

## Catholic University Law Review

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Volume 22  
Issue 2 *Winter 1973*

Article 6

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1973

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#### Recommended Citation

William F. Fox Jr., *Alimony, Property Settlement and Child Custody under the New Divorce Statutes: No-Fault Is Not Enough*, 22 Cath. U. L. Rev. 365 (1973).

Available at: <https://scholarship.law.edu/lawreview/vol22/iss2/6>

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## COMMENTS

### Alimony, Property Settlement and Child Custody Under the New Divorce Statutes: No-fault is Not Enough

There is an increasingly strong movement today both within and without the legal profession which seeks to reduce the hazards and pains of traditional adversary litigation. One aspect of this trend has been in the area of automobile accident tort litigation with the move toward non-litigated, "no-fault" settlement of injury and property damage claims.<sup>1</sup> A similar trend is to be found in the area of divorce law; the newer divorce statutes seek to eliminate the litigious aspects of divorce grounded in the old "fault" concept<sup>2</sup> and substitute a contractual approach which treats marriage as dissoluble at the wish of the two parties involved.<sup>3</sup>

A "pure" no-fault divorce statute typically permits divorce or dissolution of the marriage when it can be shown that "irreconcilable differences [exist] which have caused the . . . breakdown of the marriage."<sup>4</sup> Such statutes

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1. See, e.g., *Symposium On No-fault Automobile Insurance*, 21 CATHOLIC U.L. REV. 259 (1972).

2. See, e.g., D.C. CODE § 16-403 (1967) which requires that divorce be granted in the District of Columbia only if one of several "grounds" can be shown by the party seeking the divorce.

While the D.C. statute is somewhat typical of fault statutes, Professor Morris Ploscowe has estimated that at least forty-three different grounds for divorce exist in the various United States jurisdictions. Ploscowe, *The Truth About Divorce*, 96, quoted in PLOSCOWE & FREED, *FAMILY LAW: CASES AND MATERIALS* 144 (1963).

3. Virtually all no-fault divorce statutes take as their starting point a classic dictum by then Chief Justice Traynor of the California Supreme Court:

In a divorce proceeding the court must consider not merely the rights and wrongs of the parties . . . the public interest in the institution of marriage . . . . [W]hen a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted. Public policy does not discourage divorce when the relations between husband and wife are such that the legitimate objects of matrimony have been destroyed.

*DeBurgh v. DeBurgh*, 39 Cal. 2d 858, 863-64, 250 P.2d 598, 601 (1952).

4. CAL. CIV. CODE § 4506(1) (West 1970). California was the first state to im-

have been enacted in six jurisdictions at the time of this writing: California,<sup>5</sup> Colorado,<sup>6</sup> Florida,<sup>7</sup> Iowa,<sup>8</sup> Michigan,<sup>9</sup> Nebraska,<sup>10</sup> and Oregon.<sup>11</sup> Additionally, a Uniform Marriage and Divorce Act (UMDA) has been promulgated by the National Conference of Commissioners on Uniform State Laws.<sup>12</sup> In each of these statutes the traditional grounds to fault have been eliminated and the common law defenses to divorce have been abolished. In their place a "breakdown" test has usually been substituted which seeks to determine the true status of a particular marriage rather than to cast blame on either husband or wife for specific acts of marital misconduct.

No-fault divorce, in essence, is an attempt to eliminate the bitter acrimony that is characteristic of many divorce actions by removing most of the elements of the adversary system from the proceedings and by eliminating the concept of guilt which requires the finding of fault on the part of one party and one party only. In theory the fault system is merely a single aspect of the adversary system—a system that has considerable disadvantages notwithstanding its durability. As one noted writer has pointed out:

[The adversary system] brings forth guile and concealment as well as truth. It presupposes equality of opportunity, means and skill; but these are seldom evenly matched. It often degenerates into trial by combat with victory to the swift and strong rather than to the party in the right.<sup>13</sup>

Particularly with respect to divorce, most couples try to avoid a full scale court battle and seek divorce on the most easily proved ground—in most jurisdictions the ground of cruelty.<sup>14</sup> Often by the time couples actually seek divorce the arguments and viciousness are quite often over, and they seek merely a judicial confirmation of what has long been reality. As one trial judge put it: "they are in court because they have already had

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plement "pure" no-fault divorce with the enactment of the Family Law Act of 1969, Cal. Civ. Code §§ 4000-5138 (West Supp. 1969), which went into effect on January 1, 1970. For a good discussion of the legislative history of the Act, see Krom, *California's Divorce Law Reform: An Historical Analysis*, 1 PACIFIC L.J. 156 (1970).

5. CAL. CIV. CODE §§ 4000-5138 (West 1970).

6. COLO. REV. STAT. §§ 46-1-1 to 46-1-33 (Supp. 1971). Colorado has enacted the Uniform Marriage and Divorce Act with minor changes. See note 12 *infra*.

7. Fla. Laws 1971, ch. 61.

8. IOWA CODE ANN. §§ 598.1 to .34 (West Supp. 1971).

9. Michigan Laws 1971, P.A. 75.

10. Nebraska Act (L.B. 820) (enacted July 6, 1972).

11. Oregon Laws 1971, ch. 280.

12. The Uniform Marriage and Divorce Act text is set out in its entirety in 5 FAMILY L.Q. 205 (1971). Hereinafter the UMDA will simply be cited by section

13. F. JAMES, JR., CIVIL PROCEDURE 7 (1965).

14. This includes both physical and mental cruelty. See P. JACOBSON, AMERICAN MARRIAGE AND DIVORCE 123 (1959). Jacobson also notes that in New Mexico, a state which permits divorce on the ground of incompatibility, almost 90% of all divorces are granted on this ground. *Id.* at 126.

their fill of battling. They've argued and threatened and called names until one or both decided they can't take it any longer."<sup>15</sup>

The real disputes in the typical divorce do not focus on whether grounds exist or which defenses may be interposed. Rather, they involve collateral issues, *e.g.*, how much the wife is paid, who gets the house, and what happens to the kids. These three questions identify the most important collateral aspects of divorce. They are, respectively, alimony, property settlement and child custody. Child custody, as shown below, is fraught with considerable non-legal and extrajudicial considerations. Alimony and property settlement, on the other hand, are essentially financial transactions which are more susceptible of a purely legal solution, and judges understandably seem more at home balancing figures rather than the children's lives.

