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THE REAL AND ILLUSORY CHANGES OF THE 1977 MARRIAGE AND DIVORCE ACT

Samuel Green
and
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The evolution of divorce law in the District of Columbia, from the historical common law fault grounds of adultery and desertion to the statutory no-fault grounds set forth in the 1977 Marriage and Divorce Act,¹ presents an impressive history of liberalization reflecting the ever changing marital and sexual mores of our society. Until 1935, for example, the guilty party in an adultery divorce case was not allowed to remarry.² With the elimination of this punitive fault provision and the introduction in that same year of the first no-fault concept of voluntary separation,³ the statutory changes in the subsequent forty-two years have also resulted in a considerable expansion of the number of divorce grounds. The recently enacted District of Columbia Marriage and Divorce Act not only conforms to this trend, but significantly alters certain other areas of existing law. For example, final divorce has become easier to obtain, and the Superior Court of the District of Columbia has been given broader jurisdiction to enable it to make a fair and equitable distribution of property. But, perhaps contrary to the drafters' intentions, some areas of the law have undergone little change. The custody criteria set out in detail for the first time in the new law represent little modification in long-established principles. Similarly, the "relevant factors" a court must consider in distributing property, established in the 1977 amendments, are no more than a codification of the case law of this jurisdiction. In fact, the only real change in the property

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1. D.C. Law 1-107 (1977). This Act was originally introduced as Bill 1-89 in the Council of the District of Columbia.

2. *See, e.g.*, D.C. Code § 966 (1902).

3. *See* Act of Aug. 7, 1935, ch. 453, § 1, 49 Stat. 539.

distribution area has been to give the courts the power to distribute solely-owned property.

This article will review the history of statutory and case law in the District of Columbia since the first statute was enacted in 1860. In addition, it will examine and evaluate each of the 1977 provisions and review what, if any, changes have been wrought thereby. As will be seen, in many areas the prior case law can be expected to continue as controlling precedent even under the 1977 law.⁴

I. LEGISLATIVE HISTORY OF D.C. LAW 1-107

The District of Columbia Marriage and Divorce Act, as originally introduced by District of Columbia City Councilmember Arrington Dixon on May 6, 1975,⁵ was based in large part on the Uniform Marriage and Divorce Act advocated by the National Conference of Commissioners on Uniform State Laws.⁶ In order to gain the advantages of a uniform statutory scheme in all states adopting the so-called "no-fault" divorce law, the proposed legislation, Bill No. 1-89, was initially intended to completely supplant Title 16, Chapter 9, of the District of Columbia Code.⁷ This legislation would have replaced all of the existing grounds for divorce, such as adultery, desertion, voluntary separation, and conviction of a felony, with a single ground: the "irretrievable breakdown" of the marriage. Under the "irretrievable breakdown" concept of divorce which has now been adopted in thirty-one states,⁸ if both parties assert that a breakdown has occurred, the court, after a hearing, is required to "make a finding whether the mar-

4. The Anti-Sex Discriminatory Language Act, D.C. Law 1-87 (1976), as well as the District of Columbia Marriage and Divorce Act, D.C. Law 1-107 (1977), effected modifications in legitimacy and paternity law. See D.C. Code §§ 16-907 to 16-909, 19-316 (1973). This area is the subject of additional proposed amendments now before the Council of the District of Columbia. This article will not discuss this subject since it involves extensive problems which merit separate treatment.

5. Seminar Coursebook, 1977 Family Law Seminar, The New District of Columbia Marriage and Divorce Act (Mar. 31, 1977) (not paginated) (available from Seminar Sec'y, 1231 25th St., N.W., Washington, D.C.) [hereinafter cited as Coursebook].

6. UNIFORM MARRIAGE AND DIVORCE ACT (1973 version). Bill 1-89 contained certain modifications of the Uniform Act, such as the broad definition of marriage as between "two persons," publication requirements in *in forma pauperis* cases, etc.. Coursebook, *supra* note 5. The Uniform Marriage and Divorce Act provides *inter alia* for a single "irretrievable breakdown of marriage" ground for divorce, allows for a property distribution of assets which belong to either or both parties, however and whenever acquired, and sets certain guidelines for maintenance and custody determinations. See UNIFORM MARRIAGE AND DIVORCE ACT §§ 305, 307, 308, 310 (1973 version).

7. Letter from Arrington Dixon to David Clarke, Chairperson, Committee on the Judiciary and Criminal Law (Oct. 7, 1975) reprinted in Coursebook, *supra* note 5.

8. 4 FAM. L. REP. (BNA) 3001 (1977).

riage is irretrievably broken.”⁹ If one party disagrees, the court would either hold a hearing to consider all factors relevant to reconciliation in order to determine whether the marriage is broken or would schedule a hearing to be held sixty days later on the issue of whether there is an irretrievable breakdown. On its own initiative or at the request of either party, the court could also order that a “conciliation conference” be held. In addition, the residency requirement for jurisdiction would have been reduced from one year to six months.¹⁰

On July 7 and 8, 1975, attorneys, citizens, and representatives of various civic organizations stated their views on Bill 1-89 at public hearings conducted by the Committee on the Judiciary and Criminal Law.¹¹ Mr. Dixon subsequently fashioned a “reprint bill” incorporating comments from the public and attorneys, as well as technical amendments proposed by Dixon himself during the hearings.¹² Nevertheless, this revised version of the bill was abandoned when members of the District of Columbia Bar and the Bar Association of the District of Columbia alerted Mr. Dixon to the practical incongruities that would have resulted from the complete repeal and replacement of the current divorce law.¹³ Also, many practicing lawyers, including those who favored adoption of a “no-fault” ground, disliked the “irretrievable breakdown” concept. Dixon responded by proposing the amendment of selected sections of the present code.¹⁴

On October 7, 1975, an alternative bill reflecting this new approach was suggested by a joint committee of the Bar Association of the District of Columbia and the District of Columbia Bar, co-chaired by the authors of this article. During informal discussions at joint meetings of the two bar groups and at later hearings on the new legislation, some lawyers argued that retention of the traditional fault grounds was desirable to protect the “innocent” spouse by giving that spouse bargaining power in property and support negotiations. It was argued, for example, that this language was

9. UNIFORM MARRIAGE AND DIVORCE ACT § 305 (1973 version).

10. D.C. Code § 16-902 (1973).

11. Report from David Clarke to City Council Members (June 24, 1976) *reprinted in* Coursebook, *supra* note 5. Among the organizations represented at the hearings were: National Organization of Women, Family Division of the D.C. Bar, Parents Without Partners, D.C. Commission on the Status of Women, Metropolitan Community Church, Gay Activists Alliance, and Neighborhood Legal Services. Coursebook, *supra* note 5.

12. See Memorandum from Arrington Dixon to David Clarke (Aug. 1, 1975) *reprinted in* Coursebook, *supra* note 5.

13. See Letter from Arrington Dixon, *supra* note 7; H. Zuckman, *Guide to the New D.C. Marriage and Divorce Law*, 1 DISTRICT LAW. 44 (1977). For example, the original Bill No. 1-89 would have eliminated, by mere oversight, all support for illegitimate children and all temporary maintenance, except in divorce cases, by repealing D. C. Code § 16-916(a) without supplying any replacement.

14. Letter from Arrington Dixon, *supra* note 7.

justified, particularly when the innocent spouse was a wife who had been out of the job market for years while raising her family and when the husband had titled property accumulated during the marriage in his sole name, thus putting it beyond reach of the divorce court. Other arguments were raised on behalf of the innocent husband. This committee ultimately produced a compromise revision of Title 16 drafted by attorneys Marsha E. Swiss and Karen Classen Kucik and submitted to Councilmember Dixon on April 19, 1976.¹⁵

The compromise proposal of the bar groups retained all existing so-called "fault" grounds for divorce, but reduced the separation period for voluntary separation from twelve to six months and added a new "no-fault" ground of twelve months of separation without cohabitation. It also reduced the residency requirement to six months. Furthermore, the bill provided that separately titled property acquired during the marriage, except by inheritance or gift, was subject to division by the divorce court, in the same manner as joint property. This latter provision was regarded as affording protection to the "innocent" spouse who was said to be losing the bargaining effectiveness of the fault divorce grounds as a result of the new no-fault ground.

On May 20, 1976, the Committee on the Judiciary and Criminal Law of the Council held a "round table discussion" to deliberate the issues raised by the original Bill 1-89.¹⁶ At this meeting, Mr. Dixon offered the combined bar organizations' compromise proposal as a substitute for the original bill. It was accepted as Title I of amended Bill No. 1-89 along with a new Title II containing provisions for service of process on absent defendants, indigent filing, and enforcement of support orders.¹⁷

This substitute bill underwent committee mark-up on June 15, 1976, and was put to a final committee vote on June 23, 1976. It was passed on the first reading by the City Council, but at an amended first reading¹⁸ on November 22, 1976, David H. Clarke introduced an amendment which deleted adultery as a ground for absolute divorce, but retained it as a

15. See Letter from Marsha E. Swiss, Chairperson, D.C. Code and Court Rules Committee, Unified Bar, and John V. Long, Chairperson, Domestic Relations Committee, Bar Association of the District of Columbia, to Councilmember David Clarke (April 19, 1976).

16. See Memorandum from Gregory Mize, Staff Director, Committee on the Judiciary and Criminal Law, to Members of the Committee on the Judiciary and Criminal Law, Staff Issue Analysis Statement on Bill 1-89 (May 10, 1976). This memorandum contains the comments made by the organizations listed in note 11 *supra*.

17. See Report from David Clarke, *supra* note 11.

18. Under the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 412(a), 87 Stat. 774 (1973), each proposed bill undergoes two readings before the Council of the District of Columbia sends it to the mayor for a 10-day review. In this particular instance, Bill 1-89 was amended at the first reading stage.

ground for legal separation. Some representatives of the bar believed this amendment contradicted the compromise agreement which had resulted in a consensus of the bar groups behind the proposal, a compromise which they felt had been accepted by Clarke.¹⁹ As a result, several of them opposed the bill after this deletion of the adultery ground for absolute divorce. In explaining his unexpected amendment, Clarke stated that the adultery ground should be retained to permit a legal separation, though not an absolute divorce because he favored a delay before permitting an application for absolute divorce. Although the amendment ultimately passed, many practitioners did not consider Clarke's reasoning valid in light of their experiences with adultery cases which were usually expensive and time-consuming to prepare. Moreover, a judgment on this ground is difficult to obtain because of the strict standards of proof.²⁰ Also, there was concern over the fact that since some religious groups only permit their members to obtain absolute divorce on adultery grounds, their adherents would be unable to obtain divorces under the District of Columbia law. In any event, after a second reading and adoption on December 7, 1976, Mayor Walter Washington signed the bill on January 4, 1977. The legislation was sent to both houses of Congress for the thirty day review period required by the District of Columbia Self-Government and Governmental Reorganization Act.²¹ Upon expiration of this review period, the City Council designated the enactment as D.C. Law 1-107, effective April 7, 1977.²²

II. RESIDENCY REQUIREMENTS

The first statute in this jurisdiction dealing with residency requirements for divorce, the Act of June 19, 1860,²³ provided that no court could grant a divorce for any cause occurring outside the District unless the party making the application had resided in the jurisdiction for two years. This requirement was clarified and augmented by a 1901 revision which flatly

19. This unwritten compromise was agreed upon by those members of the committee who favored retention of fault grounds for divorce and those members who had favored no-fault grounds. In essence, the pro-fault members agreed to support the substitute bill if a second no-fault ground were added and adultery were retained as a fault ground (authors' recollections).

20. As recently as 1959, adultery was a ground for divorce in every state, but was used in less than 3% of all divorce cases. *See* H. CLARK *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 327-28 (1968).

21. Pub. L. No. 93-198, § 602(c), 87 Stat. 774 (1973).

22. Notice of April 13, 1977, Council of the District of Columbia. The Act was published in 23 D.C. Reg. 5869 (Feb. 11, 1977).

23. Act of June 19, 1860, ch. 158, § 5, 12 Stat. 60; R.S.D.C. § 740 (Comp. St. D.C. 1894, ch. 30, § 36).

declared that no decree of divorce or nullity would issue unless the applicant was a District of Columbia resident.²⁴ Further, in 1901, the period of residency was increased to at least three years prior to the date of application for any cause occurring outside the District of Columbia prior to residence.²⁵ The primary purpose of this residency requirement, as enunciated by the Court of Appeals of the District of Columbia in *Creel v. Creel*,²⁶ was to avoid making the District an attractive haven for those seeking quick divorces.²⁷ The residency period was reduced to one year in 1965²⁸ to liberalize the divorce law and bring it into closer conformity with the laws of Maryland and Virginia.²⁹ In that same year, the Code was modified to provide jurisdiction if *either* the plaintiff or defendant met the residency requirement.³⁰

The 1977 amendment, as finally enacted, reduces the one-year residency requirement for divorce to six months.³¹ Consonant with the continuing trend making divorce easier to obtain, this is virtually the only substantive provision that appeared in both the original bill and the Bar proposal. In

24. Act of Mar. 3, 1901, ch. 854, § 971, 31 Stat. 1345.

25. *Id.* The statute has always required that the applicant be a "bona fide resident", which the courts have interpreted to mean domiciliary. *See, e.g.,* *Rogers v. Rogers*, 76 U.S. App. D.C. 297, 130 F.2d 905 (D.C. Cir. 1942) (bona fide residence means domicile); *Rzeszotarski v. Rzeszotarski*, 296 A.2d 431 (D.C. 1972) (requirements for establishing domicile are physical presence and an intent to abandon former domicile and remain in this jurisdiction indefinitely); *Gullo v. Gullo*, 192 A.2d 126 (D.C. 1963) (bona fide residence means domicile); *Downs v. Downs*, 23 App. D.C. 381 (1904) (residence for the purpose of divorce must be in good faith).

26. 43 App. D.C. 82 (1915).

27. This purpose has been echoed in subsequent decisions despite the gradual reduction of the residency period. *See* *Bottomley v. Bottomley*, 104 U.S. App. D.C. 311, 262 F.2d 23 (D.C. Cir. 1958); *Orlans v. Orlans*, 99 U.S. App. D.C. 170, 238 F.2d 31 (D.C. Cir. 1956); *Dennett v. Dennett*, 63 App. D.C. 252, 71 F.2d 975 (D.C. Cir. 1934).

