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Burns v. Burns, 400 P.2d 642 (Mont. 1965)

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perspective, and the objectives of the Federal Power Act, as a whole, be achieved.[30]

The Commission's decision correctly resolved the conflict between priority and preference. Because of its recognition that the priority created by section 5 of the act must be paramount, the usefulness of the preference clause has been severely limited. The preference given public agencies will not be applicable unless public and private producers happen to apply simultaneously for a preliminary permit, or a license for which no permit has been issued.

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DIVORCE—RECRIMINATION IS NO LONGER AN ABSOLUTE DEFENSE—A DECREE OF DIVORCE MAY BE AWARDED TO BOTH PARTIES IN CERTAIN SITUATIONS.—Plaintiff wife commenced an action in district court for separate maintenance. Defendant husband cross-claimed for a divorce. Plaintiff's complaint was amended to seek an absolute divorce. The trial court granted a decree of divorce to each party and alimony and support to the wife. On appeal by the wife to the Montana Supreme Court,[1] *held,* affirmed. The doctrine of recrimination, as established by Montana statute, is not an inflexible rule to be mechanically applied. Where both parties to a divorce action have established grounds for divorce and the trial court finds that the legitimate objects of marriage have been destroyed, the court may, in its discretion, award a divorce to both parties. *Burns v. Burns,* 400 P.2d 642 (Mont. 1965).

Montana has dramatically reversed its position on the strongly criticized doctrine of absolute recrimination,[2] and has become one of the few jurisdictions to adopt the double divorce.[3] The following discussion is an analysis of the legal rules and reasons employed in those cases in which both spouses have established a cause of action for divorce.

[30]Petitions to review and set aside the Federal Power Commission order licensing PNPC to build High Mountain Sheep were entered in June, 1964, in the United States Court of Appeals for the District of Columbia Circuit. Petitions were filed separately by WPPSS, the Washington State Department of Conservation, and the Secretary of the Interior through the U. S. Attorney General. All three argued that the Federal Power Commission erred in matters of law and fact, and all sought remand of the case to the Federal Power Commission—the first two with court orders in favor of WPPSS's application, and the last in favor of federal development.

[1]The appeal was based on two grounds: that the lower court's award of alimony was inadequate, and that the court erred in granting a double divorce. Instant case at 643.

[2]The instant decision was anticipated in Bissel v. Bissel. 129 Mont. 187, 284 P.2d 264 (1955), where the court, in a lengthy discussion of recrimination, gave approval by way of dictum to cases which abandoned strict application of the doctrine in other jurisdictions.

[3]*E.g.,* DeBurgh v. DeBurgh, 39 Cal. 2d 858, 250 P.2d 598 (1952); Flagg v. Flagg, 192 Wash. 679, 74 P.2d 189 (1937); Simmons v. Simmons, 122 Fla. 325, 165 So. 45 (1936); Burch v. Burch, 195 F.2d 799 (3d Cir. 1952); Barber v. Barber, 28 Tenn. App. 559, 192 S.W.2d 79 (1945).

ABSOLUTE RECRIMINATION

Analogous to the doctrine of contributory negligence in tort actions, absolute recrimination renders divorce impossible when each spouse is guilty of misconduct serious enough to give the other a cause of action for divorce.[4] Recrimination first appeared in the Mosaic Code,[5] and was later assimilated into Roman canon law. The chief purpose of the doctrine was the protection of the property rights of the wife where both spouses had been guilty of adultery.[6] Lord Stowell, sitting in an ecclesiastical court, was the first to apply recrimination in England.[7] Later English courts realized the consequences of inflexible application of the doctrine but were reluctant to overrule such an established principle. A remedy was found in the Matrimonial Causes Act[8] and its amendments,[9] which transferred divorce jurisdiction to the common law courts and allowed the judges discretion in granting a divorce where both parties were guilty of misconduct. American courts applied the doctrine as a matter of course, and today some form of recrimination is found in almost every jurisdiction.[10]