The no-fault divorce statutes have modified somewhat the collateral areas as well as abolishing grounds and defenses. However, it has become abundantly clear that much less legislative thought and effort has gone into those areas than has gone into the basic reforms. This article is based on the premise that the three collateral areas of divorce require as much or more reform and have as much significance for the parties than do the abolished grounds and defenses. To show this oversight each area has been independently analyzed and the new modifications in each state have been discussed. The analysis reveals that these auxiliary matters have not received all the attention they are properly due.

### Alimony

The basic premise of the award of alimony to the wife grew out of an older time and a much different society, one in which women did not work, could not sustain themselves and unless married and supported by a husband, became public burdens.<sup>16</sup> This concept has been transmuted into a much abused mechanism by which courts grant or withhold alimony awards on criteria other than pure need. Generally, the alimony award has rested in the unfettered discretion of the trial court,<sup>17</sup> although some jurisdictions

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15. Alexander, *Let's Get the Embattled Spouses Out of the Trenches*, 18 LAW & CONTEMP. PROB. 98, 102 (1953).

16. See the excellent discussion on the historical origins of alimony in CLARK, LAW OF DOMESTIC RELATIONS 420-22 (1968) [hereinafter cited as CLARK]. Professor Clark argues cogently that while alimony may have had some relevance in an ecclesiastical setting when church courts awarded only limited (*a mensa et thoro*) divorces and a husband's duty to support his wife thereby continued unabated, there is much less justification today when absolute divorces are the rule and women are becoming increasingly self-sufficient. *Id.*

17. See, *e.g.*, INDIANA STAT. ANN. § 3-1218 (1968). "The court shall fix the amount of alimony . . . which, in his discretion he deems to be just and proper. . . ."

have barred awards of alimony to a husband entirely (even when he is the innocent party and in need of support).<sup>18</sup> Further impinging on the trial court's discretion are additional criteria often imposed either by statute or appellate courts. These include the use of alimony as a punitive device for the husband's wrongdoing,<sup>19</sup> and the ability of the husband to pay.<sup>20</sup>

### *The Concept of Fault in Alimony Awards*

Fault has long played a major role in alimony disputes. In many jurisdictions there is an absolute bar to an alimony award to the wife when the divorce is awarded to the husband.<sup>21</sup> The common law rule prohibited an award to a wife at fault in a divorce and many statutes reflect this persuasion.<sup>22</sup> Moreover, a few courts have forbidden or reduced alimony when the wife gets the divorce "[but] . . . has engaged in serious marital misconduct."<sup>23</sup> This rather harsh rule has often had severe consequences for women even in the twentieth century and has recently been subject to some modification. In a 1960 Kentucky case, after conceding that the divorce was grounded solely on the wife's "fault", the appellate court held that ". . . when the wife has not been guilty of moral delinquency . . . the wife may be entitled to alimony even though the divorce is rightly granted to the husband."<sup>24</sup>

A Louisiana appellate court devised a somewhat different modification of the original rule by requiring that an award to the wife not be denied solely on the basis of her misconduct unless the misconduct was "of a serious

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18. When a statute does not expressly provide for alimony awards to the husband, none may be granted. See the cases cited in 66 A.L.R.2d 880, 882 (1959); Comment, *Alimony for Men*, 3 KAN. L. REV. 357 (1955) (listing those states which have enacted statutes permitting alimony awards to either spouse). It would appear that the equal rights amendment currently awaiting ratification which prohibits sex-based discrimination would void alimony awards solely to wives.

19. In the South Carolina case of *Graham v. Graham*, 171 S.E.2d 704 (S.C. 1970), the court awarded a sum of alimony and child support amounting to over 90 percent of the husband's income. Cf. *Caldwell v. Caldwell*, 5 Wis. 2d 146, 92 N.W.2d 356 (1958); *Pinion v. Pinion*, 92 Utah 255, 67 P.2d 265 (1937).

20. While the husband's income would seem to be an inherent limitation on the total award, some courts have seen fit to make awards significantly out of proportion to the husband's current financial status if the court feels his lowered economic condition has been brought about wilfully or through negligent management. See, e.g., *Donigan v. Donigan*, 208 Md. 511, 119 A.2d 430 (1956); *Hawkins v. Hawkins*, 187 Va. 595, 47 S.E.2d 436 (1948).

Other criteria which various courts have applied include: the ages and health of the spouses, the length of the marriage, the standard of living, and "what the wife gave up when she married the husband." CLARK, *supra* note 16, at 446.

21. See the cases collected at 34 A.L.R.2d 313, 321 (1954).

22. See, e.g., KAN. STAT. ANN. § 60-1610 (1964); TENN. CODE ANN. § 8449 (1932): "If the bonds of matrimony be dissolved at the suit of the husband, the defendant shall not be entitled to . . . alimony."

23. CLARK, *supra* note 16, at 446, citing 9 A.L.R.2d 1026 (1950).

24. *Taylor v. Taylor*, 331 S.W.2d 895, 897 (Ky. 1960).

nature [and] . . . an independent contributory or proximate cause of the separation rather than a justifiable or natural response to initial fault on the part of the husband."<sup>25</sup> In *DeBurgh v. DeBurgh*,<sup>26</sup> the California Supreme Court held that when a divorce is granted to both parties (virtually abolishing the defense of recrimination) alimony may be awarded to either party.<sup>27</sup>

This system of spousal support has led to considerable injustice. Perhaps the inequity arises from the problems caused by the trial courts' having lost sight of the central purpose of alimony—to keep unemployable wives or husbands from becoming public charges. The attitude that alimony should be awarded in the nature of a punitive fine is absurd both from a sociological and a legal sense. It is clear that such punishment has little or no deterrent effect on the divorcing spouse; few couples abstain from divorce when their marriage has broken down merely because of fear of an award of alimony. "Fault" is not the moral equivalent of "guilt" since an act of marital misconduct may be merely a symptom of a broken marriage and not the cause of the breakdown.<sup>28</sup> But even if we may equate fault and guilt and thus legitimately seek punishment of the errant spouse, the divorce itself should constitute the punishment: that is, it should be sufficient that one is driven out of a family environment—and thus out of the cultural mainstream—in the same sense that political crimes are often punished by exile. It is a senseless compounding of the tragedy to look to a collateral area such as spousal support in search of further sanctions.

