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THE DISSOLUTION ACT OF 1973: FROM STATUS TO CONTRACT?

Luvern V. Rieke*

On or about February 28, 1854, presumably in Olympia, Washington, the territorial legislature enacted a measure stating "that marriage is declared to be a civil contract."[1] While not denying that ethical and religious systems may properly characterize marriage differently, the legislature has continued to refer to the marital relation as a contract. With the enactment of a new dissolution law, the legislature has given content to the legal designation it has consistently employed.

Mr. Justice Field, speaking for the United States Supreme Court in an 1888 divorce case from the territory of Washington, observed that "whilst marriage is often termed . . . a civil contract . . . it is something more . . . ."[2] He quoted with approval Chief Justice Appleton, who wrote for the Supreme Court of Maine that "the contracting parties . . . have not so much entered a contract as into a new relation, the rights, duties, and obligations of which rest upon their agreement, but upon the general law . . . ." Mr. Justice Appleton hinted rather broadly that marriage really may not be a contract at all, or at most an extreme form of adhesion contract, and pointed out that the marital partners cannot modify, change or shorten the "contract" by subsequent agreement. He noted that the "contract" is not within the meaning of the clause of the Constitution which prohibits the impairment of contractual obligation,[3] and then concluded that, rather than being a contract, marriage is "a social relation, like that of parent and child, . . . a relation most important, . . . the first step from barbarism to incipient civilization, . . . the true basis of human progress."

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1. [1854] Wash. Sess. Laws 404, § 1.
2. Maynard v. Hill, 125 U.S. 190, 210 (1888).
3. The Florida Supreme Court recently agreed with this conclusion. The constitutional prohibition of impairment applies only to "those contracts providing certain, definite and fixed private rights of property which are vested in the contract." Ryan v. Ryan, 277 So. 2d 266, 269 (Fla. 1973). The reasoning, however, is not the same as that of Mr. Justice Appleton. The Florida court insists that marriage is and "for over

Expectations concerning the contract of marriage have changed during the last century. The Washington legislature has now said that if one spouse alleges that "the marriage is irretrievably broken," and "[i]f the other party joins in the petition or does not deny that the marriage is irretrievably broken, the court shall enter a decree of dissolution."[4] Is this a mutual rescission of a contract, leaving only questions of restitution for the attention of the parties or the court? The new Dissolution Act also provides that the judge shall enter a decree of dissolution if the petitioner, after a brief delay and perhaps some counseling, persists in asserting that the marriage is irretrievably broken, even though the respondent denies the allegation.[5] To continue the contract analogy, should such a unilateral demand for dissolution be viewed simply as a renunciation of future performance? If so, should the resulting question be whether the renunciation can be justified by reason of failure of consideration or, alternatively, whether it is itself a breach of contract? If the analysis is predicated upon contract theory, the performance would be ended and it would remain for the parties to negotiate, or for the court to decide, upon the ancillary issues of remedy. The relief to be expected, quite unlike the historical divorce pattern which often favored negative injunctions precluding marriage to another and which usually ordered some degree of specific performance,[6] might now emphasize damages or restitution.[7]

All of this has a strange sound to lawyers and judges. Marriage has been called a contract, but a "breach" usually has been treated as a tort or a crime. Examples of this anomaly are abundant. For instance, consider the remedy for what is commonly called a breach of a contract to marry. When damages are not measured by "the natural con-

120 years of Florida Jurisprudence" has been a contract "rather than a mere 'relationship' " as the *Maynard* case suggests.

4. Dissolution Act of 1973, § 3(1), enacted as ch. 157, § 3(1), [1973] Wash. Laws 1st Ex. Sess. 1217, codified as WASH. REV. CODE § 26.09.030(1) (Supp. 1973).

5. *Id.*, § 26.09.030(3).

6. Separate maintenance is of course a type of specific performance. The orders for child support and alimony also resemble equitable orders although in strict terms the divorce power is statutory. *See* Tupper v. Tupper, 63 Wn. 2d 585, 388 P.2d 225 (1964).