Recrimination has been justified on a number of legal principles. Most frequently used is the doctrine of "unclean hands"—the equitable principle that one who is guilty of misconduct should not receive aid from the court.[11] Another theory views marriage as a mutually dependent covenant, and if both parties have breached any of the covenants, neither may be granted a divorce.[12] A third explanation is based on the doctrine of pari delicto, or equal fault, which also calls for denial of a divorce.[13]

The sociological justifications for recrimination have been under constant attack by legal writers.[14] It was formerly thought that a principal merit of the doctrine would be that of keeping the family together. However, almost all the states, although having a vital interest in preservation

[4]Goldsmith v. Goldsmith, 151 Misc. 198, 270 N.Y.Supp. 47 (1934).

[5]"If any man take a wife, and go in unto her, and hate her, and give occasions of speech against her, and bring up an evil name upon her. . ." and these charges of the wife against the husband are true, then "she shall be his wife; he may not put her away all his days." *Deut.* 22:13-19.

[6]Beamer, *Doctrine of Recrimination in Divorce Proceedings*, 10 U. KAN. CITY L. REV. 213, 249 (1941).

[7]Forster v. Forster, 1 Hag. Con. 144, 147, 161 Eng. Rep. 504, 506 (1790).

[8]20 & 21 Vict., c. 85 (1857).

[9]See 1 Edw. 8 & 1 Geo. 6, c. 57 (1937).

[10]Thirty-two states have some form of recormination by statute, and the remainder, except Connecticut, recognize the doctrine by juidicial decision. 2 VERNIER, AMERICAN FAMILY LAWS § 78, at 82-88 (1932 ed.).

[11]See, *e.g.*, Thorem v. Thorem, 188 Minn. 153, 246 N.W. 674 (1933); Phillips v. Phillips, 48 Ohio App. 322, 193 N.E. 657 (1933).

[12]Comfort v. Comfort, 17 Cal. 2d 736, 752, 112 P.2d 259, 268 (1941). "The deceptive analogy to contract law ignores the basic fact that marriage is a good deal more than a contract." *DeBurgh, supra* note 3, 250 P.2d at 601.

[13]Johns v. Johns, 29 Ga. 718 (1860).

[14]In 1948, a committee of experts of the American Bar Association, participating in the National Conference of Family Life, strongly recommended the elimination of the defense of recrimination. REPORT OF THE LEGAL SECTION OF NATIONAL CONFERENCE ON FAMILY LIFE 1, 17 (1948).

of the family as the fundamental sociological unit of our civilization, have decided that the interests of family and society can best be served by permitting divorce in certain situations.[15] Moreover, the trend is towards further liberalization of divorce laws:

> This decision and tendency may be said to be due to a slowly awakening realization that denial of divorce seldom restores life to families sociologically dead when they come into court, and that if anything is preserved it is but the dead and empty shell of what has been and is no longer—a realization that upon refusal of divorce, those things which cannot be done legally are often done illegally, those which cannot be done openly are done clandestinely; that other relationships are formed, nameless children born; and that even if the parties force themselves to remain together, their children probably will not thank them for it or even be imbued with any high and lasting ideas about their family, or the family as a sociological concept. If this is the justification for permitting divorce where only one party is at fault, how much more reasonable is it to permit divorce where both parties hold their marriage vows in contempt, and the likelihood that attempts at reconciliation will fail are thereby doubled.[16]

Application of recrimination may have the effect of encouraging immorality. In a majority of cases, the counter charge is based on adultery or cruelty.[17] It is true that existence of the doctrine causes the spouse seeking divorce to avoid giving the other a cause of divorce; however, once both parties have a cause of divorce, either or both may continue to violate the marriage vows without fear that the other will obtain a divorce.

