner Quarreling Seeking therapy
I		
<i>Pre-divorce</i> A time of deliberation and despair	Dread Anguish Ambivalence Shock	Denial Withdrawal (physical and emotional) Pretending all is okay
II	Emptiness Chaos Inadequacy Low self esteem	Attempting to win back affection Asking friends and family for advice

	Depressed Detached Angry Hopelessness Self pity Helplessness	Bargaining Screaming Threatening Attempting suicide Consulting an attorney
III		
<i>During divorce</i> A time of legal involvement	Confusion Fury Sadness Loneliness Relief	Separating physically Filing for legal divorce Considering economic arrangements Considering custody arrangements Grieving and mourning Telling relatives and friends Reentering workworld (unemployed woman)
IV		

		Optimism	Finalizing divorce
		Resignation	Begin reaching out to
		Excitement	new friends
		Curiosity	Undertaking new activities
		Regret	Stabilizing new life style
	V	Sadness	and daily routine for
			children
			Exploring new interests
			and possibly taking
			a new job
<i>Post-divorce</i>		Acceptance	Resynthesis of identity
A time of ex-		Self confidence	Completing psychic divorce
ploration and		Energetic	Seeking new love object
reequilibration	VI	Self worth	and making a commit-
		Wholeness	ment to some
			permanency
		Exhilaration	Becoming comfortable with
		Independence	new lifestyle and friends
		Autonomy	Helping children
			accept finality
			of parents' divorce and
			their continuing relation-
			ship with both parents

This model consists of three major stages, each of which is composed of two subphases. In recognition of the complexity of individual responses to divorce, the model's component parts are nondiscrete and overlapping, and, although all six phases must be mastered, for reequilibration to occur, the sequence is not invariant.

Not all divorced persons successfully complete the process illustrated in the table. It has been my observation that individuals contend with divorce in much the same way that they have coped with other emotional crises in their lives. Reasonably rational and self-confident divorcing persons occasionally exhibit erratic behavior and mood swings which the literature describes as normal during the first six to twelve months after a separation. Nevertheless, they will usually be able to function at work and at home—even if it takes great effort—will not seriously consider suicide, will vow to survive the ordeal, and will not become overly pessimistic. My clinical experience has been that these individuals usually require approximately two years to complete the process and resume fulfilling lives after divorce. The time required varies, however, for each person can only proceed at his or her own pace.

In contrast, individuals whose general pattern of coping with adversity is to become emotionally disabled are frequently unable to progress through the stages of divorce enumerated in the dialectic model. These individuals never recover from the debilitating effects of divorce. Their lives remain filled with loneliness, self-pity, and unresolved anger as they cling to the inglorious past, unwilling to fashion a meaningful present. Periodically relitigating custody or support orders, these persons use such litigation as occasions to convince friends and family to side with them and to reassure themselves of the validity of their position. Sadly, they also often attempt to convince their children that the ex-spouse wronged them and they expect their children to behave in ways which will compensate them for their self-inflicted suffering.

V. CONCLUSION

The basic roles of the attorney and therapist are clearly demarcated. The attorney attempts to protect the client's legal interests¹⁷⁶ while the therapist tries to help the patient regain functional independence.¹⁷⁷ There is nonetheless much overlap in their provision of services. Therefore, this article has attempted to provide the attorney and the therapist with a shared awareness of the psycholegal effects of the divorce process which will allow them to better serve the divorcing. Such knowledge will, among other things, enable both professionals to generalize to the divorcing person about the emotional as well as legal consequences of the divorce experience. This information will serve to reassure a client about the normality of his or her psychological reactions. Such knowledge will also allow all concerned to better explain the potential consequences of different plans of action so that the client will be able to make appropriate decisions.

Divorce is a painful and confusing experience. It marks the destruction of dreams of marital felicity and, unfortunately, is frequently interpreted to represent personal failure, lack of commitment, and poor judgment. The attorney and the therapist are society's two representatives designated to assist the divorcing through this turbulent time. To ensure that they receive the highest quality professional services, it is essential that the members of both disciplines be acquainted with each other's area of expertise and be willing to consult and cooperate on behalf of the client.

176. See note 25 and accompanying text *supra*.

177. See notes 153-54 and accompanying text *supra*.