7. The normal "loss of profit" or expectation damages might be too speculative to be helpful in these actions. Perhaps it is time to pay greater attention to antenuptial contracts (see Friedlander v. Friedlander, 80 Wn. 2d 293, 494 P.2d 208 (1972) for a recent example) or the ordinary liquidated damage clauses. It may also be useful to consider the emerging contract remedy of restitution, *not* in the traditional quasi-contract sense, but in the newer sense of a money judgment designed to put the injured party in the economic position occupied before the contract was entered. *See* J. CALAMARI & J. PERILLO, CONTRACTS § 240 (1970).

sequences of the breach" but upon consideration of the "character, the chastity and social standing . . . personal feelings and pride . . . mental suffering, the age, wealth . . . and motives," one must agree with the court that " . . . we never look upon the relationship as one of contract in the sense that word is generally used."[8] Another example is that the failure to provide the support promised in marriage is routinely regarded as a crime.[9] Finally there has been little in the conflict of laws rules applicable to marriage and divorce which resembled the rules applicable to contract cases. Does the Dissolution Act start us on a new road?

I. NO-FAULT: TERMINATION OF THE STATUS

No-fault divorce is not new and if the Dissolution Act of 1973 were simply a "no-fault" piece of legislation, Washington would not be venturing into untested territory. The no-fault label has been used to refer somewhat indiscriminately to a broad class of divorce legislation. For example, the exclusive ground for divorce in England, "that the marriage has broken down irretrievably," cannot be found unless the petitioner proves at least one of five "facts," any one of which would constitute grounds for divorce in many jurisdictions of the United States.[10] The term also has been used when a new ground has been inserted among more traditional grounds in an existing divorce act.

8. Warner v. Benham, 126 Wash. 393, 395, 218 P. 260, 261 (1923). There are many indications that this "breach of contract" is treated as a tort rather than as a contract: One cannot effectively mitigate by offer of performance, Heasley v. Nichols, 38 Wash. 485, 80 P. 769; a prior tort action for seduction is at times res judicata of the subsequent "contract" action, Rieger v. Abrams, 98 Wash. 72, 167 P. 76 (1917); there is virtually a presumption of "contract" which arises from illicit conduct even though there was no "express and specific promise" to marry, Kelly v. Drumheller, 150 Wash. 185, 272 P. 731 (1928); and even the statute of limitations, WASH. REV. CODE § 4.16.080(7) (1963), is separately stated from the section governing limitation upon contract actions.

9. *See* WASH. REV. CODE ch. 26.20 (1963) (family desertion).

10. Divorce Reform Act 1969, c. 55, provides:

2.—(1) The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say—

(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

(d) that the parties to the marriage have lived apart for a continuous period

Delaware lawyers have described as "no-fault" a divorce granted because of incompatibility proven "by rift or discord produced by reciprocal conflict of personalities existing for 2 consecutive years . . . ."[11] A new act in Iowa is regarded as "no-fault" even though the breakdown of marriage cannot be established by testimony of the petitioner alone but must be corroborated by others.[12]

If the "no-fault" acts in other jurisdictions require the court to find some objective set of facts which proves that the marriage has deteriorated too far to be salvaged, one could reasonably contend that the legislation merely substitutes a new set of facts for the old as "grounds" for dissolution. The scene of battle may have been changed but a battle, genuine or contrived, is still demanded. The Dissolution Act goes beyond such scene shifting. The determination to dissolve a marriage rests with the spouses, not with the state. The important question is whether the law can process the termination without generating needless animosity, bitterness or trauma.

In an attempt to accomplish this goal of dissolution with minimum hostility, the Dissolution Act makes two basic changes from prior law: (1) New terminology is used,[13] and (2) contractual form and the negotiation role of the parties and their counsel are emphasized. The second change obviously relates to economic interests and child related problems which will be discussed later. At this point our inquiry

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of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted:

(e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

11. DEL. CODE ANN. tit. 13, § 1522(12) (Cum. Supp. 1970). The section reads: When husband and wife are incompatible in that their marriage is characterized by rift or discord produced by reciprocal conflict of personalities existing for 2 consecutive years prior to the filing of the divorce action, and which has destroyed their relationship as husband and wife and the reasonable possibility of reconciliation.

The Delaware court has continued to speak of fault although it "should not" do so: the practical effect has been divorce without recourse to fault. Gallagher, *No-Fault Divorce in Delaware*, 59 A.B.A.J. 873, 873-74 (1973).