> As a result, the more honest and upright of the two, who realizes that his marriage has been a failure and desires to terminate it and remarry, is denied a divorce and forced to choose between celibacy and forming an illicit relationship. A legal doctrine which has this effect can hardly be justified on the basis of public policy.[18]

Another major defect of the doctrine is that a petty form of blackmail is encouraged. The defendant may demand substantial concession is return for not raising an existing recriminatory defense.[19]

The justification that recrimination protects the wife's property interests is based on canon law and early English decisions. In those times absolute divorce was prohibited because the wife had no property of her

[15]Public policy of the state still favors maintenance of the marriage if there is a possibility of reconcilitation. See 4 ARIZ. L. REV. 88, 92 (1962).
[16]Beamer, *supra* note 6, at 249.
[17]*Id.* at 251.
[18]*Id.* at 252.
[19]*DeBurgh*, *supra* note 3, 250 P.2d at 604.

own and there was no place for women outside the home. The only way to keep a wife from becoming a public charge was to deny divorce and continue the husband's liability for her debts. Today women frequently own property during marriage, and in addition there is a place for them in society. They now occupy substantial positions in business, industry, and the professions.[20] Therefore the economic argument in support of recrimination is no longer valid.

The development of new grounds for divorce not based on fault has contributed to a trend away from strict recrimination. As a countercharge of misconduct against the party seeking divorce, recrimination was derived from the alleged fault of the parties. It follows, that if a divorce is sought on some ground other than fault, recrimination would not be appropriate. If the defendant's fault is not the basis of the action, there is no reason to require plaintiff to be "innocent." Thus the recent growth of statutory grounds for divorce, such as separation, incompatibility, and insanity, which are based on "conditions" other than fault of the parties, is another means by which amelioration of the doctrine has occurred.[21]

THE RETREAT FROM RECRIMINATION

The retreat from inflexible operation of the doctrine of recrimination has taken several, nonmutually exclusive forms: (1) making recrimination a discretionary rather than an automatic defense,[22] (2) the use of comparative rectitude, by which some courts grant a divorce if one party's misconduct is not as serious as that of the other,[23] and (3) double divorce. The majority of courts abandoning strict recrimination have adopted comparative rectitude, while a few, such as Montana and California, have adopted the double divorce.[24]

1. Discretionary Recrimination.

By the instant decision Montana has made application of recrimination discretionary, following the reasoning of the California Supreme Court in the leading case of *DeBurgh v. DeBurgh*,[25] decided in 1952. There, Justice Traynor, writing for the majority, interpreted California's Civil Code so as to give discretion to trial courts in applying recrimination. One section of the code states that "divorces must be denied upon showing [of] . . . recrimination."[26] Another section defines recrimination

[20]Beamer, *supra* note 6, at 253.

[21]See Comment, 41 Calif. L. Rev. 320, 322 (1953).

[22]Courts have also restricted the application of recrimination, some requiring that plaintiff's transgressions be of the same type upon which he bases his action, while others permit use of the doctrine only when plaintiff is guilty of adultery. Kovak v. Kovak, 26 Ill. App. 2d 29, 167 N.E.2d 281 (1960); Hokamp v. Hokamp, 32 Wash. 2d 593, 203 P.2d 357 (1949).

[23]*E.g.*, Longinotti v. Longinotti, 169 Ark. 1001, 277 S.W. 41 (1925).

[24]*Supra* note 3.

[25]*Supra* note 3.

[26]Cal. Civ. Code § 111. Revised Codes of Montana, 1947, § 21-118 is identical. Hereinafter Revised Codes of Montana are cited R.C.M.

as "a showing by the defendant of any cause of divorce against plaintiff, *in bar* of plaintiff's cause of divorce."[27] (Emphasis added.) The latter section had previously been interpreted as making every cause of divorce against plaintiff an absolute and automatic bar to relief in every case. Upon re-examination, however, the California court found, that if the legislators had intended the statute to be mandatory, then the phrase "in bar of plaintiff's cause of divorce" would be superfluous.[28] Its insertion, the court said, indicated a legislative intent that a showing of a cause of divorce against plaintiff would not in every case be "in bar" of plaintiff's relief, but only in the discretion of the trial court.