28. Act of Sept. 29, 1965, Pub. L. No. 89-217, § 1, 79 Stat. 889.

29. 111 CONG. REC. 21,680 (1965). In 1965, both Maryland and Virginia had one-year residency requirements for causes arising outside the jurisdiction. The conformity with neighboring states was so desired that the Senate rejected the six-month residency period which originally had passed in the House. *Id.*

30. A series of cases have held that "residence" under § 16-902 of the District of Columbia Code means domicile. *See, e.g.,* *Rogers v. Rogers*, 76 U.S. App. D.C. 297, 130 F.2d 905 (D.C. Cir. 1942) (discussing § 16-401, a precursor of § 16-902). *Cf. Rzeszotarski v. Rzeszotarski*, 296 A.2d 431 (D.C. 1972) and *Alves v. Alves*, 262 A.2d 111 (D.C. 1970) (non-citizens were found domiciled in the District of Columbia). These District of Columbia precedents are in accord with the holding of the United States Supreme Court in *Williams v. North Carolina*, 325 U.S. 226 (1945) (divorce jurisdiction is based upon common law concepts of domicile, for purposes of full faith and credit under the United States Constitution).

31. "No action for divorce or legal separation shall be maintainable unless one of the parties to the marriage has been a bona fide resident of the District of Columbia for at least six months next preceding the commencement of the action." D.C. Law 1-107 (1977) (amending D.C. Code § 16-902 (1973)).

addition, the new law provides for jurisdiction when a member of the armed services stationed in the District of Columbia meets the six-month residency requirement.³² In effect, this provision overrules prior case law which held that the courts lacked jurisdiction when a resident member of the armed forces was domiciled elsewhere.³³

III. GROUNDS FOR DIVORCE

The District of Columbia Code provides for two types of divorce. Absolute divorce, or divorce *a vinculo matrimonii*, results in a complete dissolution of the bond of marriage, thus creating the legal status of a single person for both husband and wife.³⁴ On the other hand, a legal separation, known as a limited divorce or divorce *a mensa et thoro*, keeps the marriage status intact but gives legal effect to the actual separation of the parties from bed and board. When the court issues such a decree, it retains jurisdiction over the parties and the matter remains open for a possible decree of absolute divorce in the future.³⁵ It should be noted, however, that courts in the District of Columbia have not always had the power to issue both types of decrees. Prior to 1860, courts only had the authority to grant decrees for legal separation and for alimony.³⁶ There was no authority to grant a final divorce decree until passage of the Act of June 19, 1860,³⁷ which gave District of Columbia courts the power to grant absolute divorces as well as divorces from bed and board for enumerated causes. The statutory grounds for divorce *a vinculo matrimonii* were limited to: adultery, lunacy or impotency of either party, and marriage which was entered into while either party had a former spouse living.³⁸ The grounds for divorce *a mensa et thoro*, or legal separation, included cruelty, which endangers life or health, reasonable apprehension of bodily harm, and desertion for three consecutive years.³⁹ The number of grounds for divorce *a vinculo matrimonii* was expanded in 1870 to include cruel treatment endangering life or health, desertion for two consecutive years, and habitual drunken-

32. "If a member of the armed forces of the United States resides in the District of Columbia for a continuous period of six months during his or her period of military service, he or she shall be deemed to reside in the District of Columbia for purposes of this section only." D.C. Law 1-107 (1977) (amending D.C. Code § 16-902 (1973)).

33. See *Stephenson v. Stephenson*, 134 A.2d 105 (D.C. 1957).

34. See, e.g., *Maschaur v. Maschaur*, 23 App. D.C. 87 (1904).

35. *Id.*

36. *Cheever v. Wilson*, 6 D.C. (1 Mackey) 149, *rev'd on other grounds*, 76 U.S. (9 Wall) 108 (1866); *Hatfield v. Hatfield*, 6 D.C. (1 Mackey) 80 (1864).

37. Act of June 19, 1860, ch. 158, §§ 4,5; 12 Stat. 59, 60; R.S.D.C. §§ 738, 739 (Comp. St. D.C. 1894, ch. 30, §§ 34, 35).

38. Act of June 19, 1860, *supra* note 37, at § 3.

39. *Id.* at § 4.

ness for three years.⁴⁰ The supplemental cruelty and desertion grounds were apparently borrowed from the existing grounds for divorce *a mensa et thoro*.

The next revision of the law in 1901 resulted in a drastic cutback in the number of grounds available for divorce.⁴¹ All causes for full divorce were eliminated with the exception of adultery, while the grounds for legal separation remained intact. In trimming back the law, Congress was responding to complaints from various sectors of society that prior statutes made divorce too readily available. District of Columbia Supreme Court Justices and the United States Attorney, as well as numerous religious leaders, had condemned the existing law as too lax.⁴² The new statute was seen as a moral and social benefit to the District of Columbia since its intent was to improve the law and bring it into conformity with the "highest grade" of divorce law found elsewhere in the states.⁴³ In keeping with this moral climate, a further provision was added stating that only the innocent party was allowed to remarry after a divorce based on adultery.⁴⁴

In 1935, Congress reexamined the divorce laws and concluded that they were too stringent. Consequently, the 1935 Act⁴⁵ was passed to broaden and liberalize the District's divorce law by adding three more grounds for divorce to supplement the existing adultery ground. The new grounds were: desertion for two years; conviction of a felony involving moral turpitude and carrying a partly served sentence of not less than two years to a penal institution; and voluntary separation from bed and board for five consecutive years without cohabitation.⁴⁶ With the enactment of this voluntary separation provision, the District of Columbia received its first no-fault divorce ground. The significance of the no-fault concept was explained by Chief Judge Hood of the District of Columbia Court of Appeals in his opinion in *Davis v. Davis*:⁴⁷

When our divorce law was amended in 1935 to include five years voluntary separation as a ground for divorce, it made possible that parties to a marriage could put an end to the marriage by

40. Act of June 1, 1870, ch. 116, 16 Stat. 147.

41. Act of Mar. 3, 1901, ch. 854, § 966, 31 Stat. 1345.

42. See S. Doc. No. 174, 56th Cong., 2d Sess. 1 (1901).

43. *Id.* at 4. By "highest grade," Congress meant to emulate those states such as New York which recognized only adultery as a ground for divorce. *Id.* Another reason for the change was the desired uniformity with divorce legislation in other states. At that time a uniform law on marriage and divorce was anticipated. Such uniformity, however, never came into being.

44. Act of Mar. 3, 1901, *supra* note 41, at § 966.

45. Act of Aug. 7, 1935, ch. 453, § 1, 49 Stat. 539.

46. D.C. Code § 16-403 (1940).

47. 191 A.2d 138 (D.C. 1963).

their own voluntary action and after the required period either party could have the marriage legally dissolved. In such a dissolution proceeding there is no question of the innocence or guilt of either party and the reason for the separation is not material. The only issue is the existence of the voluntary separation for the required time.⁴⁸

Adoption of a no-fault concept was clearly an important step toward the liberalization of District of Columbia divorce law.

The next notable change did not occur until 1965, when Congress settled on the following grounds for divorce: (1) adultery, (2) actual or constructive desertion for one year, (3) voluntary separation from bed and board for one year without cohabitation, and (4) final felony conviction with sentence of not less than two years to a penal institution which is served in whole or in part.⁴⁹ As in the prior law, the grounds for a legal separation included the four grounds for final divorce and the same fifth ground, cruelty. Basically, the effect of this revision was to reduce the period of desertion from two years to one year and the period of voluntary separation from five years to one year.⁵⁰ The change was made because the law had remained the same since 1935 and Congress wanted to bring the District of Columbia divorce statutes into closer harmony with the provisions in the adjoining jurisdictions of Maryland and Virginia.⁵¹

The 1977 amendments have now removed all "fault" grounds for absolute divorce from the D.C. Code. As a result, parties can no longer secure a divorce based on adultery, desertion, or the conviction of a felony. The voluntary separation no-fault ground has been retained in a modified form, and a second no-fault ground has been added:

A divorce from the bonds of marriage may be granted if:

- (1) both parties to the marriage have mutually and voluntarily lived separate and apart without cohabitation for a period of six months next preceding commencement of the action;
- (2) both parties to the marriage have lived separate and apart without cohabitation for a period of one year next preceding commencement of the action.⁵²

48. *Id.* at 139.

49. Act of Sept. 29, 1965, Pub. L. No. 89-217, § 2, 79 Stat. 889. A 1963 revision provided only minor changes in phraseology. Act of Dec. 23, 1963, Pub. L. No. 88-241, § 1, 77 Stat. 560.

50. This is also reflected in the time requirement involved in enlarging a decree of divorce *a mensa et thoro* into a divorce *a vinculo matrimonii*, which was also reduced from two years to one. Act of Sept. 29, 1965, *supra* note 49, at § 2.

51. See H.R. REP. NO. 24, 89th Cong., 1st Sess. 1 (1965); S. REP. NO. 638, 89th Cong., 1st Sess. 3 (1965).

52. D.C. Code § 16-904 (1973), as amended by D.C. Law 1-107, § 102 (1977).

Thus, the period of voluntary separation required under the amended divorce law has been reduced from one year to six months. Under prior case law, the complaining party was required to establish that the separation was mutually voluntary for the statutory period.⁵³ Obviously, this requirement is not eliminated under the new amendments. What is significant, however, is that the creation of the new twelve month separation ground does not impose any requirement of either voluntariness or mutuality. This means that would-be plaintiffs who are unable to establish that the separation was voluntary on the part of the defendant are no longer barred from securing a no-fault divorce based upon separation without cohabitation. Further, this amendment obviates the need for potential plaintiffs to move their residence to Virginia in order to make use of that jurisdiction's no-fault provision, now that the District of Columbia and Virginia have virtually identical twelve-month separation without cohabitation grounds for divorce.⁵⁴ The comparable ground in Maryland requires three years of separation.⁵⁵

At this point, it is unclear whether plaintiffs seeking divorce under the new twelve month separation ground will have to make any kind of showing as to the intended nature of the separation. Although it is not necessary to show voluntariness under the twelve month ground, District courts may follow their Virginia counterparts and require an intention on the part of at least one party to separate permanently at the time the separation occurred to trigger the running of the one year period.⁵⁶ In *Hooker v. Hooker*,⁵⁷ a husband was transferred to South Vietnam as a civilian employee of the United States Army. After nearly two years of continuous separation from his wife and family, he instructed a Richmond attorney to institute divorce proceedings against his wife based on Virginia's separation without cohabitation ground.⁵⁸ The Virginia Circuit Court held that Hooker was not entitled to a divorce under this provision since there was no expressed intent by him to separate, nor had he undertaken any actions

53. See *Martin v. Martin*, 82 U.S. App. D.C. 40, 160 F.2d 20 (D.C. Cir. 1947); *Seabrook v. Seabrook*, 264 A.2d 311 (D.C. 1970); *Glendenning v. Glendenning*, 206 A.2d 824 (D.C. 1965).

54. The Virginia statute provides in part: "A divorce from the bond of matrimony may be decreed: . . . [o]n the application of either party if and when the husband and wife have lived separate and apart without any cohabitation and without interruption for one year." VA. CODE § 20-91(9)(a) (1975).

55. MD. CODE ANN. art. 16, § 24 (1973).

56. See *Hooker v. Hooker*, 215 Va. 415, 211 S.E.2d 34 (1975).

57. *Id.*

58. *Id.* At that time, the separation period was two years. See VA. CODE § 20-91(9) (Cum. Supp. 1974).

from which such intent could be implied.⁵⁹ The Supreme Court of Virginia affirmed, stating that the statutory concept of living separate and apart meant more than mere physical separation:

In our view, the General Assembly intended that the separation be coupled with an intention on the part of at least one of the parties to live separate and apart permanently, and that this intention must be shown to have been present at the beginning of the uninterrupted two year period of living separate and apart without any cohabitation.⁶⁰

The Court voiced a fear that without the intent requirement, many situations requiring extended absences might ripen into "instant divorces," thus precluding any contemplation of or attempts at reconciliation. Accordingly, under *Hooker*, a trial separation period would neither trigger the running of Virginia's no-fault period nor count as part of the one year separation period since there would be no intent to separate permanently at the inception of the trial separation. Such rulings may serve as important precedents in the District of Columbia.

The 1977 amendments have also provided the following guidelines to aid in the determination of whether an alleged separation by spouses will suffice as grounds for divorce under the new statute: "[P]arties who have pursued separate lives, sharing neither bed nor board, shall be deemed to have lived separate and apart from one another even though: (1) they reside under the same roof; or (2) the separation is pursuant to an order of a court."⁶¹ This provision is little more than a codification of the "separate lives" doctrine first enunciated in *Boyce v. Boyce*⁶² and later reaffirmed in *Hurd v. Hurd*.⁶³ In both *Boyce* and *Hurd*, the spouses continued to occupy different parts of the same abode but neither took meals nor engaged in any social life together. The courts emphasized that the "essential thing is not separate roofs, but separate lives."⁶⁴ In contrast, this doctrine has been expressly rejected in Maryland by the Court of Special Appeals. In *Jackson v. Jackson*,⁶⁵ that court required that the parties live in completely separate abodes. The husband had resided on a separate floor from his disabled wife and had testified that they lived separate lives in different

59. 215 Va. at 416, 211 S.E.2d at 36. The only evidence relating to the intent behind the separation indicated that *Hooker* had taken the overseas job in order to earn a higher salary. In addition, *Hooker* had sent his wife varying sums of money during the entirety of the separation period in order to pay for support, education, and mortgage expenses. *Id.*

60. 215 Va. at 417, 211 S.E.2d at 36.

61. D.C. Code § 16-904 (1973), as amended by D.C. Law 1-107, § 102 (1977).

62. 80 U.S. App. D.C. 355, 153 F.2d 229 (D.C. Cir. 1946).

63. 86 U.S. App. D.C. 62, 179 F.2d 68 (D.C. Cir. 1949).

64. 80 U.S. App. D.C. at 356, 153 F.2d at 230.