From a legal standpoint the concept of alimony as punishment is directly contradicted by those statutes which require the cessation of alimony payments upon the remarriage of the spouse.<sup>29</sup> If truly punitive there is no reason to cease payments because of a change in a spouse's circumstances.<sup>30</sup>

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25. *Kendrick v. Kendrick*, 236 La. 40, 106 So. 2d 707, 709 (1958).

26. 39 Cal. 2d 858, 250 P.2d 598 (1952).

27. *Id.* at 862, 250 P.2d at 602. The defense of recrimination prohibits award of a divorce to one spouse based on the other spouse's fault when the first spouse has also engaged in conduct which constitutes grounds for divorce.

28. See Walker, *Disarming the Litigious Man: A Glance at Fault and California's New Divorce Legislation*, 1 PACIFIC L.J. 182, 191-94 (1970). In a later article Professor Walker argues that the fault system in general leads to a pattern of "law-avoidance" rather than "law abidingness" on the part of troubled couples. Walker, *Beyond Fault: An Examination of Patterns of Behavior in Response to Present Divorce Laws*, 10 J. FAMILY L. 267 (1971).

29. See, e.g., former COLO. REV. STAT. § 46-1-5(5) which requires termination of the alimony payment upon the wife's remarriage unless otherwise agreed upon by the parties.

30. Professor Clark lists eight factors which influence modification of alimony awards. These include: (1) wife's remarriage, (2) husband's remarriage, (3) changes in the wife's needs, (4) changes in the husband's ability to pay, (5) husband's death, (6) subsequent misconduct of wife, (7) violation of divorce decree by husband or wife, and (8) post-decree agreement of the parties. CLARK, *supra* note 16 at 457-64.

Thus, the present system of alimony is not in the least satisfactory. Its function and purpose are often misconstrued; its premise is founded on an outmoded view of society not comporting with contemporary American society. One empirical study of alimony has noted that it is often used by divorce lawyers more as a device to get negotiating leverage rather than as an end in and of itself.<sup>31</sup> Some judges, anxious to permit the ties between spouses to be clearly severed (a rather healthy attitude, it would seem), are reluctant to award alimony at all. As Hopson's study in the Kansas trial courts noted:

Viewing alimony as a "cash" payment, the judges said that women did not ask for it too often, and when they did the court was not particularly receptive. . . . [One judge] said he doubted if he granted alimony in more than one out of five cases where the wife asked for it, and that usually she does not ask for it. Another said that he did not like alimony and that a wife should not be "making money" off a divorce. He added that since it is almost impossible to collect there is not much reason to grant it. He has granted alimony in only twenty five cases in his twenty years as a judge.<sup>32</sup>

### *The New Statutory Reform*

The new no-fault statutes have in general corrected only a few of the deficiencies in the present system of alimony awards. The California Family Law Act,<sup>33</sup> the Colorado act,<sup>34</sup> the Uniform Marriage and Divorce act,<sup>35</sup> and the Oregon statute<sup>36</sup> bar evidence of misconduct from the courts' determination of spousal support. Florida, in a curious and seemingly inexplicable anomaly, incorporated much of the previous statutory language (phrased in fault terms) in its new law. The earlier Florida statute barred alimony for an adulterous wife;<sup>37</sup> the new statute permits the court to "consider" a

31. Hopson, *The Economics of a Divorce: A Pilot Empirical Study at the Trial Court Level*, 11 KAN. L. REV. 107, 123 (1962) [hereinafter cited as Hopson].

32. *Id.* at 125.

33. CAL. CIV. CODE § 4509 (West 1970). "In any pleadings or proceedings for legal separation or dissolution of marriage . . . evidence of specific acts of misconduct shall be improper and inadmissible. . . ."

34. COLO. REV. STAT. 46-1-14(2)(a) (Supp. 1972). "The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to marital misconduct. . . ."

35. UMDA § 308(b) (the language is the same as the Colorado act).

36. ORE. REV. STAT. § 107.036(2) (1971). "The court shall not receive evidence of specific acts of misconduct. . . ." (with exceptions for child custody and to show irreconcilable differences).

37. FLA. STAT. § 65.08 (1957) read, in part, as follows:

In every decree of divorce in a suit by the wife, the court shall make such orders touching the maintenance, alimony and suit money of the wife . . . as from the circumstances of the parties and nature of the case may be fit, equitable and just; but no alimony shall be granted to an adulterous wife.

spouse's adultery in the award.<sup>38</sup>

The remaining statutes do not specifically mention the exclusion of misconduct evidence. It remains to be seen whether the lack of an express prohibition will lead to an intrusion of fault evidence in subsequent proceedings. This appears entirely possible since the prerogatives of trial court discretion have been retained and the matter of misconduct is not excluded from the permissible factors relied on by the court.