12. IOWA CODE § 598.10 (Cum. Supp. 1973). The corroborating testimony need not be sufficient in itself to establish the basis for dissolution. It suffices if it "satisfies the court from all the evidence presented [that] (1) there has actually been a breakdown of the relationship and (2) there remains no likelihood the marriage can be preserved." *In re* Marriage of Boyd, 200 N.W.2d 845, 853 (Iowa 1972).

13. The terms petitioner and respondent are used instead of plaintiff and defendant and the proceeding is styled "In re the marriage of _____ and _____" rather than as an adversary action; the term "dissolution" is used in place of "divorce" and decrees are not to be "awarded" to a party but only to "affect" the relationship. WASH. REV. CODE § 26.09.010 (Supp. 1973).

may be limited to termination of the contract—the "status" itself—rather than to questions of ancillary relief.

A. Jurisdiction: The Problem of Domicile

So far, no one has suggested that the public should be without a voice in marital determinations. The question is not whether the public has *an* interest in marriage contracts but whether "the state is a third party whose interests take precedence over the private interests of the spouses."[14] However the public interest is characterized, it is conceded that some formal proceeding is required for a change of relationship. As long as the proceedings are judicial, the problem of jurisdiction must necessarily be resolved.

Decrees of legal separation are in personam and may be thought of as transitory actions. When more than a personal order is sought—when status is to be changed—the action acquires an in rem quality and different jurisdictional requisites are involved.[15] For historical reasons too lengthy to recite here, jurisdiction to terminate a marriage usually has been founded upon a domiciliary relation between the forum and the petitioning spouse or spouses.[16] Jurisdiction to change marital status cannot be conferred upon a court by agreement and appearance of nondomiciliary spouses.[17] Questions about jurisdictional requisites do not arise frequently because most divorce acts

14. Posner v. Posner, 233 So. 2d 381, 383 (Fla. 1970).

15. In discussing the difference between the "equitable" suits to enforce marital obligation and the "statutory" proceedings for divorce, the Washington court said:

> The power, or jurisdiction, of the court thus proceeds upon differing, though correlated, bases, one resting upon the marital status and situs, and the other resting upon the personal and marital obligations flowing from and incident to a marital relationship. The first requires jurisdiction over the marital status, and the second jurisdiction over the parties.

Tupper v. Tupper, 63 Wn. 2d 585, 588, 388 P.2d 225, 227 (1964). The view that marriage is a status and is to be treated as a res is clearly the traditional view. The extent to which this concept is changed by the Dissolution Act so that the relationship is to be regarded as contractual is a central inquiry.

16. Domicile has been defined as a settled legal relation between a person and a place. A domicile may be acquired by establishing a dwelling place with the concurrent intention of making that place home. *See* Sasse v. Sasse, 41 Wn. 2d 363, 249 P.2d 380 (1952).

17. Andrews v. Andrews, 188 U.S. 14 (1903). While few people would contend that marital actions are simple, transitory proceedings to be heard by any court of general jurisdiction when both spouses appear, it is certainly no longer clear—if it ever was—that such actions are truly in rem with exclusive jurisdiction in the state, or states, of domicil.

clearly specify that domicile shall be required.[18] The U.S. Court of Appeals for the Third Circuit has said that domicile is a constitutional requirement for divorce jurisdiction[19] but, despite a long line of decisions by the U.S. Supreme Court dealing with full faith and credit,[20] the precise issue of whether a sovereign state may elect a jurisdictional base other than domicile is still open. It may well be, as Mr. Justice Clark said in a dissenting opinion, that the "constitutional bugaboo is a judge-made one . . . ."[21]

The jurisdictional issue is interesting because Section 3 of the Dissolution Act provides that the court has jurisdiction not only for residents but also when the petitioner "is a member of the armed forces and is stationed in this state." The question of when a serviceman acquires domicile in a state has been a bothersome one.[22] A number of states have statutes generally comparable to the new Washington provision regarding military personnel and those provisions have been held valid by state courts.[23] The U.S. Supreme Court has not yet spoken.