65. 13 Md. App. 725, 284 A.2d 654 (1971).

parts of the house. He had remained there to be near his children and to assist his critically ill wife, but had no intention of continuing the marriage.⁶⁶ The Council of District of Columbia has rejected the *Jackson* approach and has incorporated the "separate lives" doctrine into the new code. Despite this codification, it is likely that the District of Columbia courts will continue to scrutinize carefully cases of separation under the same roof before dissolving marriages under this provision when the cases involve close facts.

The new divorce law has also modified the grounds for a legal separation, resulting in two "no-fault separation without cohabitation" grounds and two fault grounds. The first no-fault ground provides that a "legal separation from bed and board may be granted if both parties to the marriage have mutually and voluntarily lived separate and apart without cohabitation."⁶⁷ Significantly, this section allows a suit for limited divorce to be filed immediately upon the occurrence of the voluntary separation. No time period is specified in the statute and apparently none is required as long as the separation can be shown to be mutually voluntary, continuous, and without cohabitation. Because of its advantage of allowing immediate filing, this ground may be used for a number of reasons, such as imminent absence from the jurisdiction, and as a basis for supplemental relief including injunctions, temporary support, and custody. The second no-fault ground provides for limited divorce when "both parties to the marriage have lived separate and apart without cohabitation for a period of one year next preceding the commencement of the action."⁶⁸ Similar to the new twelve month separation ground for absolute divorce, this section may be used by plaintiffs when the separation was not mutually voluntary or when such voluntariness may be difficult to establish.⁶⁹ Unlike the voluntary separation provision, a suit for legal separation on this ground may not be filed until expiration of twelve months.

Two fault grounds for legal separation have been retained: adultery and cruelty.⁷⁰ While this seems anomalous in view of the fact that all fault grounds for absolute divorce were stricken from the Code, it does allow for

66. This rule has been affirmed in *Carney v. Carney*, 16 Md. App. 253, 256, 295 A.2d 792, 795 (1972).

67. D.C. Code § 16-904 (1973), as amended by D.C. Law 1-107, § 102 (1977).

68. *Id.*

69. It is uncertain under the new law whether the rule of *Hooker v. Hooker*, requiring intent to permanently separate at the inception of the separation, will apply to the area of limited divorce as well. It would seem unlikely under the court's reasoning in that case since there would be no danger of "instant divorces," only "instant legal separations," which would not destroy the bond of marriage and would still leave open the possibility of contemplation and reconciliation.

70. The 1977 amendments eliminated the other fault grounds for legal separation: deser-

the immediate filing of a suit for legal separation in cases in which the separation cannot be shown to be mutually voluntary, continuous, and without cohabitation under the new no-fault ground. Under such a suit, the plaintiff may seek additional benefits such as alimony, child support, custody, injunctive relief, and property division.⁷¹

Finally, section 16-905 has been amended to provide for the enlargement of decrees of legal separation into decrees for absolute divorce. This may be accomplished

upon application of the party to whom the decree of legal separation was granted, a copy of which application shall be duly served upon the adverse party, if the court finds on the basis of affidavits that no reconciliation has taken place or is probable and that a separation has continued voluntarily and without interruption for a six-month period or without interruption for a period of one year.⁷²

This provision appears, perhaps inadvertently, to revert back to fault theories of divorce, insofar as it bars the nonmoving party from obtaining an enlargement of a legal separation and mandates that the separation shall have continued voluntarily. In thus limiting the right to move for an enlargement to the moving party, and in requiring that the separation be voluntary, the new code has become more restrictive than prior law. It is expected that enlargement of legal separations may fall into disuse in view of the availability of the six-month voluntary separation and the twelve-month separation without cohabitation grounds for absolute divorce.

The annulment of marriages has not been significantly affected by the new Act. As described by the Municipal Court of Appeals for the District of Columbia in *Duley v. Duley*,⁷³ there are two types of illegal marriages in this jurisdiction: those which are void *ab initio* without the necessity of obtaining a decree of annulment, and those which are void only when declared so by a court decree.⁷⁴

[T]he first class of marriages is void and the second merely voidable. Thus we have two classes of illegal marriages, one declared void from the beginning and without any standing in law, whose

tion and conviction of a felony. D.C. Code § 16-904 (1973), as amended by D.C. Law 1-107, § 102 (1977).

71. The right to divide property ancillary to a limited divorce was upheld in *Tendrich v. Tendrich*, 90 U.S. App. D.C. 61, 193 F.2d 368 (D.C. Cir. 1951); *Reilly v. Reilly*, 86 U.S. App. D.C. 345, 182 F.2d 108 (D.C. Cir.), cert. denied, 340 U.S. 865 (1950); and *Posnick v. Posnick*, 160 A.2d 804 (D.C. 1960).

72. D.C. Code § 16-905 (1973), as amended by D.C. Law 1-107, § 103 (1977).

73. 151 A.2d 255 (D.C. 1959).

74. *Id.* at 257.

nullity may be shown and must be recognized in any proceeding. . . . Marriages of the second class . . . although forbidden are not void until so declared by court decree. These marriages therefore have a degree of validity and the courts are not compelled under all circumstances to declare them void.⁷⁵

Section 16-903 of the D.C. Code states that "a decree annulling the marriage as illegal and void may be rendered on any of the grounds specified by sections 30-101 and 30-103 as invalidating a marriage."⁷⁶ Section 30-101 sets forth those marriages which are *void ab initio*, and includes incestuous and bigamous marriages,⁷⁷ while section 30-103 lists those marriages which are voidable: (1) marriage of an "idiot" or one adjudged to be a lunatic, (2) marriage in which either party's consent was secured by force or fraud, (3) marriage in which either party is physically incapable of "entering into the married state," and (4) marriage in which either party is under the age of consent. The only change effected by the 1977 amendments has been to add a paragraph to section 16-904 which enumerates five grounds for annulment, including the bigamy ground from section 30-101 and the four grounds listed in section 30-103.⁷⁸ This is a change without a difference.

IV. REAL PROPERTY DISTRIBUTION

Procedures for the distribution of property have remained virtually unchanged since they were first enacted in 1935.⁷⁹ Prior to the 1977 amendments, the D.C. Code provided as follows:

Upon the entry of a final decree of annulment or absolute divorce, in the absence of a valid antenuptial or postnuptial agreement in relation thereto, all property rights of the parties in joint tenancy or tenancy by the entirety shall stand dissolved and, in the same proceeding in which the decree is entered, the court may award the property to the one lawfully entitled thereto or apportion it in such manner as seems equitable, just and reasonable.⁸⁰

Consistent with the face of the statute, the courts have held that only jointly held property may be apportioned.⁸¹ In *Wheeler v. Wheeler*,⁸² for

75. *Id.*

76. D.C. Code § 16-903 (1973).

77. D.C. Code § 30-101 (1973). D.C. Code § 30-102 provides that these marriages may be "declared to have been null and void by judicial decree" as well.

78. D.C. Law 1-107; § 102 (1977).

79. Act of Aug. 7, 1935, ch. 453, § 3, 49 Stat. 540.

80. D.C. Code § 16-910 (1973).

81. *Tendrich v. Tendrich*, 90 U.S. App. D.C. 61, 193 F.2d 368 (D.C. Cir. 1951); *Wheeler v. Wheeler*, 88 U.S. App. D.C. 193, 188 F.2d 31 (D.C. Cir. 1951); *Reilly v. Reilly*, 86 U.S.

example, the United States Court of Appeals for the District of Columbia Circuit set aside a trial court's award to a wife of a percentage interest in real property held solely in her husband's name. Acknowledging that the terms of the statute⁸³ clearly precluded it from making such an award, the court addressed the issue of whether the "court has power from some other source to award the wife an equity in property owned by the husband."⁸⁴ The court rejected the contention that such power to award property in lieu of alimony could be found under its statutory or equitable powers.⁸⁵ In order to justify such an award of an interest in separate property prior to the 1977 amendments, it was necessary for a spouse to make a showing of either a legal or equitable interest in the other spouse's solely titled property or facts that would establish a basis for a constructive or resulting trust.⁸⁶

Courts have, however, been reluctant to find such equitable interests in solely held property. In *Mumma v. Mumma*,⁸⁷ the District of Columbia Court of Appeals reversed a trial court's award to the wife of a one-half interest in land owned and paid for solely by the husband. The court reviewed the evidence relevant to the wife's contribution to the family finances and found that she had performed "sporadic clerical services" for the husband. The court held that such services were insufficient to justify award of a half interest in her husband's property.⁸⁸ This case should be distinguished from situations in which the wife has made material financial contributions. In *Lyons v. Lyons*,⁸⁹ the court ordered the husband to pay his wife \$7,500 in settlement of her equitable interest in a savings ac-

App. D.C. 345, 182 F.2d 108 (D.C. Cir.), *cert. denied*, 340 U.S. 865 (1950); *Mumma v. Mumma*, 280 A.2d 73 (D.C. 1971); *Hunt v. Hunt*, 208 A.2d 731 (D.C. 1965); *Mazique v. Mazique*, 206 A.2d 577 (D.C. 1965), *aff'd on other grounds*, 123 U.S. App. D.C. 48, 356 F.2d 801 (D.C. Cir.), *cert. denied*, 384 U.S. 981 (1966).

82. 88 U.S. App. D.C. 193, 188 F.2d 31 (D.C. Cir. 1951).

83. At the time of this decision, the applicable provision was D.C. Code § 16-409 (1940).

84. 88 U.S. App. D.C. at 194, 188 F.2d at 32.

85. *Id.* At the time this case was decided, the pertinent provision authorizing alimony was D.C. Code § 16-411 (1940). The present alimony sections are D.C. Code §§ 16-911 to 16-914 (1973).

86. The courts have consistently held that this section applies only to property in which a tenancy, joint or by the entirety, exists. It does not apply to individual property. *See Wheeler v. Wheeler*, 88 U.S. App. D.C. 193, 188 F.2d 31 (D.C. Cir. 1951); *McGeen v. McGeen*, 339 A.2d 384 (D.C. 1975); *Jett v. Jett*, 221 A.2d 925 (D.C. 1966); *Hunt v. Hunt*, 208 A.2d 731 (D.C. 1965); *Posnick v. Posnick*, 160 A.2d 804 (D.C. 1960). Apart from the Code provision, however, courts have equity power to reach property not covered in this section, including individual property. *See Mumma v. Mumma*, 280 A.2d 73 (D.C. 1971); *Hunt v. Hunt*, 208 A.2d 731 (D.C. 1965).

87. 280 A.2d 73 (D.C. 1971).

88. *Id.* at 76.

89. 295 A.2d 903 (D.C. 1972).

count which was held solely in his name. The trial court found that Mrs. Lyons had made considerable monthly contributions from her earnings to her husband's savings account over a period of several years. The appellate court agreed, and held that there was sufficient justification in returning to her that portion of the account which she had deposited. Similarly, in *Hunt v. Hunt*,⁹⁰ a husband and wife had purchased several properties as tenants by the entirety but subsequently conveyed them to the husband's mother after the husband was arrested on a felony charge. When the husband's mother died, she left the properties to her son as sole beneficiary under her will. The court awarded the wife a one-half interest in the properties (which by then were in her husband's sole name) based on their finding that the two parties had remained equitable owners of the properties since they had been transferred to the husband's mother without consideration.⁹¹

District of Columbia courts have interpreted section 16-910 to give the courts broad discretion in apportioning jointly held property.⁹²

The trial court must "exercise a sound judicial discretion in adjusting the property rights of the parties". . . . No hard and fast rule can be laid down. Each case must be decided on its particular circumstances; and considering all those circumstances a trial judge in his sound discretion must rule in a manner that seems to him equitable, just and reasonable.⁹³

Courts rely upon several factors in determining distribution of the spouses' jointly held property. In *Chamberlain v. Chamberlain*,⁹⁴ the court found that the wife had provided the total financial contribution for the parties' jointly owned house and awarded it to her.⁹⁵ The court also cited a number of other considerations which affected its decision: the wife had been awarded custody of all five children; her support payments were modest in view of her expenses; the husband had a duty to provide for his wife; and the parties had lived in the house for only a short while.⁹⁶ Direct financial contribution by the wife, although an important factor, is thus not the sole and decisive factor in determining her interest in jointly held

90. 208 A.2d 731 (D.C. 1965).

91. 208 A.2d at 733. The record disclosed that the transfers were made to put the properties beyond the reach of creditors and to enable the husband to proceed *in forma pauperis* with respect to his criminal trial. *Id.*

92. It should be noted that prior to the 1935 amendments, a separate action was required in order to partition jointly held property since joinder rules were not then in effect. *See Act of Aug. 7, 1935, ch. 453, § 3, 49 Stat. 540.*

93. *Lundregan v. Lundregan*, 176 A.2d 790, 792 (D.C. 1962).

94. 287 A.2d 530 (D.C.), *cert. denied*, 409 U.S. 892 (1972).

95. *Id.* at 532.

96. *Id.*

property.⁹⁷ In fact, the trial court may award a wife an amount in excess of that which she has contributed.⁹⁸

In this jurisdiction, when "real property is purchased entirely by one spouse, and title is taken in the name of both as tenants by the entirety . . . the consideration to be implied for the share of the non-purchasing spouse is the faithful performance of . . . [the] marriage vows."⁹⁹ This rule, of course, brings marital fault into the determination. For example, in *Sebold v. Sebold*,¹⁰⁰ the District of Columbia Court of Appeals held that the faithful performance of the marital vows was a sufficient ground for awarding the wife a one-half interest in the parties' jointly owned property, even though she had made no financial contribution.¹⁰¹ Conversely, in *Mazique v. Mazique*,¹⁰² the court denied the wife any share in the couple's jointly-owned residence after it was found that she had deserted her husband "with malice prepense."¹⁰³ Thus, while the court's discretion to distribute jointly owned property is flexible, guidelines have emerged on a case-by-case basis.