Furthermore, the new statutes, with the exception of Colorado and the UMDA,<sup>39</sup> make no other modification of present procedures for awards. There are no statutory guidelines or standards set out to guide alimony determination at the trial level. Most statutes appear to permit almost unbridled judicial discretion. Iowa, for example, sets out its alimony provisions in a single sentence, lumped with child custody and property division: "When a dissolution of marriage is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties *as shall be justified*."<sup>40</sup> Even with the magnificent legislative history compiled for the California Family Law Act, Professor Clark notes that the Governor's Commission "gave relatively little consideration to problems of alimony and property."<sup>41</sup>

One of the criticisms most frequently directed toward alimony awards is the lack of adequate judicial or statutory guidelines for the trial court. As early as 1939 legal commentators were skeptical of the wide discretion permitted trial courts.<sup>42</sup>

Only the Colorado act and the UMDA provide judicial guidelines for the exercise of trial court discretion in the area of alimony. First they prohibit any maintenance award at all unless the spouse seeking support lacks sufficient property (ideally property given him as part of the divorce settle-

38. FLA. STAT. § 61.08 (Supp. 1971) reads, in part:

(1) In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature . . . The court may consider the adultery of a spouse . . . in determining whether alimony shall be awarded to such spouse and the amount of alimony if any, to be awarded to such spouse. . . .

39. See discussion in the text at notes 42-45, *infra*.

40. IOWA CODE ANN. § 598.21 (Supp. 1971) (emphasis added).

41. Clark, *Divorce Policy and Divorce Reform*, 42 U. COLO. L. REV. 403, 409 (1971) [hereinafter cited as *Divorce Reform*].

42. Cooley, *The Exercise of Judicial Discretion in the Award of Alimony*, 6 LAW & CONTEMP. PROB. 213 (1939). Mr. Cooley remarked:

Judicial discretion is probably nowhere more intimately connected with human relations, nor is it given freer rein, than in the field of domestic relations. Particularly is this true when applied to the question of alimony.

*Id.*



ment to "provide for his reasonable needs;"<sup>43</sup> and unless custodianship of a child or lack of employability bar him from seeking outside employment.

Second, the court is admonished to consider all "relevant factors" including:

- (1) the financial resources of the party seeking support;
- (2) the time necessary to acquire sufficient education or training to enable the party to find employment;
- (3) the standard of living established during the marriage;
- (4) the duration of the marriage;
- (5) the age and physical and mental condition of the spouse; and
- (6) the ability of the paying spouse to meet his own needs.<sup>44</sup>

Professor Clark scoffs at these guidelines and asserts that the limitations on judicial discretion set out above are "more apparent than real" since the factors a judge is to consider are already considered today by "most courts."<sup>45</sup>

Additionally, none of the statutes make any attempt to resolve the much more vital problem of the source of funds to properly support the spouse once alimony is awarded. In most cases a husband's income is barely sufficient to meet the needs of a single, unseparated nuclear family. A divorce frequently requires the husband to maintain himself in a separate residence as well as support his ex-wife and children. At the same time, in the transitional period the husband is faced with moving expenses and large attorney's fees.<sup>46</sup>

If the main purpose of alimony is to prevent one spouse from going on the public dole, clearly more thought should be given to the problem of stretching a single budget to fit two households. Professor Clark suggests that marital insurance be made available by which spouses may insure themselves

43. UMDA § 308(a)(1)-(2); COLO. REV. STAT. 46-1-14(1)(b)-(c) (Supp. 1971).

44. UMDA § 308(b)(1), (6); COLO. REV. STAT. 46-1-14(2)(b)-(g) (Supp. 1971). The comments to the UMDA indicate:

The dual intention of this section and Section 307 [Property Division] is to encourage the court to provide for the financial needs of the spouses by property division rather than by an award of maintenance. Only if the available property is insufficient for the purpose and if the spouse who seeks maintenance is unable to secure employment appropriate to his skills and interests or is occupied with child care may an award of maintenance be ordered.

Comment to § 308, UMDA, 5 FAMILY L.Q. at 234.

45. *Divorce Reform*, *supra* note 41, at 411. Admittedly the UMDA standards come very close to the "net need" approach advocated by many previous writers, e.g., Hofstadter & Levittan, *Alimony—A Reformulation*, 7 J. FAMILY L. 51, 53 (1967); Hofstadter & Herzog, *Common Sense About Alimony*, HARPER'S 68, 73 (May, 1958).

46. In Kansas in 1962 lawyers spoke of fees ranging from \$150 upward to \$1400 for one party to a contested divorce. A losing husband often gets stuck with both fees and may, immediately after the divorce, find himself in considerable debt due solely to the legal work involved in the action. Hopson, *supra* note 31, at 142-44.

against a marital breakdown.<sup>47</sup> When a dissolution does occur a spouse might then be able to look to the insurance company for payment of at least part of his alimony payments.

Finally, none of the new statutes incorporates any good workable mechanism for ascertaining the true financial status of either of the parties. In the past this often had to be litigated. Louis Nizer, for example, writes of a famous divorce proceeding involving Billy Rose and Eleanor Holm ("The war of the Roses") in which he was able to use a statement made by Rose to a newspaper reporter as indicative both of Rose's wealth and of the Roses' standard of living.<sup>48</sup> California has required the execution of a "confidential questionnaire," but the form itself is suitable only for counseling purposes and not financial disclosures, and even then makes its use mandatory only in the 13 California counties with established Conciliation Courts.<sup>49</sup> In order to apply the proper criteria in maintenance awards a court must be able to decide on the basis of valid, up-to-date and thorough information. No new no-fault statute has provided this.

### *Property Settlement*

At common law, a married woman achieved a rather mystical legal position upon her marriage. This status, called by Blackstone a "unity of person" (with her husband) meant that for all legal purposes she ceased to exist while her husband was alive.<sup>50</sup> Virtually all of her property whether real or personal became the property of her husband. More recently, statutes have been enacted which permit a married woman to own property in her own right and to convey it as if unmarried.<sup>51</sup> However, while these newer statutes are a significantly liberating device for married women, they tend to complicate divorce proceedings. Courts now must try to distinguish the man's property from that of the woman's; and to equitably divide that portion owned jointly. This is clearly a difficult task under the best of circumstances; it is a monumental undertaking with parties who own large amounts of property.