In *DeBurgh,* the California court laid down four major considerations which should govern the courts in exercising their newly found discretion: (1) prospect of reconciliation, (2) effect of marital conflict on the parties, (3) effect on third parties, and (4) comparative guilt.[29] The court, however, set no standards to determine what would constitute an abuse of discretion in application of the new theory of recrimination. This vagueness was clarified the following year in *Phillips v. Phillips*[30] when the same court held that it is an abuse of discretion to apply recrimination and deny the divorce where the legitimate objects of marriage have been destroyed.[31] In the principal case, the Montana court applies the *Phillips'* rule.[32]

In the thirteen years since the *DeBurgh* decision, at least fifteen other jurisdictions have tempered the doctrine of absolute recrimination.[33] The majority of these are western states. Several, like Montana, have statutes similar to those of California. A definite trend away from strict recrimination is now recognized.[34] Those states retreating from the doctrine have taken two different approaches to making application of recrimination discretionary: (1) the use of comparative rectitude as a basis for granting an unilateral decree in favor of the more "innocent" spouse, and (2) the use of the dual decree, either automatically with comparative guilt playing no part, *or* only when in terms of comparative guilt, both parties have contributed equally to the marriage failure.

2. Comparative Rectitude.

The doctrine of comparative rectitude has developed by implication from the pari delicto rationale of strict recrimination. If the parties are

[27]Cal. Civ. Code § 122. Identical to R.C.M. 1947, § 21-128.

[28]Concurring in result only, three Justices argued that the language of code section 111 precluded any discretion. Associate Justice John C. Harrison, dissenting in the principal case, argued along the same line. Justice Adair reserved the right to file a dissent at a later date.

[29]*DeBurgh, supra* note 3, 250 P.2d at 606.

[30]41 Cal. 2d 869, 264 P.2d 926 (1953).

[31]*Id.* at 931.

[32]Instant decision at 644-45.

[33]An annotation found in 170 A.L.R. 1076 (1947) indicated the beginning of a trend away from strict recrimination. Numerous decisions which temper recrimination are found in the supplemental decisions to the annotation.

[34]Cahill, *supra* note 21, at 321.

denied a divorce because of recrimination when both are equally at fault, it follows that if the parties are not in equal fault, that the party least guilty may be granted a divorce.[35] Comparative rectitude is used in those states which have relaxed recrimination, yet have not made double divorce a part of their law. Thus, comparative rectitude may be applied when the court feels a divorce should be granted because there is no prospect of reconciliation.[36] The use of the doctrine to grant an unilateral decree has the advantage of giving the court the power to grant either party a divorce, depending upon whose conduct has been the most condemnatory. However, a unilateral decree makes one party the victor, and the other suffers a psychological, and possibly an economic defeat. The fault principle thus continues to be the determining factor.

3. Double Divorce

The award of a divorce to both parties is a recent development of divorce law, based on the discretion inherent in the clean hands doctrine[37] and fostered by the retreat from absolute recrimination. In this country precedent for the dual decree is found in decisions from the state of Washington which is the only jurisdiction having mutual divorce by statute.[38] However, mutual divorces had been decreed prior to enactment of the present statute.[39] Support for the double divorce is also found in the English case of *Blunt v. Blunt*,[40] which by dictum reasoned that an award of divorce to both parties was possible when injustice might be done if the court gave an unilateral decree.[41]

Comparative guilt may be a factor in determining whether a double divorce is justified. Consideration of this factor has resulted in two different approaches in application of the dual decree. In Washington, if both parties seek a divorce, the courts seem to automatically grant a decree to both.[42] Thus, comparative rectitude is not considered. However,

[35]Smith v. Smith, 64 Iowa 682, 21 N.W. 137 (1884).