The 1977 amendments have significantly augmented the divorce court's jurisdiction over real property by providing it with authority to distribute both jointly and separately titled real property. This power is indeed a salutary and much needed change, and will permit the court to better protect a dependent spouse. The only property remaining beyond the court's jurisdiction is: (1) property disposed of pursuant to a valid antenuptial or postnuptial agreement or a decree of legal separation, (2) sole and separate property acquired prior to the marriage, (3) sole and separate property acquired during the marriage by gift, bequest, devise, or descent, and (4) any increase thereof or property acquired in exchange therefor.¹⁰⁴

The first exception to the court's jurisdiction, property distributed under an agreement by the parties, merely echoes prior versions of the property distribution statute. Such property has never been subject to distribution

97. See *Lundregan v. Lundregan*, 176 A.2d 790,792 (D.C. 1962).

98. See *Slaughter v. Slaughter*, 83 U.S. App. D.C. 301, 302, 171 F.2d 129, 130 (D.C. Cir. 1948).

99. *King v. King*, 286 A.2d 234, 237 (D.C. 1972). See also *Sebold v. Sebold*, 143 U.S. App. D.C. 406, 414, 444 F.2d 864, 872 (D.C. Cir. 1971); *Mazique v. Mazique*, 206 A.2d 577 (D.C. 1965), *aff'd on other grounds*, 123 U.S. App. D.C. 48, 356 F.2d 801 (D.C. Cir.), *cert. denied*, 384 U.S. 981 (1966); *Johnson v. Johnson*, 257 A.2d 482, 483 (D.C. 1969); *Lundregan v. Lundregan*, 176 A.2d 790, 792 (D.C. 1962).

100. 143 U.S. App. D.C. 406, 444 F.2d 864 (D.C. Cir. 1971).

101. 143 U.S. App. D.C. at 414, 444 F.2d at 872.

102. 206 A.2d 577 (D.C. 1965), *aff'd on other grounds*, 123 U.S. App. D.C. 48, 356 F.2d 801 (D.C. Cir.), *cert. denied*, 384 U.S. 981 (1966).

103. 123 U.S. App. D.C. at 52, 356 F.2d at 805.

104. D.C. Code § 16-910 (1973), *as amended by* D.C. Law 1-107, § 107 (1977).

by the court. The remaining three exceptions are aimed at those types of property which were initially titled in a spouse's sole name and were acquired from a source from which the other spouse is unlikely to have had any connection or opportunity to have made any contribution.

Subsection (b) of amended section 16-910 provides for the distribution of all other real property, regardless of title, and expressly states that the distribution shall be made "in a manner that is equitable, just and reasonable, after considering all relevant factors." It also sets forth the following nonexclusive factors to be considered:

the duration of the marriage, any prior marriage of either party, the age, health, occupation, amount and sources of income, vocational skills, employability, assets, debts, and needs of each of the parties, provisions for the custody of minor children, whether the distribution is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of assets and income. The court shall also consider each party's contribution to the acquisition, preservation, appreciation, dissipation or depreciation in value of the assets subject to distribution under this subsection, and each party's contribution as a homemaker or to the family unit.¹⁰⁵

These factors have been borrowed largely from the case law precedents.¹⁰⁶ Interestingly enough, a number of these factors may be found in Circuit Judge Bazelon's opinion in *Quarles v. Quarles*,¹⁰⁷ a case dealing with the propriety of an alimony award. Speaking of the court's discretion to award alimony, Bazelon states that:

[N]o fixed set of rules or formulae can be substituted for a careful study of the particular facts and circumstances in each case. Nevertheless, certain impelling factors of an equitable nature have always affected such awards. Among the factors have been: the duration of the marriage; the number and age of the children; the age and health of the parties; their respective economic conditions—both present and prospective; the wife's contribution to the accumulation of the husband's property; the circumstances under which the divorce was granted; the effect, if any, upon the family; and the interest of society generally to prevent a person, wherever possible, from becoming a public charge.¹⁰⁸

Thus, the question raised by these nonexclusive statutory factors is whether they provide any criteria which have not already been considered

105. *Id.* at § 107(b).

106. See text accompanying notes 93-102 *supra*.

107. 86 U.S. App. D.C. 41, 179 F.2d 57 (D.C. Cir. 1949).

108. 86 U.S. App. D.C. at 42, 179 F.2d at 58.

by the courts of this jurisdiction in dividing jointly-held property. The apparent answer is that the new law has simply codified prior case law in this area.

V. CUSTODY

The custody statute has remained largely unchanged from the date it was first enacted until 1977. The 1860 version provided that the court had jurisdiction to order and direct which parent was to be awarded custody of the children in any divorce. It further provided that the court could direct who would be charged with the children's maintenance.¹⁰⁹ A 1901 amendment modified the statute to give the court additional power to decide which spouse would be awarded custody of infants pending the divorce proceeding.¹¹⁰ Except for changes in phraseology, however, there have been no significant alterations in custody law.¹¹¹

Since 1897, the case law of this jurisdiction consistently held that the best interest of the child is paramount in determining custody:

In all such cases . . . the courts, looking *principally* to the welfare and happiness of the children, will award their care and custody to the one party or the other as will best promote their interest and general welfare. And acting on that principle, no certain fixed rule for the government of the courts in all cases can be laid down, other than this, that the best interest of the children must be consulted as paramount. It has been repeatedly declared in such cases, that the courts do not act to enforce the rights of either parent, but to protect the interest and general welfare of the children.¹¹²

This principle has been reiterated consistently for 80 years. One of the leading cases in this jurisdiction in dealing with judicial discretion in custody matters observed:

Out of a maze of conflicting testimony, usually including what one court called 'a tolerable amount of perjury,' the judge must make a decision which will inevitably affect materially the future life of an innocent child. In making his decision, the judge can

109. Act of June 19, 1860, ch.158, § 1, 12 Stat. 60; R.S.D.C. § 747.

110. Act of Mar. 3, 1901, ch. 854, § 975, 31 Stat. 1346. The following year, this section was amended to state that the court may determine "who" is awarded custody. Act of June 30, 1902, ch. 1329, 32 Stat. 537. This was done to allow the court to grant custody to someone other than the child's parents. In *Hitchcock v. Thomason*, 148 A.2d 458 (D.C.), *rev'd on other grounds*, 107 U.S. App. D.C. 27, 274 F.2d 89 (D.C. Cir. 1959), for example, the court awarded custody to the child's grandmother.

111. The Act of Dec. 23, 1963, Pub. L. No. 88-241, § 91-1, 77 Stat. 561, made only minor changes in phraseology.

112. *Wells v. Wells*, 11 App. D.C. 392, 395 (1897) (emphasis in original).

obtain little help from precedents or general principles. Each case stands alone. After attempting to appraise and compare the personalities and capabilities of the two parents, the judge must endeavor to look into the future and decide that the child's best interests will be served if committed to the custody of the father or mother. He starts with the premise, as did the trial judge here, that the best interests of the child would be served by living in a united home with the affection, companionship and care of both father and mother, but that possibility has been eliminated before the case reaches the judge. So, the question for him is what is best for the child within the limitations presented. When the judge makes his decision, he has no assurance that his decision is the right one. He can only hope that he is right. He realizes that another equally able and conscientious judge might have arrived at a different decision on the same evidence.¹¹³

Spokesmen for the bar groups generally opposed statutory enunciation of any criteria and expressed their satisfaction with existing case law during the drafting stages. They stated that they preferred to rely upon case by case development of custody law. The bar's alternative proposal, therefore, had set forth no new criteria to guide the courts in custody cases. In its 1977 amendments, the District of Columbia Council nevertheless established five nonexclusive "relevant factors" which the Court "should consider" in making custody determinations:

- (1) the wishes of the child as to his or her custodian, where practicable,
- (2) the wishes of the child's parent or parents as to the child's custody,
- (3) the interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may emotionally or psychologically affect the child's best interest,
- (4) the child's adjustment to his or her home, school, and community,
- (5) the mental and physical health of all individuals involved.¹¹⁴

These factors were derived from the Uniform Marriage and Divorce Act,¹¹⁵ and this section is a holdover from the original version of Bill 1-89,

113. *Coles v. Coles*, 204 A.2d 330, 332 (D.C. 1964). *Accord* UNIFORM MARRIAGE AND DIVORCE ACT § 402 (1973 version).

114. D.C. Code § 16-911 (1973), *as amended* by D.C. Law 1-107, § 108(d) (1977).

115. UNIFORM MARRIAGE AND DIVORCE ACT § 402 (1973 version).

which was intended to adopt the Uniform Marriage and Divorce Act.¹¹⁶ Yet the enactment of this new statutory language is of questionable value since a careful review of the five factors shows that nothing has been added to appellate decisions in this district.

Generally, judges in this jurisdiction do not make custody awards without first seeing and talking with any child old enough to express a view, in order to determine the first of the five factors, "the wishes of the child as to his or her custodian." There is ample authority in existing precedents for such action. In *Lindau v. Lindau*,¹¹⁷ a husband appealed a decision awarding custody to the wife. The husband alleged that the judge had applied a presumption in favor of the maternal custody of young children, thus imposing a burden upon him to prove his wife's unfitness as a mother.¹¹⁸ The District of Columbia Court of Appeals disagreed, noting that a fair reading of the record indicated that the trial judge had been primarily concerned with the child's best interest. As evidence of this, the court noted that the judge had interviewed the child in chambers to make a more informed judgment as to the custody award.¹¹⁹ However, since the controlling interest is the child's welfare, not the child's desires, the judge does not abandon his function as *parens patriae* if the child's expressed wishes appear to be inconsistent with the child's best interest. Indeed, an intuitive judge may decide that a child's expressed wishes do not reflect the child's true desire.

As for the second enunciated criteria, the wishes of the parents, it is equally clear that every disputed custody case involves a consideration of the contending parents' wishes. But, as stated in *Boone v. Boone*,¹²⁰ the general proposition will continue to prevail that "the rights of the parent to the child are secondary to the welfare of the child [W]hat is best for the child, rather than the natural right of the parent, is the controlling factor."¹²¹ The court shall consider all five factors and any other considerations that the court deems relevant to the child's best interest. In this regard, the law remains unchanged.

A number of cases in this jurisdiction have already looked to the third "new" factor, the child's interaction and interrelationship with his or her parents or siblings as a consideration in awarding custody. In *Bradley v.*

116. See text accompanying notes 5-10 *supra*.

117. 286 A.2d 864 (D.C. 1972).

118. *Id.* at 865.

119. *Id.*

120. 80 U.S. App. D.C. 152, 150 F.2d 153 (D.C. Cir. 1945).

121. 80 U.S. App. D.C. at 155, 150 F.2d at 156, (quoting *Holtsclaw v. Mercer*, 79 U.S. App. D.C. 252, 145 F.2d 388 (D.C. Cir. 1944)).

Bradley,¹²² for example, the court affirmed a custody award by the lower court because the trial court "had ample opportunity to form an enlightened opinion as to the personalities, past conduct and behavioral patterns of the two parents."¹²³ Similar considerations were examined in the recently decided case of *Benvenuto v. Benvenuto*:¹²⁴

Mrs. Benvenuto has been the primary caretaker and the mainstay of this child's world. It is [a psychiatrist's] recommendation that [the child] spend the bulk of her time with the parent who shows much less 'pathology' since the amount of [the father's] unresolved conflicts leave 'little left to be a parental figure.' In his professional opinion [the mother] should receive custody because of the normal relationship between her and the child and her supportive family.¹²⁵

Thus, it is evident that judges in this jurisdiction are already familiar with this particular factor.

The fourth factor cited by the 1977 amendment, the child's adjustment to his or her home, school, and community, was also considered in *Boone v. Boone*.¹²⁶ In *Boone*, the United States Court of Appeals for the District of Columbia Circuit reviewed a custody award to the husband by the district court. The lower court had taken into consideration the fact that the children were accustomed to their present home, their associations and environments were "of the best," they were attending excellent schools, they had access to a nearby hospital and were generally happy in their home, neighborhood, and school.¹²⁷ The appellate court agreed with the trial court's assessment of the evidence, even though it reversed the award on other grounds.¹²⁸

Finally, a number of prior cases have given weight to the last factor, the mental and physical health of all individuals involved. Both parties in *Rzeszotarski v. Rzeszotarski*¹²⁹ secured the services of expert witnesses who gave psychiatric and psychological testimony as to their son's emotional welfare. The court considered this factor along with the other evidence presented.¹³⁰ The mental and physical health of the child was also an im-

122. 172 A.2d 414 (D.C. 1961).

123. *Id.*

124. 105 DAILY WASH. L. REP. 1033 (D.C. Super. Ct. June 14, 1977).

125. *Id.* at 1038.

126. 80 U.S. App. D.C. 152, 150 F.2d 153 (D.C. Cir. 1945).

127. 80 U.S. App. D.C. at 153, 150 F.2d at 154.

128. The court of appeals decided that in addition to the evidence produced by the parents, the trial court should have considered reports from disinterested parties as well. 80 U.S. App. D.C. at 156, 150 F.2d at 157.

129. 296 A.2d 431 (D.C. 1972).

130. *Id.* at 439.

portant determinant in the *Benvenuto* decision.

A custody determination is more than an evaluation of love and affection. It is a composite, *inter alia*, of a totality of information concerning also the personal safety of a child, the morals and health of the child, the happiness of the youngster, where her bastions of security exist, where she derives most of her essential comfort and needs, where she has the greatest stability, what home environments are offered, what are the parenting capabilities or willingness to provide quality care, what has prologue shown us. Essentially, this decision-making must be an unbiased consideration of the best interests of the child based on her individual characteristics and the relationships of the parents and the child.¹³¹

It is therefore apparent from the leading cases in this jurisdiction that all of the District of Columbia Council's five "new" factors have long been among the many relevant criteria that have gone into custody determinations here. Nothing novel has been added by this statutory enactment and no change in custody proceedings in this jurisdiction can be anticipated as a result of this amendment.

Under the new law it remains unclear whether fault will be considered in determination of custody awards even though divorces are now awarded strictly on no-fault grounds. In an attempt to anticipate how the courts will deal with this issue, Professor Harvey L. Zuckman has noted that although custody criteria under the 1977 law were derived from the Uniform Marriage and Divorce Act, the D.C. Council omitted the following language found in the Uniform Law:¹³² "The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child."¹³³ Professor Zuckman speculates that the absence of this provision implies that Superior Court judges may continue to consider "fault" in custody adjudications. He is correct insofar as the "fault" is deemed relevant to the best interest of the child. Nevertheless, it must be observed that in a number of cases over the years custody has been awarded to the parent found guilty of marital "fault." One such case was *Jaffe v. Jaffe*,¹³⁴ in which the husband was awarded a divorce on the grounds of his wife's adultery. The wife was given custody of the children and the husband appealed the award. The United States Court of Appeals for the District of

131. 105 DAILY WASH. L. REP. 1033, 1039 (D.C. Super Ct. Apr. 26, 1977).