The matter is additionally complicated by the tendency of trial courts, noted by Professor Clark, to blur the alimony-property distinction and to divide the property under substantially the same criteria as they award alimony.<sup>52</sup>

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47. *Divorce Reform*, *supra* note 41, at 412.

48. L. NIZER, *MY LIFE IN COURT* 185-86 (1961).

49. CAL. CIV. CODE § 4505 (West 1970). See also Krom, *California's Divorce Law Reform: An Historical Analysis*, 1 *PACIFIC L.J.* 156, 175 n.115 (1970).

50. CLARK, *supra* note 16, at 219 (quoting Blackstone).

51. OHIO REV. CODE ANN. § 3103.07 (1972). "A married person may take, hold, and dispose of property, real or personal, the same as if unmarried."

52. CLARK, *supra* note 16, at 450-51.

Perhaps one reason this is done is ease of decision-making. Once having devised a criteria for an alimony award a court may then simply transfer the same standards to the property division. It spares the court from having to look deeper to the true equitable ownership of the property.

*Fault and the Community/Non-community Property Distinction*

Two statutory patterns have evolved in this area in the United States. The first group of statutes is largely confined to the western states with Spanish influences; it denominates all property acquired during marriage as "community property"<sup>53</sup> and generally contemplates an equal division upon divorce. In non-community property states which have statutes permitting the distribution of property following divorce, the concept of spousal property is not so clearly defined.<sup>54</sup>

One writer has characterized community property as akin to the accumulation of property by a partnership; thus

. . . it makes no difference whether one contributes more energy to the task with better material results than the other; nor does it matter if one makes no contribution at all . . . . If the marriage fails because of the [problems of] individuals composing it, ownership of the property is nevertheless fixed by the original articles of marriage . . . .<sup>55</sup>

This theory has not been strictly adhered to, however. In California, for example, a community property state, under the old statute if the divorce decree was granted on grounds of adultery, insanity, or extreme cruelty, the court was empowered to divide the community property "as the court, from all the facts of the case, and the condition of the parties may deem just."<sup>56</sup>

In the non-community property states the courts have shown little reluctance to divide property on various bases including a consideration of the fault of the parties. A study in Kansas revealed that many lawyers there

53. See, e.g., N.M. STAT. ANN. § 57-3-4, 5 (1953). "All property of the wife owned by her before marriage and that acquired afterwards by gift, bequest . . . is her separate property." N.M. STAT. ANN. § 57-4-1 (1953): "All other real and personal property acquired after marriage by either husband or wife or both, is community property."

54. Compare ARK. STAT. ANN. § 34-1214 (1962): ". . . where the divorce is granted to the wife [she] shall be entitled to one third of the husband's personal property absolutely and one third of all the lands . . . seized. . . ." with IND. STAT. ANN. § 3-1227: "A divorce granted for misconduct of the husband shall entitle the wife to the same rights . . . that she would have been entitled to by his death."

55. Daggett, *Division of Property Upon Dissolution of Marriage*, 6 LAW & CONTEMP. PROB. 225, 233 (1939).

56. CAL. CIV. CODE § 146 (West 1954). See *Decker v. Decker*, 52 Wash. 2d 456, 326 P.2d 332 (1958); In at least one California case, the California statute had been used to award the entire community property to an innocent wife. *Barham v. Barham*, 33 Cal. 2d 416, 202 P.2d 289 (1949).

used fault as part of their negotiation process in property settlement as well as alimony awards. Professor Hopson surmised that " 'fault' is thought of as a factor in property division more often than it is the basis for alimony."<sup>57</sup>

While it is difficult to determine, on any kind of comparative basis, the intrusion of fault into property settlements as opposed to alimony awards, such a distinction need not be drawn in most cases since the line dividing alimony and property division is quite blurred. Suffice it to say that fault has been a factor in the division of property in both community and non-community property states.

#### *Property Division and the No-fault Statutes*

Taking its lead from Professor Daggett's 1939 article on property division, the most ambitious no-fault act, the UMDA, requires that a division of property upon dissolution of marriage "be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership."<sup>58</sup> The UMDA and the Colorado statute approach the problem from what might be termed a "quasi-community property" approach. The first duty of the court is to divide the property into "marital" and "non-marital" portions: marital property being, with exceptions, "all property acquired by either spouse subsequent to the marriage . . ."<sup>59</sup> Non-marital property is the residuum—what is left over.

While the court is admonished to disregard marital misconduct, the property division is divided as the court deems "just" after considering all "relevant factors including"

- (1) the contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;
- (2) the value of the property set apart to each spouse; and
- (3) the economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.<sup>60</sup>

Thus, while the UMDA takes a community property approach to the problem by first dividing the property into marital and non-marital groups, it

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57. Hopson, *supra* note 31, at 136. One judge who admitted considering fault in splitting the property said in speaking of a specific case: "I'll give one-third to the husband, he'll spend it on booze; I'll give two-thirds to the wife, she'll use it on the children." *Id.* at 138.

58. Comments on the UMDA, 5 FAMILY L.Q. at 207.

59. UMDA § 307(b); COLO. REV. STAT. § 46-1-13(2)(a) (Supp. 1971).

60. UMDA § 307(a)(1)-(3); COLO. REV. STAT. § 46-1-13(1)(a)-(d) (Supp. 1971).

then modifies the "partnership" (equal division) split<sup>61</sup> by permitting a "just" determination on other grounds. The rationale given for this method is that, as noted earlier, the division of property rather than spousal maintenance should provide for the future financial well-being of the spouses. To a large extent this is a thoroughly justified position since regular continuing payments retain bonds and connections that should be severed. An early sociological comment on the nature of alimony noted that "[a]limony perpetuates, in most instances, a relationship passionately undesired and in a way that continues and even increases former antagonisms."<sup>62</sup>

The remaining no-fault statutes appear to have other defects. The Oregon statute expressly bars any consideration of fault in its section on property division<sup>63</sup> but without the UMDA's orientation away from a dependence on alimony payments. California now appears to require a strict half and half division of the community property without regard to fault.<sup>64</sup> Iowa permits the court to make whatever order regarding property it considers "justified."<sup>65</sup> None of the other three statutes, Michigan, Florida, or Nebraska, contain any language either barring evidence of fault or modifying the earlier property division rules.