[36]In a comparative rectitude jurisdiction, if fault is exactly balanced, evidently the divorce is denied. See Furlong, *Dual Divorce Decrees and Conciliation in Contemporary Family Law*, 2 Willamette L. J. 134, 155 (1963).

[37]"Important developments of the past several decades have made it increasingly clear that the courts can no longer decline to exercise the discretion inherent in the clean hands doctrine." *DeBurgh, supra* note 3, 250 P.2d at 603.

[38]"If the court determines that either party, or both, is entitled to a divorce . . . ." Wash. Rev. Code § 26.08.110 (1951).

[39]Schirmer v. Schirmer, 84 Wash. 1, 145 Pac. 981 (1915); Hilleware v. Hilleware, 92 Wash. 99, 158 Pac. 999 (1916);; McDonall v. McDonall, 95 Wash. 553, 164 Pac. 204 (1917).

[40][1943] A.C. 517, 531 (H.L.).

[41]Although there are no statutory prohibitions against such a decree, the dual divorce did not appear until 1915. Disapproval by way of dictum was given by Justice Field in Conant v. Conant, 10 Cal. 249, 256 (1858), "a decree granting a divorce in favor of each, would be an anomalous proceeding." Justice Field thought that the first decree would dissolve the marriage, leaving nothing upon which the second could operate.

[42]See, *e.g.*, Schilling v. Schilling, 42 Wash. 2d 105, 253 P.2d 952 (1953); Merkel v. Merkel, 39 Wash. 2d 102, 234 P.2d 857 (1951); Hathaway v. Hathaway, 23 Wash. 2d 237, 160 P.2d 632 (1945); Cornwall v. Cornwall, 13 Wash. 2d 594, 126 P.2d 52 (1942); Kirsch v. Kirsch, 192 Wash. 156, 73 P.2d 356 (1937).

in Washington, alimony and support do not depend on which spouse prevails.[43] The English courts exercise more discretion in considering the three alternatives—denial of divorce, a unilateral decree, or divorce to both. A dual decree is awarded only when comparative guilt is balanced. The *DeBurgh* decision tends towards the English approach in that the California court indicated that comparative guilt may bear on whether a unilateral decree or double divorce should be awarded.[44]

Certain benefits result from judicious use of the double divorce: (1) the antagonisms resulting from the attempts of the spouses to prove the other at fault will be reduced,[45] and the victory-reward defeat-sanction characteristics of the divorce will be eliminated,[46] (2) the dual divorce leads towards abolition of adversary type divorce proceedings which are not always effective in handling marital difficulties,[47] and (3) the double divorce places both parties on an equal footing regarding alimony and support orders, and in some states may facilitate property settlements. Montana has no provision in its statutes for the division of property upon divorce, but in California and other states having community property laws, the dual divorce removes the superior tactical position held by the prevailing party of the unilateral decree.[48]

The use of double divorce in Montana should result in less emphasis being placed on fault, although it may continue to be one of several factors considered. Also, the mutual decree will give the courts more latitude in determining support and alimony. R. C. M. 1947, section 21-139[49] provides that when a divorce is granted to the wife, the court *may* compel the husband to provide for the wife and children.[50] But, if the husband obtains the divorce, Montana courts have held that he cannot be forced to pay alimony and support.[51] However, the instant case indicates that when both obtain a divorce, the court may in its discretion order alimony for the wife although a divorce was granted against her. Several jurisdictions with similar statutes have so held.[52] This will help

[43]The court considers the respective merits of the parties, and the circumstances in which divorce will leave them. Nerland v. Nerland, 173 Wash. 311, 23 P.2d 24 (1933).

[44]250 P.2d at 606.

[45]The alienation of children will be prevented, for no longer will the prevailing spouse be able to point out the other as being adjudged by court of being cruel or inhuman.