132. See H. Zuckman, *Guide to the New D.C. Marriage and Divorce Law*, 1 DISTRICT LAW. 44 (1977).

133. UNIFORM MARRIAGE AND DIVORCE ACT § 402 (1973 version).

134. 74 U.S. App. D.C. 394, 124 F.2d 233 (D.C. Cir. 1941).

Columbia found ample precedent for such an adjudication¹³⁵ and discerned no abuse of discretion on the part of the trial court since "[i]t was clear that the wife was a devoted and successful mother."¹³⁶ The court stated that courts had the discretion to award custody to unsuccessful defendants in divorce suits.¹³⁷ More recently, the District of Columbia Court of Appeals, in *Rzeszotarski v. Rzeszotarski*,¹³⁸ affirmed a custody award to an adulterous husband and placed the significance of marital fault in perspective:

[T]he presumption of unfitness of an adulterous parent should not be viewed as an absolute bar to an award of custody to that parent. . . . All of the facts of each individual case must be considered by the trial judge as they may be relevant to the best interest and welfare of the child and not the adversary rights of the parents.¹³⁹

Thus, while fault grounds have been eliminated for absolute divorce in this jurisdiction, fault is still relevant in custody proceedings, although its role is somewhat diminished. Again, little, if anything, has been added in this legislation to the custody standards already applied by the courts.

VI. JURISDICTION AND SERVICE OF PROCESS

Since a divorce action is a proceeding *in rem*, the *res* being the legal status of the parties, jurisdiction may be secured over a nonresident defendant either by constructive service, such as publication, or by actual service of process outside the District of Columbia.¹⁴⁰ Custody proceedings are also *in rem* actions¹⁴¹ and constructive service is therefore similarly sufficient to bring the *res* before the court.¹⁴² In *Mankiewicz v. Mankiewicz*,¹⁴³ a wife sued her absent husband for divorce on the ground of desertion. She also sought legal custody of their child, who resided with her. Process was effected by publication. The husband failed to appear and was represented by court-appointed counsel at trial. The trial court awarded her an absolute divorce, but rejected her request for custody due to lack of jurisdiction, since her husband had not been personally

135. 74 U.S. App. D.C. at 395, n.1, 124 F.2d at 234, n.1.

136. 74 U.S. App. D.C. at 395, 124 F.2d at 234.

137. *Id.*

138. 296 A.2d 431 (D.C. 1972).

139. *Id.* at 439 (citation omitted).

140. *See, e.g.*, *Thompson v. Tanner*, 53 U.S. App. D.C. 3, 6, 287 F. 980, 983 (D.C. Cir. 1923).

141. *See Mankiewicz v. Mankiewicz*, 177 A.2d 913, 915 (D.C. 1962).

142. *Id.* at 915. The relation between parent and child, like that between married persons, is a legal status which is sufficient to give *in rem* jurisdiction. *Id.*

143. 177 A.2d 913 (D.C. 1962).

served.¹⁴⁴ On appeal, the court reversed this judgment, adopting the *in rem* rule of other jurisdictions.¹⁴⁵ The court offered a practical consideration for its holding: a rule requiring personal service on an out-of-state spouse would enable the absent party to “forever defeat the innocent parent’s claim to custody, merely by staying out of the District of Columbia.”¹⁴⁶ The *in rem* theory facilitated the resolution of parental rights and avoided the “anomalous and anguishing” situation of a parent enjoying physical but not legal custody.

By contrast, a judgment for support or alimony, or one which purports to affect title to property rights outside the District of Columbia must be based upon *in personam* jurisdiction.¹⁴⁷ In *Gaines v. Gaines*,¹⁴⁸ a plaintiff residing in the District of Columbia sued her husband for limited divorce and sought alimony. The defendant was personally served in Virginia, his state of residence. The district court issued a decree of legal separation and awarded the wife alimony. The United States Court of Appeals for the District of Columbia Circuit reversed the alimony award, ruling that such an order was a judgment *in personam* which could only be entered against a defendant who had either been personally served within the territorial jurisdiction of the court or had submitted himself to the jurisdiction of the court.¹⁴⁹ The only *res* before the court was the husband’s marital status, over which the lower court had already exercised the full extent of its jurisdiction in issuing the decree of limited divorce.¹⁵⁰ The wife’s contention that the court had jurisdiction over the alimony award because it was merely an incident of her action for legal separation was rejected. The court reiterated that “[w]hile an action for divorce is *in rem*, an effort to obtain a money judgment, unconnected with the claim of, right to, or lien upon, real or personal property, is *in personam*.”¹⁵¹

The statute allowing constructive service remained largely unchanged from 1901 until the 1977 amendments.¹⁵² The principal provision of the 1901 law required publication weekly for three successive weeks and made it necessary for the plaintiff to file an affidavit showing either that notice

144. *Id.* at 914.

145. *Id.* at 915.

146. *Id.* at 915-16.

147. *Cf.* *Bunnell v. Bunnell*, 25 F. 214, 216 (C.C.E.D. Mich. 1885) (constructive service by seizure of property within state gives court jurisdiction).

148. 81 U.S. App. D.C. 260, 157 F.2d 521 (D.C. Cir. 1946).

149. 81 U.S. App. D.C. at 262, 157 F.2d at 522-23. The husband appeared and contested the court’s personal jurisdiction over him. *Id.*

150. *Id.*

151. *Id.*

152. Act of Mar. 3, 1901, ch. 854, §§ 108, 109, 31 Stat. 1206, 1207; D.C. Code, § 13-340 (1973).

had been mailed to defendant's last address or that after a diligent search, the defendant's last address could not be determined. Upon failure of the defendant to appear, the case could nevertheless proceed to judgment. Certain precautions, however, were included in the statute. A guardian *ad litem* for minors had to be appointed, and a later amendment stated that counsel had to be appointed for minors.¹⁵³ The 1901 Code further required the court to appoint an attorney to represent all absent defendants and all unrepresented defendants in uncontested divorce cases.¹⁵⁴

These requirements were based, of course, on the public policy of ensuring due process and basic fairness. In the recent case of *Bearstop v. Bearstop*,¹⁵⁵ the District of Columbia Court of Appeals adopted a five-part standard to be applied in determining whether to allow constructive service. The court held that the following information must be submitted by the plaintiff in affidavit form: (1) time and place where the parties last resided as spouses, (2) the last time the parties were in contact with each other, (3) the name and address of the defendant's last employer known to the plaintiff, (4) the names and addresses of close relatives, and (5) any other information that could "furnish a fruitful basis for further inquiry by one truly bent on learning the present whereabouts of the defendant."¹⁵⁶

Rule 4 of the Civil Rules of the Superior Court of the District of Columbia, stating the requirements for service of process, has been modified by Domestic Relations Rule 4 in order to accommodate domestic relations practice.¹⁵⁷ Specifically, Domestic Relations Rule 4(j) provides:

Notices relating to proceedings in this Division of which publication is required shall be published in the Washington Law Reporter for the prescribed time in addition to any other newspaper or periodical specifically designated by the Court. If it is shown to the satisfaction of the Court that an undue hardship would be incurred by the requirements of this section it may order notices to be published in any other manner deemed appropriate within D.C. Code, 1967 Edition, § 13-340.¹⁵⁸

153. Act of June 30, 1902, ch. 1329, 32 Stat. 523.

154. Originally D.C. Code § 982 (1902), this provision is presently found in D.C. Code § 16-918 (1973), which also includes authorization for the payment of attorney fees by whichever party the court directs.

155. 377 A.2d 405 (D.C. 1977).

156. *Id.* at 408. In enunciating these standards, the court was guided by the constitutional principle set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (a default judgment against an absent defendant is void unless methods "reasonably calculated to provide actual notice" were used). 377 A.2d at 408.

157. See Advisory Committee Comment, reprinted in, D.C. CODE ENCYCL., Annot., SUPER. CT. R.—DOM. REL. 4 (West Supp. 1977).

158. D.C. SUPER. CT.—DOM. REL. R. 4(j).

This "hardship" provision has been applied in several cases, including *Johnson v. Johnson*,¹⁵⁹ in which the District of Columbia Court of Appeals reversed the superior court's denial of a plaintiff's motion to allow publication in only the least expensive newspaper. The plaintiff was proceeding *in forma pauperis* and had made a bona fide effort to comply with the requirements of publication. Citing the explanatory note to Rule 4(j), the court pointed out that a measure of discretion is available in ordering publication for cases *in forma pauperis*.¹⁶⁰ The court concluded by stating that denial of the plaintiff's motion had deprived her of access to the court solely because of financial considerations, thus denying her her due process rights under *Boddie v. Connecticut*¹⁶¹ and similar precedents.¹⁶²

Through the 1977 amendments, the District of Columbia Council has further eroded the requirements of Rule 4(j) by allowing posting as a substitute for publication in certain instances:

In actions for divorce in which service by publication is authorized under this chapter, and satisfactory evidence is presented to the court that the plaintiff is unable to pay the cost of publishing an advertisement pursuant to D.C. Code sec. 13-340, without substantial hardship to himself or herself, or to his or her family, the court may direct that such publication may be made by posting the order of publication defined in D.C. Code sec. 13-339, for a period of twenty one calendar days, in the Clerk's Office of the Family division of the Superior Court of the District of Columbia.¹⁶³

The otherwise commendable objective of alleviating expenses faced by indigent plaintiffs who seek access to the divorce courts would seem to deny due process to indigent defendants. There is now a serious question as to whether such defendants receive sufficient due process protections if their only notice consists of a posting in the Family Division Clerk's office. Practitioners, including those representing indigents, should note, however, that this 1977 amendment to the publication provisions does not eliminate the "diligent effort" obligation to find the defendant, since section 13-340 of the D.C. Code remains intact except for the addition of the

159. 329 A.2d 451 (D.C. 1974).

160. *Id.* at 452.

161. 401 U.S. 371 (1971) (given position of marriage relationship in our society, and state monopolization of means for dissolving relationship, due process bars states from denying parties access to courts because of inability to pay court costs).

162. For similar cases in the District of Columbia, see *Harris v. Harris*, 137 U.S. App. D.C. 318, 424 F.2d 806 (D.C. Cir.), *cert. denied*, 400 U.S. 826 (1970); *Gomez v. Gomez*, 341 A.2d 423 (D.C. 1975).

163. D.C. Code § 13-340(a) (1973), *as amended by* D.C. Law 1-107, § 201(a) (1977).

authority to post instead of publish when proceeding *in forma pauperis*.¹⁶⁴

VII. APPOINTMENT OF ATTORNEYS & TERMINATION OF APPEARANCE

Since 1901, the District of Columbia divorce law has provided that in all uncontested divorce cases and in any other divorce case in which the court deemed it necessary or proper, a disinterested attorney "shall" be assigned by the court to enter an appearance for the defendant and to actively defend the cause. This attorney was to be compensated as the court deemed proper and by whichever of the parties the court designated.¹⁶⁵ In 1949, an amendment was passed extending the application of this section to annulment proceedings as well.¹⁶⁶ Finally, in 1970, another amendment was added stating that in any proceeding in which a child's custody was in question, the court could appoint a disinterested attorney to appear on the child's behalf and to represent the child's best interests.¹⁶⁷

According to the courts, this statute was intended to prevent the granting of divorce decrees without proof,¹⁶⁸ to require caution before granting uncontested divorces,¹⁶⁹ and to prevent collusion in divorce cases.¹⁷⁰ As recently as 1974, the District of Columbia Court of Appeals reaffirmed these principles in *Campbell v. Campbell*¹⁷¹ when it reversed a lower court's divorce judgment which had been granted without the participation of either defendant or appointed counsel at trial. In assessing whether the court-appointed defense attorney was necessary at a divorce hearing, the court concluded that because the state was a third party to every divorce action, an attorney was necessary to assert the District's interest actively in such suits.¹⁷² Asserting the District's interest in sponsoring "the welfare of society and the sanctity of the marriage relation,"¹⁷³ the court stated:

164. D.C. Code § 13-340(b) (1973), as amended by D.C. Law 1-107, § 201(b) (1977).

165. Act of Mar. 3, 1901, ch. 854, § 982, 31 Stat. 1347.

166. Act of June 20, 1949, ch. 229, 63 Stat. 213. A change in phraseology was made by Act of Dec. 23, 1963, Pub. L. No. 88-241, § 16-918, 77 Stat. 562. See also D.C. Code § 16-418 (1961).

167. Act of June 29, 1970, Pub. L. No. 91-358, § 145(e)(3)(A), 84 Stat. 557. See D.C. Code § 16-918 (1973).

168. See *Stone v. Stone*, 78 U.S. App. D.C. 5, 136 F.2d 761 (D.C. Cir. 1943). See also Act of June 19, 1860, ch. 158, § 1; 12 Stat. 59; R.S.D.C. § 737, which required that no judgment for divorce be rendered on default without proof.

169. *Id.*

170. See *Rea v. Rea*, 124 F. Supp. 922 (D.D.C. 1954). In *Rea*, the court stated that it is the policy in the District of Columbia that no divorce should be granted except on the basis of a hearing in open court at which evidence is adduced. *Id.* at 922.

171. 325 A.2d 188 (D.C. 1974).

172. *Id.* at 189.

173. *Id.*, (quoting *Simmons v. Simmons*, 57 U.S. App. D.C. 216, 217, 19 F.2d 690, 691 (D.C. Cir. 1927)).