#### *Property Settlement in the Future*

Property settlement, like alimony, has not received a great amount of attention by the draftsmen of the new statutes. The most thoughtful and well-written of the no-fault acts, the UMDA, is to a certain extent, an extension of comments made in a 1939 law review article.<sup>66</sup> The healthier trend is toward a judicial outlook which seeks spousal maintenance by property division rather than alimony. In this respect Colorado and the UMDA are of higher quality than any of the other statutes. California, by apparently requiring an equal division of the property seems to be continuing to look toward alimony for future support of a spouse. Florida, Iowa, and Ne-

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61. See Daggett, *supra* note 55, at 230.

62. Peele, *Social and Psychological Effects of the Availability and the Granting of Alimony on the Spouses*, 6 LAW & CONTEMP. PROB. 283 (1939).

63. ORE. REV. STAT. § 107.036 (1971): "In dividing, awarding and distributing the real and personal property (or both) of the parties . . . the court shall not consider the fault, if any, of either of the parties . . ."

64. As noted earlier, California courts until 1970 were permitted to award more than half of the community property to the innocent spouse if the spouse at fault had engaged in either adultery or extreme cruelty. *Eslinger v. Eslinger*, 47 Cal. 62 (1873). This doctrine survived intact until the 1970 Family Law Act. The new act disregards conventional language such as "just" and "equitable" and instead requires: "The court shall . . . divide the community property and quasi-community property of the parties equally." CAL. CIV. CODE § 4800 (West Supp. 1969).

65. IOWA CODE ANN. § 598.21 (Supp. 1971).

66. Daggett, *supra* note 55.

braska have not even expressly prohibited evidence of misconduct in property settlement disputes. Clearly, in the matter of property division one should look to the UMDA and the Colorado act for future developments.

### *Child Custody*

The most arousing and emotional collateral area of divorce is inevitably the decision of custody of the children. Twenty years ago Judge Bernard Botein remarked that "a judge agonizes more about reaching the right result in a contested custody issue than about any other type decision he renders."<sup>67</sup> This is rightfully so since probably nowhere else must a judge assume responsibility for a decision affecting the entire future of totally innocent individuals. Custody decisions, unlike property settlement and alimony payments, are not susceptible of the balance sheet method of conflict resolution. Nor is it at all like criminal sentencing proceedings where judges may draw on voluminous and meticulously prepared pre-sentencing reports to imprison someone already adjudged guilty of a crime. Anna Freud observed that a child of divorced parents often

acts like an employee of a bankrupt firm who has lost all confidence in his principals and no longer therefore feels any pleasure in his work. Thus the child in such circumstances stops work—that is, his normal development is checked and he reacts to the abnormal situation in some abnormal way.<sup>68</sup>

Thus, the trial judge not only must make a decision with an overwhelming number of complications and interrelated factors, but he must also make it without even the privilege of observing the child in a normal state. Moreover, the task is often complicated by his own prejudices and those of the members of his appellate court. In a spectacular 1966 decision, the Iowa Supreme Court denied a father custody of his child and awarded custody to the child's two elderly maternal grandparents on the ground that the father, an artist in San Francisco, lived a "bohemian" existence while the grandparents were more stable types living in a healthy rural environment.<sup>69</sup>

### *Common Law and Pre No-Fault Developments*

At common law the legitimate child was effectively the property of his father.<sup>70</sup> Generally, the father could be denied custody only when the child

67. B. BOTEIN, TRIAL JUDGE 273 (1952).

68. A. FREUD, INTRODUCTION TO PSYCHOANALYSIS FOR TEACHERS 36 (1949).

69. *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152, cert. denied, 385 U.S. 949 (1966).

70. See *King v. DeManneville*, 102 Eng. Rep. 1054 (K.B. 1804) and J. GOLDSTEIN & J. KATZ, THE FAMILY AND THE LAW 324-35 (1965).

was in actual physical danger or the father was corrupted.<sup>71</sup> Over the last 100 years this rule has been almost completely abrogated in the United States by the development of various presumptions. For example, the Iowa Supreme Court has adopted the presumption that a child of tender years is normally better off in the custody of his mother.<sup>72</sup> This presumption is now quite often juxtaposed with the newer, more discretionary "best interests of the child" test. Judge Cardozo set out the test in *Finlay v. Finlay*<sup>73</sup> as:

The chancellor in exercising his jurisdiction . . . does not proceed upon the theory that the petitioner, whether father or mother, as a cause of action against the other or indeed against any one. He acts as *parens patriae* to do what is best for the interest of the child . . . . He is not adjudicating a controversy between adversary parties, to compose private differences. . . . Equity does not concern itself with such disputes in their relation to the disputants. Its concern is for the child.<sup>74</sup>

The "best interests" test generally applies when the dispute is between the two parents. It is replaced by a kind of "fitness" test with a presumption in favor of the natural parent when the custody issue is between a natural parent and a third party non-parent.<sup>75</sup>

As in the other collateral areas of divorce, the concept of fault has been consistently present. Fault, in this sense, is generalized fault of the same type which provides grounds for divorce. Maryland, for example, has established a rule of law which sets up a presumption of unfitness whenever a mother has been found to have committed adultery apart from the issue of whether the child was ever aware of the misconduct.<sup>76</sup> In Nebraska, an adulterous mother is deemed unfit as a matter of law, again, regardless of whether the child knew of the adultery.<sup>77</sup>

Other fault grounds have also provided the rationale for a deprivation of custody, although Foster and Freed have remarked that "since cruelty is alleged as a matter of routine in matrimonial actions and custody disputes, difficult problems of fact are often presented to the courts."<sup>78</sup> It is enough to say that fault is often a factor in a custody decision, and many trial judges

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71. Clark, *supra* note 16, at 584.