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18. "Clearly specify" may be an overstatement. In some states the legislative language used is "residence" rather than "domicile." This was true in Washington's prior law, WASH. REV. CODE § 26.08.030 (1963), and is true in the present statute, WASH. REV. CODE § 26.09.030 (Supp. 1973). Courts have construed "residence" to mean domicile. *See* Thomas v. Thomas, 58 Wn. 2d 377, 363 P.2d 107 (1961).

19. Alton v. Alton, 207 F.2d 667 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954).

20. These cases began at the turn of the century (*see* Andrews v. Andrews, 188 U.S. 14 (1903)), and ranged from one extreme in Haddock v. Haddock, 201 U.S. 562 (1906), to another in the two decisions of Williams v. North Carolina, 317 U.S 287 (1942); 325 U.S. 226 (1945).

21. Granville-Smith v. Granville-Smith, 349 U.S. 1, 27 (1955).

22. *See* Note, *Divorce—Domicile of Choice—Military Personnel*, 28 WASH. L. REV. 161 (1953).

23. Craig v. Craig, 143 Kan. 624, 56 P.2d 464 (1936); Schaeffer v. Schaeffer, 175 Kan. 629, 266 P.2d 282 (1954); Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958); Lauterbach v. Lauterbach, 392 P.2d 24 (Alas. 1964).

WASH. REV. CODE § 26.09.030 (Supp. 1973) provides for jurisdiction, but it does not control the conflict of laws questions which may be involved. Because marriage has been regarded as a status or a res and because the res is said to be situated where the persons are domiciled, courts have generally used the law of the forum to determine whether relief should be granted even though the wrongful acts or the conduct which allegedly breached the marriage contract, may have occurred in another state where such conduct would not be considered "grounds" for divorce. *See generally* Comment, *Jurisdiction Versus 'Choice-of-Law' in Divorce Actions*, 25 ROCKY MT. L. REV. 51 (1952).

If dissolutions are to be granted to persons not domiciled in the state such as servicemen, the conflict of laws question needs reconsideration. As Judge Hastie, dissenting in Alton v. Alton, 207 F.2d 667, 685 (1953), stated:

> [O]nce the power to decide the case is based merely upon personal jurisdiction a court must decide as a separate question upon what basis, if any, the local

The Acts of New Mexico and Alaska differ from the Washington jurisdictional provision in one possibly significant manner. They provide that the serviceman must have spent a specified period of time in the state prior to petitioning for dissolution of his marriage. The Dissolution Act does not require a prefiling residence period for either a serviceman or for a person who claims domicile. Domicile can be acquired immediately upon arrival in a state. Is there anything to suggest that domicile or residence as a serviceman must exist for some time prior to filing a marital status action?

The requirement of prefiling residence period has been before several courts in recent years. The question asked, however, has been the precise opposite of that suggested above: *i.e.*, the issue has been whether a residence period can be required rather than if such a period is required to establish domicile. In *Wymelenberg v. Syman*,[24] a three-judge federal court held unconstitutional a Wisconsin requirement that a divorce petitioner reside in the state at least two years before filing. The decision was based upon the equal protection and due process guarantees of the fourteenth amendment to the U.S. Constitution. A similar decision was reached in the Federal District Court for the District of Hawaii, again by a three-judge court.[25] However, a federal district court has upheld the Florida requirement of six months prefiling residence.[26]

The division in lower federal courts may be resolved ultimately by the Supreme Court. For Washington's purposes this does not seem important. None of the decisions say there *must* be a prefiling residence period. It is enough that Washington has, in its new law, stayed within acceptable jurisdictional principles and has acknowledged that the public has an interest when family status is to be changed. The public policy demand for a cooling-off period is adequately met by the ninety day delay after the proceeding is commenced.[27] The requirement for

substantive law of divorce can properly be applied to determine whether the plaintiff is entitled to the relief sought.

24. 328 F. Supp. 1353 (E.D. Wis. 1971).