In a divorce suit the state becomes in a sense a party, not necessarily to oppose, but to make sure that a divorce will not prevail without sufficient and lawful cause shown by the real facts. Both the policy and the letter of the law concur in *guarding against collusion and fraud*.¹⁷⁴

Basing its decision on this premise, the court held that the court-appointed attorney's presence at a fact-finding was necessary even though he had been unable to contact the defendant. Had the attorney been present, he might have found it advisable to test the validity and legal sufficiency of the plaintiff's case by cross-examination of that party and her witnesses.¹⁷⁵ Accordingly, a court-appointed counsel would have ensured compliance with the statutory prohibition against divorces on default without proof.¹⁷⁶

Under the 1977 amendments, the appointment of counsel has become discretionary rather than mandatory: "In all cases under this chapter, where the court deems it necessary or proper, a disinterested attorney may be appointed by the court to enter his appearance for the defendant and actively defend the cause."¹⁷⁷ It is noteworthy that the original version of Bill 1-89 had completely eliminated the appointment of counsel except on behalf of children. This was in accord with the sentiments of a number of community members who attended the hearings and expressed the view that the mandatory appointment of counsel created an unnecessary and expensive hurdle to obtaining an uncontested divorce.¹⁷⁸ Most representatives of the bar committees also favored the elimination of the mandatory appointment in uncontested cases. The report from David A. Clarke, Chairman of the Committee on the Judiciary and Criminal Law, stated that "this change is consistent with the proper absence in the current law of any requirement that persons must hire an attorney to obtain a divorce decree or to initiate actions to enforce support payments in the Family Division of the Superior Court of the District of Columbia."¹⁷⁹ Subse-

174. *Id.* (emphasis in original), (quoting *Gage v. Gage*, 89 F. Supp. 987, 991 (D.D.C. 1950)).

175. 325 A.2d at 190. The court acknowledged that court-appointed defense counsel may decide not to contest the divorce action, since often the circumstances may afford no basis for any defense. *Id.*

176. This policy has less application in contested divorce cases. For example, in *Mazique v. Mazique*, 206 A.2d 577 (D.C. 1965), *aff'd on other grounds*, 123 U.S. App. D.C. 48, 356 F.2d 801 (D.C. Cir.), *cert. denied*, 369 U.S. 981 (1966), it was held that a party to a contested divorce has the right to proceed pro se. The theory underlying such a holding is that there is less likelihood of fraud or collusion in contested cases.

177. D.C. Code § 16-918 (1973), *as amended by* D.C. Law 1-107, § 110(a) (1977).

178. The expense involved in such cases is vividly demonstrated to less affluent plaintiffs when they learn of the court's practice of requiring a \$100.00 deposit with the clerk as a minimum fee for appointed counsel, prior to granting a motion for such appointment.

179. Report from David Clarke, *supra* note 11.

quent to the enactment of the 1977 amendments, the Family Division of the Superior Court issued implementation guidelines which provide in part:

Plaintiffs or their attorneys may still seek to have counsel appointed to defend in cases wherein service of process has been had, but no answer filed within the time provided

Cases in which the plaintiffs or their attorneys do not make application for appointment of counsel will be reviewed by the court for a determination of the necessity for such appointments.¹⁸⁰

The effect of this guideline is to require court review of the need for counsel in all uncontested divorce cases in which the plaintiff does not request the appointment of counsel to represent the defendant. Thus, it is still necessary for the judge to review whether counsel for defendant should be appointed. Some practitioners view this procedure as inconsistent with the legislative intent of the Council in replacing "shall" with "may." Nevertheless, many practitioners routinely move to have counsel for defendant appointed to safeguard the rights of both parties. This tactic also assures the validity of any subsequent actions taken by the court by short-circuiting claims that there was a denial of due process or that no diligent effort was made to provide actual notice.¹⁸¹

The 1977 legislation has also made changes affecting the termination of an attorney's appearance. There are several proceedings in which the court, either expressly¹⁸² or by implication,¹⁸³ retains jurisdiction of the matter after a decree or order is entered. For example, after a decree of alimony is entered, the court retains jurisdiction for future orders concerning modification of the amount awarded, enforcement for nonpayment, termination of the award, and so on.¹⁸⁴ Similar considerations apply to custody awards, child support, and maintenance awards. Thus, an attorney's appearance in the aforementioned proceedings may not terminate with the entry of the immediate decree or court order. Under prior practice, an attorney would have to take the initiative to withdraw from such

180. 105 DAILY WASH. L. REP. 593 (April 7, 1977). The guidelines were intended to aid the court, the public, and the bar until formal adoption of rules dealing with matters covered in the new legislation.

181. Counsel for plaintiff would also be well advised to avoid risking a violation of the ABA Code of Professional Responsibility by preparing pleadings for unrepresented defendants in uncontested cases.

182. See D.C. Code § 16-914 (1973) (retention of jurisdiction as to alimony and custody of children).

183. See D.C. Code § 16-912 (1973) (decrees of permanent alimony and their enforcement); D.C. Code § 16-916 (1973) (maintenance decrees and their enforcement).

184. See D.C. Code § 16-914 (1973).

cases in order to terminate his or her appearance. The new legislation has changed this. It provides that:

[T]he appearance of an attorney . . . shall be deemed to have terminated for the purpose of service of any motion, process, or any other pleading, upon completion of the case ending in a judgment, adjudication, decree, or final order from which no appeal has been taken There shall be no action required of any person or attorney under this subsection, but the court having jurisdiction over the matter may suspend the termination of the appearance on its own motion, or on the motion of any party to the case prior to the expiration of the time for appeal.¹⁸⁵

This modification appears designed to promote certainty for all parties as to when an attorney's appearance terminates. It is also a convenience for lawyers who no longer have to withdraw from a case in order to terminate their appearance. Finally, it affords certain procedural safeguards by providing that a termination of appearance prior to expiration of the appeal period may be suspended by the court upon motion.

VIII. ENFORCEMENT OF JUDGMENTS

D.C. Code section 16-911 specifies the procedural mechanisms available for the enforcement of alimony *pendente lite*, permanent alimony, child support, and maintenance orders.¹⁸⁶ The nature of such orders has been described as follows: "[T]he husband becomes liable for the payment of installments of alimony as they accrue. The wife has a vested right to collect them. The obligation is enforceable by execution, by sequestration, or by contempt proceedings. Failure to make the payments constitutes a serious default."¹⁸⁷

*Johnson v. Johnson*¹⁸⁸ presents a case in which a wife appealed from the trial court's denial of her motion to hold her husband in contempt of a court order for child support. The District of Columbia Court of Appeals set out the options available in such cases:

185. D.C. Code § 16-918 (1973), *as amended by* D.C. Law 1-107, § 110(a) (1977). This section of the 1977 amendments was derived from MD. CODE ANN. art. 10, § 45 (1975) (termination after appeal time has expired).

186. D.C. Code § 16-911 (1973) provides for alimony *pendente lite* and money for the maintenance of legal actions, and sets forth the enforcement alternatives. Both § 16-912 (permanent alimony) and § 16-916 (maintenance of wife and minor children) refer back to § 16-911 for the manner of enforcement.

187. *Cole v. Cole*, 67 F. Supp. 134, 136-37 (D.D.C. 1946), *rev'd on other grounds*, 161 F.2d 883 (D.C. Cir. 1947). *See also* *Kephart v. Kephart*, 89 U.S. App. D.C. 373, 377, 193 F.2d 677, 681 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 944 (1952) (the award of alimony is a money judgment on which a writ of execution may issue).

188. 195 A.2d 406 (D.C. 1963).

There are two avenues by which a wife may seek enforcement of an order for support issued in this jurisdiction. As each installment matures, it becomes a judgment debt and (1) she may execute thereon as upon any other judgment for money; or (2), as in the present case, . . . [the court may] enforce a support order against a husband by "imprisonment for disobedience." . . . The burden is upon the husband, however, to show by competent evidence a reasonable excuse for his nonperformance and where he offers no valid reason for his default, the wife is entitled to the aid of the court in the enforcement of its order by imprisonment, unless the husband should purge himself of the arrears.¹⁸⁹

The court stated that proper accounting procedure required that all payments be credited against the earliest arrears so that "accrued arrearages would equal total instalments due less payments made,"¹⁹⁰ and held that the trial court had erred in denying the wife's motion since the husband had neither offered to pay arrearages nor shown any justification for non-payment.

The 1977 Act has facilitated the enforcement and collection of support payments for a spouse or for children by expanding the number of enforcement procedures available under section 16-911. The prior version of the Act provided for attachment, imprisonment, sequestration,¹⁹¹ and injunctions against disposition of property.¹⁹² The new Act has added the word "garnishment" to section 16-911.¹⁹³ It also states that "[i]f a party under court order to make payments under this section is in arrears, [the court may] order the party to make an assignment of part of his or her salary, wages, earnings or other income to the person entitled to receive the payments" ¹⁹⁴ Furthermore, the attachment, garnishment, or assignment is binding on the employer and forbids discrimination against the employee by the employer because of the binding order.¹⁹⁵ This amend-

189. *Id.* at 407 (footnote omitted).

190. *Id.* at 408.

191. A writ of sequestration may be issued against a party who fails or refuses to pay alimony, suit money, or child support. The sequestered property may be real or personal and it may be held until there is compliance with the court's order. *See* D.C. Code §§ 16-911, 916 (1973).

192. In the words of the 1973 statute, "the court may enjoin any disposition of the husband's property to avoid the collection of the allowances so required." D.C. Code § 16-911(2) (1973).

193. D.C. Code § 16-911 (1973), *as amended by* D.C. Law 1-107, § 108(b) (1977). It should be noted that garnishment was available and was utilized as a remedy by virtue of other provisions of the Code prior to the 1977 amendments. This is another instance of a change without a difference.

194. D.C. Code § 16-911 (1973), *as amended by* D.C. Law 1-107, § 108(c) (1977).

195. *Id.* at § 108(e).

ment clears the way for more effective enforcement of support obligations and protects defendants who are subject to such orders. The ban on the discharge of employees has the practical purpose of keeping defendants employed so that they will maintain their financial ability to make the payments. The availability of garnishment as an enforcement measure is especially significant in light of recent legislation allowing for the garnishment of the wages of federal employees¹⁹⁶ and employees of the District of Columbia.¹⁹⁷

Finally, the Marriage and Divorce Act gives the court power to order that "maintenance or support payments be made to the clerk of the court for remittance to the person entitled to receive the payments."¹⁹⁸ As a matter of practice, the Superior Court has exercised its discretion for many years by requiring that payments for spousal and child support be made through the court under Rule 403 of the Domestic Relations Rules.¹⁹⁹ As noted in the Advisory Committee Notes to this rule, payment through the clerk supplies the court with its own record of payments made pursuant to its order, thus expediting any necessary enforcement proceedings.

IX. WAIVER OF COSTS

Section 15-712 of the D.C. Code has been changed many times since it was first enacted in 1921,²⁰⁰ but its basic substance has remained the same. The 1973 version provides that:

When satisfactory evidence is presented to the Superior Court of the District of Columbia or one of the judges thereof that the plaintiff in a suit is indigent and unable to make deposit of costs,

196. See 42 U.S.C. § 659 (Supp. V 1975). This statute authorizes, for the first time, the attachment of government employees' salaries, military pay, and federal retirement payments under the existing procedures for child and spousal support enforcement orders created by local state law.

197. See Employees' Garnishment Act of 1977, D.C. Law 2-14 (July 26, 1977). This Act provides in part:

[w]ages, salaries, annuities, retirement and disability benefits, and other remuneration based upon employment, that are owed by, due from, and payable by the government of the District of Columbia to any individual shall be subject to attachment and garnishment provided the levy is predicated upon the entry of a judgment, order, or decree determining the individual's legal obligation to provide child support or to make maintenance or alimony payments.

Notably, the MD. CODE ANN. art. 16, § 5B(b) (1977 Cum. Supp.) has also been amended to allow the court to "order a lien on the earnings of the defaulting party, due or to be due, in an amount sufficient to pay the support ordered by the court." Under this provision, the term "employer" includes "any public entity."

198. D.C. Code § 16-911 (1973), *as amended by* D.C. Law 1-107, § 108(e) (1977).

199. D.C. SUPER. CT. DOM. REL. R. 403 (amending D.C. SUPER. CT. DOM. REL. R. 11 (1956)).

200. Act of Mar. 3, 1921, ch. 125, § 8, 41 Stat. 1311.

the court or judge may permit the prosecution of the suit without the prepayment or deposit of costs.²⁰¹

The purpose, scope, and application of this section was explained by the United States Court of Appeals for the District of Columbia in *Harris v. Harris*.²⁰² *Harris* involved two appellants who petitioned *in forma pauperis* to be relieved from the prepayment of costs required in their actions for divorce. The appellants based their petitions on section 15-712. The trial court denied both petitions on a number of grounds, including the public policy of encouraging the preservation of marriage and the "permanency of the family relationship."²⁰³ The court was apprehensive that the grant of such petitions in divorce cases, as opposed to matters of mere custody or support, would be tantamount to stamping a judicial seal of approval on the attorney's role of home breaker.²⁰⁴ In reversing the denial, the United States Court of Appeals for the District of Columbia assumed that the two appellants were, in fact, indigent for the purpose of section 15-712²⁰⁵ and that the trial court's denial had effectively barred them from proceeding with their divorce suits. The court then discussed the purpose of the indigency statute:

The obvious intent of the indigency statute is to make available to the indigent, in common with his fellow citizen, the full range of civil remedies contrived by court or legislature including what appear to be meritorious cases for divorce. . . . Congress has enacted a statute authorizing divorce on prescribed grounds and, where the facts indicate that a party is entitled to a divorce on the basis of one of these grounds, additional inquiries are not warranted [T]he *in forma pauperis* statute should be construed to permit indigents to proceed in good faith with nonfrivolous claims for divorce.²⁰⁶

The court noted that the lower court's public policy concerns could not be imposed as an additional requirement under the divorce statute. The court

201. D.C. Code § 15-712 (1973).

202. 137 U.S. App. D.C. 318, 424 F.2d 806 (D.C. Cir. 1970).

203. 137 U.S. App. D.C. at 322, 424 F.2d at 810.

204. See 137 U.S. App. D.C. at 322-23, 424 F.2d at 810-11. The court drew attention to the practice of the Legal Aid Society to petition for leave to proceed *in forma pauperis* only in support and custody matters. It was asserted that seeking a waiver of court costs in divorce actions was "demeaning" to the bar since it put attorneys in the position of attempting to destroy families and stir up litigation for that purpose. *Id.*

205. *Adkins v. E.I. Dupont De Nemours & Co.*, 335 U.S. 331 (1948), was cited as providing the proper test for determining whether a party is eligible to proceed *in forma pauperis* under the federal statute. The court indicated that under the D.C. Code, a petitioner need not be on welfare or "absolutely destitute" in order to qualify. 137 U.S. App. D.C. at 322, 424 F.2d at 810.