72. *Bell v. Bell*, 240 Iowa 934, 38 N.W.2d 658 (1949).

73. 240 N.Y. 429, 148 N.E. 624 (1925).

74. *Id.* at 433-34, 148 N.E. at 626.

75. Foster and Freed, *Child Custody, Part I*, 39 N.Y.U. L. Rev. 423, 425 (1964).

76. *See, e.g.*, *Parker v. Parker*, 222 Md. 69, 158 A.2d 607 (1960).

77. *Beck v. Beck*, 175 Neb. 108, 120 N.W.2d 585 (1963).

78. Foster & Freed, *supra* note 74, at 431.

have not been sufficiently sensitive to exclude those aspects of misconduct completely unrelated to the spouse's relationship with the child.<sup>79</sup>

### *Disputes between Parents and Non-Parents*

Early custody disputes between natural parents and what Professor Clark calls "strangers"—a generic term meaning all others but the natural parent—were disposed of on the basis of the doctrine of parental "right." The doctrine was simply that natural parents had an almost unassailable right to the custody of their own children and an overwhelming showing of lack of parental fitness was required to persuade a court to hold otherwise.<sup>80</sup> In a more recent Colorado case, however, *Root v. Allen*,<sup>81</sup> a father attempted to get custody of a child he had seen for only one and a half hours in ten years (at which time he had been introduced as a "friend of the family"). The trial court awarded custody to the child's step-father (the man who had married the natural mother, now dead, after her divorce from the natural father) and indicated that the "parental right" idea had long since been abandoned and that courts may apply a "best interests" test even in disputes between natural parents and third parties.<sup>82</sup>

Thus, the "best interests of the child" test seems to obtain in all custody disputes regardless of the relationship of the parties themselves. The test itself is a rather amorphous evaluation which requires the court to weigh a large number of factors. Some of these factors as developed in a law review note from an analysis of relevant appellate decisions are:

- (1) the moral fitness of the competing parties;
- (2) the comparative physical environments offered;
- (3) the emotional ties of the child to the parties and of the parties to the child;
- (4) the age, sex, and health of the child; and
- (5) the articulated preference of the child.<sup>83</sup>

These guidelines do not, of course, exist in a vacuum. They must inevitably be evaluated, as divorce grounds were evaluated, against contemporary psychological and sociological findings on the subject.

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79. Clark lists other factors influencing a court's decision as: (1) the desire and ability to care for the child, (2) the child's wishes and (3) the race, religion and social views of the parties, and (4) any contract or agreement between parents. CLARK, *supra* note 16, at 586-90.

80. In re Gibbons, 247 N.C. 273, 101 S.E.2d 16 (1957); Fox v. Fox, 210 S.W.2d 622 (Tex. Civ. App. 1948). ILL. REV. STAT. ch. 3, § 132 (1961).

81. 377 P.2d 117 (Colo. 1962).

82. *Id.* at 120-21.

83. Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 (1963).



### *The Psychology of Custody and Custody Disputes*

As Anna Freud noted earlier, a child involved in a custody dispute is not a normal child. Indeed, he may have been permanently affected by the continuing antagonisms of a couple on the verge of divorce over a long period as well as being affected by the ultimate splitting of the family. Like any other living organism a child has needs and generally will find these needs best fulfilled within an intact nuclear family. The needs themselves vary from simple ones such as food, clothing, shelter and, for infants, demonstrated physical affection, to the more complex emotional and sociological requirements of the adolescent.<sup>84</sup>

Furthermore, a child's needs include a relatively stable environment to develop the "predictive capability with which he can learn to master inner impulses and to relate them to the external world."<sup>85</sup> An adolescent needs a parent-figure as both an object of affection and as a sexual model; children with unusual medical or psychological problems often have unique needs of care and affection impossible to gratify outside a stable, more or less conventional family relationship.<sup>86</sup>

Investigators have found that the breakdown of the family and the resulting failure of need gratification within the family conclusively leads to external conflicts and problems such as school failure, delinquency, and various psychological, physiological, and emotional problems.<sup>87</sup>

### *The "Psychological Best Interests of the Child" Test*

What the psychological data suggest is a test for custody which Andrew Watson has called the "psychological best interests of the child" test.<sup>88</sup> This test is defined generally as "an organizing concept which can relate and integrate all relevant data in relation to custodial disputes."<sup>89</sup>

To implement this test Watson suggests as a minimum a thorough psychological examination of the child and of those adults who seek custody in the context of the child's environment, which examination should be given great weight by the court. To safeguard the child's interests, which are often antagonistic to those of his parents, he also advocates the independent represen-

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84. See, e.g., L. DESPERT, *CHILDREN OF DIVORCE* (1962); A. FREUD, *SAFEGUARDING THE EMOTIONAL HEALTH OF OUR CHILDREN* (1955).

85. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 71 (1969).

86. *Id.* at 72-73.

87. McDermott, *Parental Divorce in Early Childhood*, 124 AM. J. PSYCHIATRY 1424-32 (1968).

88. Watson, *supra* note 84, at 67. Dr. Watson indicates that the standard generally "appears [in judicial opinions] as a conclusion and as an article of faith." *Id.*

89. *Id.*

tation of the child at the custody proceeding by a competent attorney appointed by the court if necessary. Watson recommends a speedy and conclusive decision which makes modification difficult if the party seeking modification cannot show actual injury to the child in his present situation. He also favors the mandatory participation of all parties concerned in whatever expert psychological or sociological evaluations are required.<sup>90</sup>

Additionally, the ultimate decision should not cut out the other parent entirely. Dr. Watson observes:

No matter what type of parents the child has, sooner or later he must see them in accurate perspective and eliminate whatever fantasies he may have had about them. This may not be established *en vacuo* and can only come about through continued and intensive contact. Indeed, the loss of easy access to both parents is one of the principal tragedies of the disrupted marriage. . . .<sup>91</sup>

A good custody provision in a divorce statute should therefore attempt to mitigate the problems set out above, should try to incorporate the "psychological best interests" test and should see that the court has the authority to appoint a representative for the child completely independent of the counsel secured by the contending parties.