[46]For an extensive discussion of the elimination of fault as a basis for divorce, see Rutman, *Departure from Fault*, 1 J. FAMILY L. 181, 182 (1961).

[47]Moreover, the parties themselves probably prefer this type of decree. Furlong, *supra* note 36, at 162-3.

[48]It should be noted that many other states are not restricted in considering alimony and support by which party was successful. These jurisdictions consider thhe circumstances and the nature of each spouse's misconduct and are not bound by principles of fault. Annot., 34 A.L.R. 313, 330 (1954).

[49]R.C.M. 1947, § 21-139, "Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage and to make such suitable allowance to the wife for her support . . . ."

[50]The husband may also be compelled to support the wife although she is unsuccessful in seeking a divorce. R.C.M. 1947, § 21-136, which is, in effect, a partial or limited divorce.

[51]Bischoff v. Bischoff, 70 Mont. 503, 226 Pac. 508 (1924); Damm v. Damm, 82 Mont. 239, 266 Pac. 410 (1928).

[52]*DeBurgh*, *supra* note 3; *Burch*, *supra* note 3.

eliminate the harshness and inflexibility which previously existed when only unilateral decrees were granted, or denied upon showing of recrimination.[53]

DOUBLE DIVORCE IN MONTANA

Although the Montana court has adopted double divorce, it is uncertain whether the court has also approved comparative rectitude. The court cites with approval decisions of other states which have adopted both the dual divorce and comparative rectitude, yet rejects the latter in the principal case, apparently looking to the economic situation of the parties:

> [I]f the doctrine of comparative rectitude is resorted to . . . a unilateral decree in the lower court . . . would render that court without jurisdiction to make an equitable settlement with regard to alimony, thus leaving appellant at large in the community without means of support. In the case at bar, the lower court might very well have found, and this seems likely, in view of the evidence, that the appellant's conduct had been the more condemnatory, denied her relief, granted a divorce to respondent only and thus precluded the payment of alimony in any amount to appellant. . . .[54]

Thus the refusal to use comparative rectitude may be unique to the facts of this case; in another case the court might apply the doctrine to a factual situation where neither recrimination nor double divorce was justified. *Or,* the court may find desirable the increased discretion as to alimony and support, which is a characteristic of double divorce, and continue to grant the dual decree in every instance in which both spouses seek divorce and the marriage is hopelessly destroyed.

It is submitted that the better approach is that taken by the Montana Supreme Court in the principal case. The retention of the fault principle and the limitations regarding alimony and support orders inherent in the doctrine of comparative rectitude make it the less desirable form of discretionary recrimination. In addition, the award of double decrees should sharply reduce the number of uncontested divorces, since the appearance of both parties will no longer jeopardize the decree. Also, the placing of all marital differences before the court will allow settlement negotiations to be properly supervised and unfair advantages prevented. A liberal policy with respect to awarding double divorces would be a major step in the elimination of fault as the basis of divorce.[55] The enlarged discretionary powers should be welcomed by Montana courts operating within the framework of current statutes.

[53]A Tennessee court held that double divorce destroys any inference or presumption as to fault. *Barber v. Barber, supra* note 3.

[54]Instant case at 645-46.

[55]See Putman, *supra* note 44.

In conclusion, the Montana Supreme Court is to be commended for tempering the erroneous, invalid, and outmoded doctrine of strict recrimination. Although several years of judicial growing pains will be necessary before the double divorce becomes settled law and before the limits of the trial courts' discretion are fully determined, its adoption marks a turning point in the resolution of several defects in contemporary divorce law. By the instant decision, the Montana court has formally recognized that most marital discord is bilateral in origin.[56] In doing away with the myth of the innocent spouse, Montana's approach to discretionary recrimination will permit dissolution of marriages which have totally and irremediably broken down.

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[56] Furlong, *supra* note 36, at 169.