206. 137 U.S. App. D.C. at 322-23, 424 F.2d at 810-11.

held that the ability to pay court costs would not be made a condition precedent to obtaining a divorce. In sum, the *in forma pauperis* statute did not exclude actions for divorce.²⁰⁷ The court concluded by interpreting section 15-712 to apply to all court costs, except for publication costs, since they were paid to the newspapers and not the court.²⁰⁸

While it has been held that transcript fees cannot be waived,²⁰⁹ more recent decisions have allowed parties proceeding *in forma pauperis* to waive these costs as well. In *Lee v. Habib*,²¹⁰ the United States Court of Appeals for the District of Columbia Circuit held that "the United States must pay for transcripts for indigent litigants allowed to appeal *in forma pauperis* to the District of Columbia Court of Appeals if the trial judge or a judge of the [District of Columbia Court of Appeals] certifies that the appeal raises a substantial question the resolution of which requires a transcript."²¹¹ The opinion surveyed recent equal protection cases in the criminal law area²¹² and concluded that the underlying principles found therein were equally applicable to civil cases, since the criminal cases had focused on deficient procedures whereby wealthy litigants received more careful consideration of their appeals than their indigent counterparts.²¹³ Two statutes were applied to impose the free transcript requirement in this jurisdiction: section 753, which sets forth a litigant's eligibility for a free transcript in federal district court,²¹⁴ and section 11-935, which imposes an obligation on the court "to equate the 'rules, practice, and procedure' relating to fees for transcripts in the Court of General Sessions [now Superior Court] as nearly as practicable to those in the United States District Court for the District of Columbia."²¹⁵ The court determined that the two stat-

207. 137 U.S. App. D.C. at 323, 424 F.2d at 811. As an example of the additional requirements imposed by the lower court's scrutiny of public policy, the court of appeals pointed out that nonindigent plaintiffs were not required to go beyond the statutory divorce grounds and make a showing that some useful social purpose would be served by the termination of their marriage. 137 U.S. App. D.C. at 324, 424 F.2d at 812.

208. 137 U.S. App. D.C. at 325, 424 F.2d at 813. In view of the \$100.00 minimum fee deposit for appointed counsel required by D.C. Code § 16-918, the court called for such attorneys to serve without compensation in *in forma pauperis* cases. 137 U.S. App. D.C. at 324-25, 424 F.2d at 812-13.

209. See *Estabrook v. Otis*, 18 F.2d 689 (8th Cir. 1927).

210. 137 U.S. App. D.C. 403, 424 F.2d 891 (D.C. Cir. 1970).

211. 137 U.S. App. D.C. at 416, 424 F.2d at 904.

212. 137 U.S. App. D.C. at 410-11, 424 F.2d at 898-99. The court cited the following cases among others: *Douglas v. California*, 372 U.S. 353 (1963) (states must provide counsel for indigent defendants on appeal); *Griffin v. Illinois*, 351 U.S. 12 (1956) (transcript fee resulting in practical unavailability of transcripts to poor on appeal amounts to denial of equal protection).

213. 137 U.S. App. D.C. at 413-14, 424 F.2d at 901-02.

214. 28 U.S.C. § 753(f) (1976).

215. 137 U.S. App. D.C. at 415, 424 F.2d at 903 (citing D.C. Code § 11-935 (1967)).

utes, construed together, provided the right to a free transcript on appeal from the Superior Court in a limited class of civil cases.²¹⁶ This view is consistent with the underlying purpose of section 15-712, which is to make the full range of civil remedies provided by the court and the legislature available to the indigent.²¹⁷

The 1977 modifications continue the liberalizing trend established in the case law in this area. The first paragraph of section 15-712 now provides that:

Any District of Columbia court may authorize the commencement, prosecution or defense of any non-criminal suit, action or proceeding, or appeal therein, without prepayment of fees and costs or security therefor, including the fees for transcripts on appeal, by a person who is unable to pay such costs or give security therefore without substantial hardship to himself or herself or his or her family, as established by affidavit or other proof satisfactory to the court.²¹⁸

This amendment codifies the court's reasoning in *Lee v. Habib*.²¹⁹ It acknowledges the equal protection rights of litigants in civil cases and makes the benefits of section 15-712 expressly available to parties in all types of civil cases, thus precluding the need for the case by case approach of *Harris v. Harris*,²²⁰ which could well have been construed as applying solely to plaintiffs in *in forma pauperis* divorce proceedings. Additionally, the statute broadens section 15-712 to include transcript fees on appeal. Again, this incorporates the holding of *Lee v. Habib* into the express language of the code. Presumably, the limiting boundaries of *Lee* will be superimposed upon the new law since they are not addressed directly by the legislation

216. 137 U.S. App. D.C. at 415-16, 424 F.2d at 903-04. This dual construction had previously been undertaken in the earlier case of *Tate v. United States*, 123 U.S. App. D.C. 261, 359 F.2d 245 (D.C. Cir. 1966), in which it was held that these same statutes required free transcripts for indigents in criminal cases which were appealed from the court of general sessions. Thus, the court again applied the mandate of a criminal equal protection case to a civil case.

217. See, e.g., *Harris v. Harris*, 137 U.S. App. D.C. 318, 322-23, 424 F.2d 806, 810-11 (D.C. Cir. 1970). In *Cabillo v. Cabillo*, 317 A.2d 866 (D.C. 1974), the District of Columbia Court of Appeals applied *Harris* in light of *Boddie v. Connecticut*, 401 U.S. 371 (1971), see note 161 *supra* and held that the denial of a petition to proceed *in forma pauperis* when petitioner's income slightly exceeded the welfare standard, in an action for divorce or annulment, deprived appellants not only of their statutory right under § 15-712, but also their due process rights under the Constitution.

Although *Harris* did not extend the effect of § 15-712 to publication costs, this obstacle has been substantially removed for the indigent by the 1977 amendment of § 13-340 which allows posting in lieu of publication. See text accompanying note 163 *supra*.

218. D.C. Code § 15-712 (1973), as amended by D.C. Law 1-107, § 202(a) (1977).

219. 137 U.S. App. D.C. 403, 424 F.2d 891 (D.C. Cir. 1970).

220. 137 U.S. App. D.C. 318, 424 F.2d 806 (D.C. Cir. 1970).

and do not clash with its intent.²²¹ Finally, this new section enunciates a "substantial hardship" standard which should give the courts a measure of flexibility in granting petitions to proceed under section 15-712.²²² A second paragraph has also been added to make it easier for recipients of assistance to show their eligibility to proceed *in forma pauperis*. Anyone receiving Aid to Families with Dependant Children, General Public Assistance, or Supplemental Security Income under the Social Security Act is presumed eligible to proceed without prepayment of fees and costs or security therefor.²²³

X. THE ELIMINATION OF TORT ACTIONS

The District of Columbia has now become the last jurisdiction in the metropolitan area to eliminate the tort actions for breach of promise and alienation of affections. Actions for criminal conversation have also now been eliminated in the District and Virginia, although they continue to exist in Maryland.²²⁴ The tort action for breach of promise to marry has existed in Anglo-American law for three hundred years.²²⁵ It is based upon the detriment or harm suffered in reliance upon a false promise. As early as the mid-1930's criticisms of this cause of action led to enactment in various states of legislation known popularly as "heart-balm acts" which abolished breach of promise actions. Nevertheless, many plaintiffs have attempted to circumvent the statute by suing under other labels such as deceit and fraud.²²⁶ We shall not attempt to examine this subject in depth since it could well justify a separate law review article, but should point out the existence of extensive litigation arising in other jurisdictions as a result of their abolition of actions for breach of promise.²²⁷

221. The court placed two limitations on its holding. First, there is no right to a free transcript whose resolution requires a transcript when the appeal does not raise a substantial question. 424 F.2d at 904. Second, even if a transcript is found necessary, *Lee* does not require the government to furnish a complete transcript. *Id.* at 904 n.59.

222. See note 205 *supra*.

223. D.C. Code § 15-712 (1973), as amended by D.C. Law 1-107, § 202(b) (1977).

224. The 1977 Act added § 16-923 to the Code, which abolishes these causes of action. D.C. Law 1-107, § 111 (1977). See also MD. CODE ANN. art. 5, § 301 (1975); VA. CODE § 8.01-220 (1975).

225. See H. CLARK, *supra* note 20, at 1.

226. See, e.g., *A.B. v. C.D.*, 36 F. Supp. 85 (E.D. Pa. 1940), *aff'd*, 123 F.2d 1017 (3d Cir. 1941), *cert. denied*, 314 U.S. 691 (1941); *Thibault v. Lalumiere*, 60 N.E.2d 349 (Mass. 1945); *Sulkowski v. Szewczyk*, 255 App. Div. 103, 6 N.Y.S.2d 97 (1938).

227. See, e.g., *Stevens v. Lang*, 99 F. Supp. 259 (S.D.N.Y. 1951); *Boyd v. Boyd*, 228 Cal. App. 2d 374, 39 Cal. Rptr. 400 (1964); *Langdon v. Sayre*, 74 Cal. App. 2d 41, 168 P.2d 57 (1946); *Bunten v. Bunten*, 192 A. 727 (N.J. Misc. 1937). See also Comment, *Breach of Promise to Marry*, 17 BAYLOR L. REV. 51 (1965); Comment, *Abolition of Breach of Promise in Wisconsin—Scope and Constitutionality*, 43 MARQ. L. REV. 341 (1959-60); Casenote, 10 ALA. L. REV. 435 (1958); Recent Decisions, 3 VILL. L. REV. 387 (1958).

Like the breach of promise to marry, the torts of alienation of affections and criminal conversation were also torts which had their origins in the English common law and which have now been abolished in most jurisdictions in the United States. Unlike breach of promise to marry, however, they were intended as protection for the rights of consortium and marriage. Historically, an action for alienation of affections was brought against a stranger who had induced or assisted the wife to leave her husband, but the action did not necessarily include adultery. Conversely, criminal conversation was a closely related action that required only proof that sexual relations had occurred between the spouse and the defendant. Similar to actions for breach of promise to marry, however, suits for alienation of affections and criminal conversation have now been eliminated in many American jurisdictions as a result of the increasing popular opposition to judicial interference in such matters.

XI. RETROACTIVITY

The separation period for both the six-month voluntary separation ground and the twelve month no-fault ground can presumably be applied retroactively under the 1977 Marriage and Divorce Act in cases filed after April 7, 1977, the date of enactment of the statute. In *Tipping v. Tipping*,²²⁸ the United States Court of Appeals for the District of Columbia Circuit held that the District's then five-year voluntary separation ground for divorce was retroactive.²²⁹ The plaintiff in that case had sued for divorce claiming advantage of the recently enacted five-year provision. She and her husband had already been separated for eight years but seven years and eleven months of that separation had transpired before the enactment of the five-year ground. The appellate court found that there was no legislative intent expressed as to retroactivity and that the statute should therefore be applied equally to "past and future transactions."²³⁰ After citing a number of authorities on statutory construction to support its finding,²³¹ the court stated that a restrictive application of the Act would give rise to incongruous and unintended results. Instead, it was resolved that the "actual status" of the parties should be given recognition, especially in light of Congress' intent to liberalize the District's divorce laws both as to existing and prospective conditions.²³² This reasoning should apply to the changes wrought by the new no-fault divorce grounds.²³³

228. 65 U.S. App. D.C. 222, 82 F.2d 828 (D.C. Cir. 1936).

229. D.C. Code § 16-403 (1940).

230. 65 U.S. App. D.C. at 224, 82 F.2d at 830.

231. *Id.*

232. 65 U.S. App. D.C. at 225, 82 F.2d at 830-31.

233. *See also* Parks v. Parks, 73 U.S. App. D.C. 93, 116 F.2d 556 (D.C. Cir. 1940). For

There is, however, considerable dispute among practitioners as to the retroactivity *vel non* of the 1977 law in other respects. In a case involving a federal statute, the United States Court of Appeals for the District of Columbia Circuit has recently stated that: "[A] court is to apply the law in effect at the time that it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."²³⁴ As an example of such "manifest" injustice, the Supreme Court "has refused to apply an intervening change to a pending action in which it concluded that to do so would infringe upon or deprive a person of a right that would have matured or become conditional."²³⁵ There are also constitutionally protected rights under the due process clause of the fifth amendment, which may not be retroactively eliminated by legislation.²³⁶ Bruce French, Staff Director and Counsel of the Committee on Government Operations, who played a major role in the legislative process, has expressed the view that the new divorce statute will apply to all aspects of all new suits filed after the April 7, 1977 enactment date. French believes, however, that the new District of Columbia Marriage and Divorce Act will also be retroactive as to property matters in all pending suits, but will not be retroactive as to grounds for divorce in suits already pending on the date of enactment.

Prior to enactment, section 16-902 provided that: "[n]o action for divorce shall be maintainable unless one of the parties has been a bona fide resident of the District of Columbia for at least one year *next preceding the commencement of the action*."²³⁷ The new Act changed this language by substituting the words "six months" for the words "one year." Therefore, it would appear that the applicable jurisdictional statute in a pending case would be the statute that existed at the time of "commencement of the action." In *Clark v. Clark*,²³⁸ it was held that if the court did not have jurisdiction for lack of residence for the requisite period at the time of "commencement" of the action, a counterclaim, and presumably a supplemental complaint, could not cure the jurisdictional defect, since the statutory language specifies that the residence requirement must be satisfied on the date of commencement of the action. There are no appellate decisions

cases discussing the retroactive effect of Maryland's separation grounds, see *Rhoad v. Rhoad*, 21 Md. App. 147, 318 A.2d 551 (1974) and *Buckheit v. Buckheit*, 10 Md. App. 526, 272 A.2d 54 (1970).

234. *National Consumer Information Center v. Gallegos*, 549 F.2d 822, 825 (D.C. Cir. 1977), (quoting *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974)).

235. *Bradley v. Richmond School Bd.*, 416 U.S. 696, 720 (1974), citing *Green v. U.S.*, 276 U.S. 149, 160 (1964)).

236. *See, e.g., Perry v. Sindermann*, 408 U.S. 593 (1972).