#### *Custody Mechanisms in the No-Fault Statutes*

The no-fault custody mechanisms are generally poor. The new Michigan statute makes no mention of the issue of child custody and the Nebraska act simply incorporates without comment the "best interests" test.<sup>92</sup> The Iowa statute permits such custody decrees "as shall be justified," lumping the problem with alimony and property settlement: the act also permits but does not require the court to appoint an attorney to represent the child at the dissolution proceedings.<sup>93</sup> Both the California and Oregon statutes bar evidence of specific misconduct except as it bears on the question of the child's health and well-being.<sup>94</sup> Oregon incorporates the "best interests" test and abolishes in express terms the traditional preference for the mother, but also permits a curious examination of the "moral conduct" of the parties—a device which may permit courts to revert to the pre-no-fault standards of examining the parents' entire background for evidence of any misconduct, not merely that conduct which touches the child.<sup>95</sup>

90. *Id.* at 67-77.

91. *Id.* at 85.

92. Nebraska Act (L.B. 820) § 18 ". . . the court may include such orders in relation to any minor children . . . as shall be justified. . . . Custody . . . shall be determined on the basis of their best interests."

93. IOWA CODE ANN. §§ 598.13, 598.12 (Supp. 1971).

94. CAL. CIV. CODE § 4509 (West 1970); ORE. REV. STAT. § 107.036(2) (1971).

95. ORE. REV. STAT. § 107.105(1)(a) (1971). The court may decree:

California establishes an "order of preference" for custody awards (having included a provision giving weight to the child's wishes if he is "of sufficient age") as follows:

- (a) To either parent according to the best interests of the child, but other things being equal, custody shall be given to the mother if the child is of tender years;
- (b) To the person or persons in whose home the child has been living in a wholesome and stable environment;
- (c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.<sup>96</sup>

Neither the California nor the Oregon statute provides personal legal representation of the child at the custody proceeding. Neither comes even close to implementing the "psychological best interests" test.

The UMDA and the Colorado act incorporate some unique and provocative provisions in their custody sections. In Section 401, the Uniform Act distinguishes between a custody dispute brought by a parent (which may be commenced separately or as a part of a dissolution proceeding) and a claim by third persons. A third party, according to the comment, cannot bring an action under the "best interests" test if a natural parent presently has custody.<sup>97</sup> Apparently, if a third party seeks custody as against a natural parent, he must look to other statutes, perhaps those which impose criminal sanctions on delinquent parents, for judicial relief.

The UMDA also incorporates the best interests test by outlining five factors which the court must consider in determining custody; and, at the same time, expressly abolishes any consideration of fault which "does not affect his relationship to the child."<sup>98</sup> Both the UMDA and the Colorado act permit expert consultation,<sup>99</sup> interviews with the presiding judge in chambers,<sup>100</sup>

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For the future care and custody of the minor children of the marriage as it may deem just and proper. In determining custody the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. No preference in custody shall be given to the mother over the father for the sole reason that she is the mother.

96. CAL. CIV. CODE § 4600(a)-(c) (West 1970).

97. UMDA § 401; COLO. REV. STAT. § 46-1-23(1)(c) (Supp. 1971).

98. UMDA § 402; COLO. REV. STAT. § 46-1-24 (Supp. 1971). The factors are:

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

99. UMDA § 405; COLO. REV. STAT. § 46-1-27 (Supp. 1971).

100. UMDA § 404; COLO. REV. STAT. § 46-1-26 (Supp. 1971).

and the appointment of counsel to represent the child.<sup>101</sup> Visitation rights by the parent not granted custody are retained,<sup>102</sup> and motions for custody are not permitted within two years of an earlier motion, thus preserving some finality.<sup>103</sup> Clearly, the UMDA best approximates Watson's psychological best interests test and appears to more adequately protect the child's welfare than any of the other statutes examined.

### *Conclusions and Recommendations*

While the no-fault divorce statutes have been a major breakthrough in family law and have gone a long way toward revising the thinking in this area, each of the statutes has defects which may create additional problems. Four of the acts fail to expressly bar evidence of specific acts of misconduct in both property settlement and alimony matters. Several fail to prohibit evidence of misconduct in custody disputes which do not affect the child.

Moreover, the statutes, except for the UMDA, have not resolved the property settlement alimony issue and presumably do not require that alimony be a last resort in those situations in which spousal support is dictated. Only the Uniform Act approaches the superior thinking of Watson's "psychological best interests" test in custody disputes.

A more satisfactory statute might incorporate the following suggestions in the area of alimony, property settlement, and custody.

1. Evidence of specific acts of misconduct should be barred from any proceeding involving alimony or property settlement by express statutory language. It is not enough that such evidence be prohibited by implication.
2. Evidence of specific acts of misconduct should be prohibited in custody disputes unless the misconduct can be shown to be directly relevant to the issue of the child's welfare.
3. By express statutory language or by commentary, the statute should make clear that alimony is to be only a last-resort device to provide spousal maintenance when the property division is not adequate.
4. Some form of marital insurance should be explored either through private firms or by government program (akin perhaps to social security or medical insurance) to provide financial support upon dissolution of the marriage without forcing one spouse to attempt to support two households on a single salary.

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101. UMDA § 310; COLO. REV. STAT. § 46-1-16 (Supp. 1971).

102. UMDA § 407; COLO. REV. STAT. § 46-1-29 (Supp. 1971).

103. UMDA § 409(a); COLO. REV. STAT. § 46-1-31(1) (Supp. 1971).

5. A custody provision must be developed which not only incorporates the older best interests test but also provides for counsel for the child, a finality to the custody proceedings and expert analysis and recommendations as to the child's welfare and environment.

Undoubtedly, the no-fault divorce statutes mark a significant advance in family law thought; but our legislative draftsmen should not rest until the new statutes reflect a substantial reform and reworking of those areas of marital breakdown other than mere grounds and defenses.

*William Fox*