237. D.C. Code § 16-902 (1971) (emphasis added).

238. 79 F. Supp. 722 (D.D.C. 1939).

on this point. If however, there were jurisdiction at the commencement of the action, there is no reason why an amended pleading could not relate back, and thus invoke new grounds for divorce and new property claims based upon the law that became effective during the pendency of the action, but prior to amendment. Leave to amend for this purpose should be freely granted unless strong equitable considerations militate against such an amendment in a particular case. But the objection of one party to application of the new statutory language should not, in and of itself, be a bar to leave to amend.

In a decision rendered on September 30, 1977, the District of Columbia Court of Appeals appeared to approve retroactivity without the need for amendment. In *Williams v. Williams*,²³⁹ the court remanded the case for failure of the court below to find precisely when a nonvoluntary separation had become voluntary, for purposes of the prior statute's twelve-month separation requirement. Nevertheless, the court, in a per curiam opinion, stated that: "Insofar as pertinent, the new law reduces substantially the requirements for a divorce based upon separation. Consequently, in the circumstances of this case, we should think that in applying the new statute on remand, the principal issue relating to separation should become rather simplified, as should the proceedings."²⁴⁰

We do not attempt here to consider constitutional due process questions which may be raised with respect to the consequences of retroactivity on rights to sole property that were fixed or vested and not subject to division in the divorce judge's discretion prior to April 7, 1977. However, we do point out that such issues will be litigated for some time to come, and that the answers are not obvious from either the statutory language or the legislative history.

XII. THE EFFECT OF THE ANTI-SEX DISCRIMINATORY LANGUAGE ACT ON ALIMONY AND CUSTODY

In contrast to the 1977 District of Columbia Marriage and Divorce Act is the Anti-Sex Discriminatory Language Act of 1976.²⁴¹ This Act added the following language to section 16-911, which deals with temporary custody: "[T]he court may . . . determine who shall have the care and custody of infant children pending the proceedings, without conclusive regard to the race, color, national origin, political affiliation, sex, or sexual orientation, in and of itself, of a party."²⁴² Similar language was appended to

239. 378 A.2d 668 (D.C. 1977).

240. *Id.* at 670.

241. D.C. Law 1-87 (1976).

242. D.C. Code § 16-911(4) (Supp. IV 1977).

section 16-914, which provides that the court retains jurisdiction of custody matters after the award is made, "[W]ith respect to matters of custody and visitation, the race, color, national origin, political affiliation, sex, or sexual orientation, in and of itself, of a party shall not be a conclusive consideration."²⁴³ While these new provisions are expected to have a significant impact on future custody determinations, existing case law indicates that the courts of this jurisdiction have already rejected sex and race as determinative factors in this area. For example, in *Coles v. Coles*,²⁴⁴ a mother appealed an award of custody to her husband. She contended, *inter alia*, that she should be given custody since both she and the child were female.²⁴⁵ The appellate court affirmed the award to the father, thus indicating that the sex of the parent, in and of itself, should not be conclusive in custody determinations. Similarly, a difference in race and religion did not prevent the adoption of a white child by a black father and a white mother. In *In re Adoption of a Minor*,²⁴⁶ the United States Court of Appeals for the District of Columbia Circuit stated:

Nor can denial of the adoption rest on a distinction between the "social status" of whites and Negroes. There may be reasons why a difference in race, or religion, may have relevance in adoption proceedings. But that factor alone cannot be decisive in determining the child's welfare. It does not permit a court to ignore all other relevant considerations. Here we think those other considerations have controlling weight.²⁴⁷

In *Rzeszotarski v. Rzeszotarski*, the District of Columbia Court of Appeals stated that "although it is recognized that children of tender years are better off with their mothers, absent a finding that the mother is unfit, this presumption cannot be viewed as controlling but merely as a usually persuasive factor relating to the issue of custody."²⁴⁸ The wording of the Anti-Sex Discriminatory Language Act does not expressly eliminate such a presumption, since subparagraph 4 of section 16-911 merely states that determination of custody shall be made "without *conclusive* regard to . . . sex." This language, however, appears to make no real change in existing case law and the courts will continue to apply the presumption that a child of tender years is better off with the mother, subject to rebuttal by other facts. Virginia law provides that, "in awarding the custody of the child to either parent or to some other person, [the judge] shall give primary considera-

243. D.C. Code § 16-914 (Supp. IV 1977).

244. 204 A.2d 330 (D.C. 1964).

245. *Id.* at 331

246. 97 U.S. App. D.C. 99, 228 F.2d 446 (D.C. Cir. 1955).

247. 97 U.S. App. D.C. at 101, 228 F.2d at 448.

248. 296 A.2d 431, 439 (D.C. 1972) (citations omitted).

tion to the welfare of the child, and as between the parents there shall be no presumption of law in favor of either."²⁴⁹ As a matter of practice, Virginia courts generally ignore that statute.²⁵⁰ However, in *Burnside v. Burnside*,²⁵¹ the Supreme Court of Virginia considered the presumption, in favor of the mother, but awarded custody to the father because the weight of the evidence showed that the child's best welfare at that point required an award of custody to the father although the mother was not unfit. As recently as 1976, the Supreme Court of Virginia held that the presumption in favor of the mother as custodian of children of tender years "is no more than a permissible and rebuttable inference that when the mother is fit and other things are equal, she as the natural custodian, should have custody of a child of tender years."²⁵² It is likely that the Anti-Sex Discriminatory Language Act will have little more effect on District of Columbia cases than the Virginia law has had in that jurisdiction.²⁵³

The anti-sex discrimination statute also purported to change the provisions of section 16-915 of the 1973 Code, which, prior to October 1, 1976, provided that: "In granting a divorce from the bond of marriage, the court may restore to the wife her maiden or other previous name."²⁵⁴ The new statute has removed discretion from the court by substituting the following mandatory language: "Upon divorce from the bond of marriage, the court shall, on request of a party who assumed a new name on marriage and desires to discontinue using it, state in the decree of divorce either the birth-given or other previous name which such person desires to use."²⁵⁵ It should be noted, however, that the District of Columbia Court of Appeals, interpreting the former provision in a case decided more than one year after the new anti-sex discrimination language had been enacted, held that, even under the prior discretionary language, it was an abuse of discretion for the court to deny an appellant's request for restoration of her maiden name when the only reason advanced by the trial court was that "it would be contrary to the best interests of her two children."²⁵⁶ The court commented that a trial court's consideration in granting or denying a request

249. VA. CODE § 31-15 (1950).

250. See *Rowlee v. Rowlee*, 211 Va. 689, 179 S.E.2d 461 (1971), and cases cited therein.

251. 216 Va. 691, 222 S.E.2d 529 (1976).

252. *Harper v. Harper*, 217 Va. 417, 419, 229 S.E.2d 875, 877 (1976).

253. For trends in other jurisdictions, see Annot., 70 A.L.R.3d 262 (1976).

On February 28, 1978, the Maryland Court of Special Appeals concluded "that since July 1, 1973 [when the Maryland Equal Rights Amendment was enacted] the maternal preference has been abolished by statute in child custody cases." *McAndrew v. McAndrew*, 382 A.2d 1081 (Md. Ct. Spec. App. 1978).

254. D.C. Code § 16-915 (1973).

255. D.C. Code § 16-915 (Supp. IV 1977).

256. *Brown v. Brown*, 105 DAILY WASH. L. REP. 2305, 2308 (D.C. App. Nov. 21, 1977),

for a change of name, whether under section 16-2501²⁵⁷ of the 1973 Code, "is limited to consideration of those factors which limited a person's common law right to change his or her name."²⁵⁸ The court remanded the case and directed the lower court to restore the maiden name unless it found "that her request was fraudulently or criminally motivated."²⁵⁹

Furthermore, the anti-sex discrimination statute has the effect of "de-sexing" certain provisions of sections 16-911 and 16-912. These provisions empower the court to require a "husband to pay alimony to the wife for the maintenance of herself and their minor children" *pendente lite* and to "decree her permanent alimony sufficient for her support and that of any minor children who the Court assigns to her care. . . ." ²⁶⁰ As amended, section 16-911 now states, in pertinent part, that

[d]uring the pendency of an action for divorce, or an action by the husband or wife to declare the marriage null and void, where the nullity is denied by the other spouse, the Court may:

(1) require the *husband or wife* to pay alimony to the other spouse for the maintenance of himself or herself and their minor children. . . . ²⁶¹

Similarly, section 16-912 has been modified to read as follows: "When a divorce is granted to either spouse, the court may decree him or her permanent alimony sufficient for *his or her* support and that of any minor children whom the court assigns to that spouse's care."²⁶²

The statute obviously makes it possible now for the wife, as well as the husband, to be required to pay alimony both temporarily and permanently. Prior to these amendments in 1976, the court had no statutory authority to order a wife to pay alimony to her husband since the terms of the Code made reference only to the husband.²⁶³ Similar modifications have been made in the statutes of Maryland²⁶⁴ and Virginia.²⁶⁵ Thus, the language

opinion vacated, 382 A.2d 1038 (D.C. 1978). In light of the anti-sex discrimination provision, the *Brown* opinion was vacated although the judgment was allowed to stand.

257. D.C. Code § 16-2501 (1973) is the general provision for name changes.

258. 105 DAILY WASH. L. REP. at 2308.

259. *Id.*

260. D.C. Code §§ 16-911, 16-912 (1973).

261. D.C. Code § 16-911(a) (Supp. IV 1977) (emphasis added).

262. D.C. Code § 16-912 (Supp. IV 1977) (emphasis added).

263. Even prior to this change, however, a wife could be required to contribute to the support of her children. Before 1970, the District followed the common law rule of imposing the primary duty on the father, but since the enactment of the 1970 amendment to D.C. Code § 16-916(C), the trial court has had discretion to require that either or both spouses contribute to the support of minor children. *See Farmer v. Midgley*, 102 DAILY WASH. L. REP. 177 (D.C. Super. Ct. 1973). *See also McKay v. Paulson*, 211 Md. 90, 126 A.2d 296 (1956) for the history of a similar Maryland provision.

264. MD. CODE ANN. art. 16, § 5A (1973).

change results not only in unanimity among the three contiguous jurisdictions but significantly broadens the court's authority to award alimony.²⁶⁶

XIII. CONCLUSION

The 1977 amendments constitute the culmination of a forty-two year trend toward liberalization of grounds for divorce in the District of Columbia, and follow the recent and rapid trend throughout the United States toward simple and accessible no-fault divorces.²⁶⁷ Nevertheless, it is anomalous that the District has retained adultery as a ground for legal separation, but not for absolute divorce. This distinction does not have a rational basis, and, as a result, adultery will rarely be used as a ground for divorce since the no-fault or voluntary separation grounds for absolute divorce are likely in most cases to be available before a plaintiff in an adultery action can get to trial.

Clearly, no-fault divorce based on separation for one year without cohabitation makes a real change in substance and practice, which, along with the shortening of the voluntary separation period to six months will make a District of Columbia divorce more easily and quickly obtainable. There will no longer be an incentive to move to a contiguous jurisdiction to accelerate the date at which a final divorce may be obtained. It is also

265. VA. CODE § 20-107 (1975).

266. The disparity among the three neighboring jurisdictions may, however, continue to play a role with respect to property considerations since both Virginia and Maryland divide joint property equally, and in neither jurisdiction can the divorce court divide property titled solely in the name of one spouse.

On January 5, 1978, the Maryland Governor's Commission on Domestic Relations Law, chaired by Beverly Anne Groner, approved a proposal now pending in the Maryland legislature, reportedly with substantial support, that would establish a concept of "marital property" consisting of all property acquired by the parties during their marriage. The proposal would give the court, in divorce and annulment cases, the power to consider the total value of "marital property" in the disposition of the property of the parties, including the recognition that special consideration from a family point of view needs to be given to real property constituting the family home and personal property devoted primarily to family use. It also recognizes the need to consider non-monetary as well as monetary contributions of the parties to the marriage. Although the approach is somewhat different, if adopted, the proposal would make changes similar to those effected by the District of Columbia Marriage and Divorce Act on April 4, 1977, with respect to the power of the D.C. Superior Court over property acquired during the marriage.

267. According to Doris Jonas Freed, Chairperson of the Committee on Research, Family Law Section, American Bar Association, and Henry H. Foster, Jr., her predecessor:

As of August 1, 1977, only three American jurisdictions still retain the old 'fault only' grounds for divorce: Illinois, Pennsylvania, and South Dakota. Reform is in the wind in these states, however. There are now 31 states with the irretrievable breakdown ground. In some 15, it is the sole ground; in the remaining 16, it has been added to the traditional fault grounds.

3 FAM. L. REP. 4048 (BNA) (1977).

now possible for a court to award a lump sum or other property award in lieu of alimony.

Unfortunately, it appears that the effort to eliminate the mandatory appointment of counsel in uncontested cases has not been entirely successful and has certainly failed to simplify the divorce proceedings.²⁶⁸ It is similarly apparent that the Council neglected to deal effectively with the retroactivity question. The statute provides little guidance and a significant amount of litigation is likely to result in this area.

The Council specifically enumerated the criteria to be considered in custody and property distribution determinations. We believe, as did the bar groups, that these criteria should have been omitted in order to give more flexibility to the courts in the future in adapting the relevant factors to reflect the changing values in society. Nevertheless, it is clear that neither the custody nor property-distribution criteria add anything significantly new to the law, and, at this point, serve as nothing more than a codification of the principles developed in the case law. These changes will have little practical effect on either custody or property division cases.

In sum, we are left to conclude that the overall effect of the new law has been to affirm the federal and local courts of the District of Columbia.

268. As this article went to press, there was pending before the Council of the District of Columbia a new bill (2-202) which, if adopted, would create a "presumption that a disinterested attorney shall not be appointed . . . in all cases in which personal service . . . is effected and . . . defendant fails to indicate any intention to contest. . . ." It would also establish criteria for appointment of counsel on other cases. The Family Law Division of the District of Columbia Bar and the Domestic Relations Committee of the Bar Association of the District of Columbia unanimously approved at a joint meeting their committees' action and recommended a revision of Court rules to effectuate the purposes of Bill 202 to obviate the necessity for Council action. *See also* notes 180-181 & accompanying text *supra*.