25. Mon Chi Heung Au v. Lum, 360 F. Supp. 219 (D. Hawaii 1973).

26. Shiffman v. Askew, 359 F. Supp. 1225 (M.D. Fla. 1973).

27. WASH. REV. CODE § 26.09.030 (Supp. 1973) says the court shall proceed "when ninety days have elapsed since the petition was filed and from the date when service of summons was made upon the respondent or the first publication of summons was made. . . ." The requirement of filing *and* service or publication to start the ninety day period is carried over from WASH. REV. CODE § 26.08.040 (1961). The prior Act, adversarial in nature, naturally required some form of service in all instances.

domicile and for physical presence of a serviceman should suffice for purposes of full faith and credit. Other questions, such as whether Washington will become a "divorce mill," seem superficial and in any event need not be decided for jurisdictional purposes.

B. Marriage Counseling

Lawyers probably have always recognized an ethical obligation to help alienated spouses consider reconciliation. Despite such effort as the legal profession may have made, one writer says that "the attorney's role is synonymous with an impending divorce" and that "the fulfillment of . . . present ethical duty falls far short of reflecting reality and the needs of the client."[28] The law has favored, and doubtlessly still does favor, the preservation of marriage, but at what price? And how, if at all, is such a policy to be implemented?

Washington has had a Family Court for nearly a quarter century and its duties, from the beginning, have been "to effect the reconciliation of the spouses or an amicable adjustment or settlement of the issues of the controversy."[29] Quite correctly, Family Court commissioners have understood their duty to include divorce counseling as well as reconciliation.[30] The Bar Association Family Law Committee, which controlled the drafting of the Dissolution Act, showed a sustained interest in better counseling services, especially in experiments which were under way in the Family Courts of Snohomish and King Counties.[31] This interest was reported to a "Family Law Conference" of approximately 140 persons, nearly all nonlawyers, where it was given an unenthusiastic reception. The Conference favored a cautious, essentially voluntary service not too closely related to the judiciary.[32]

Under the new Act a question arises: If both parties join in the petition, will the ninety days begin upon filing or must one serve for purely technical reasons? To require service in such an instance seems wholly unnecessary.

28. Marder, *The Need for an Expanded Role for the Attorney in Divorce Counseling*, 4 FAMILY L.Q. 280, 287–88 (1970).

29. WASH. REV. CODE §26.12.170 (1963).

30. *See, e.g.*, statements in the Résumé of 1972 Annual Report, Special Calendars Department for King County.

31. Report of the Family Law Committee 7-8 (July 1970); Minutes of the Family Law Committee 1 (June 11-12, 1971).

Various studies of the Family Courts in King and Snohomish Counties were conducted during the years 1969–72 by Manzer J. Griswold, Ph.D., Associate Professor in the School of Social Work, University of Washington. Data from these studies were considered during the drafting of the act.

32. Report of the Family Law Conference, Oct. 21-23, 1971. This conference was

The ultimate result of the Conference recommendation was enactment of Section 3 (3)(b) of the Dissolution Act. That section permits the judge to refer the parties to the Family Court, to "another counseling service of their choice," or to order a continuance. Referral to a counseling service or an order of continuance may suspend the dissolution proceeding for not more than 60 days. The Family Court Act specifies that marital actions may be suspended for an initial 30 days and then, for cause, an additional 90 days and, with the consent of the parties, for even longer.[33] Since the Family Court Act was not expressly amended, one may assume these time periods govern.

Authorization to refer to "another counseling service" was not in the original HB 392. The addition of this language reflects a conviction that private counselors may be able to help if the parties are referred by the court and if fees are made available.[34] The parties may choose the counseling service. May they decline private counseling entirely?[35]

Professional opinion is divided on the issue of whether parties should be ordered to seek counseling.[36] The Washington legislature has wrestled with this question once before. As originally enacted, the Family Court Act permitted a judge to "recommend or invoke the aid of physicians, psychiatrists or other specialists or the pastor or director of any religious organization to which the parties may belong" *if* the consent of both parties had been given.[37] In 1971 the statute was

organized and financed by the State Bar Association. Recommendations from the conference were accepted as policy guides by the committee which drafted the bill which ultimately became the Dissolution Act of 1973. Most of the persons attending the conference were professionals who offer services related in some way to families. They heard an explanation of the proposed Uniform Marriage and Divorce Act drafted by the National Conference of Commissioners on Uniform State Laws, presented by Mr. Bernard Helling, chairman of the Commissioner's drafting committee and studied reports on the marriage and dissolution act proposed for Washington by the State Bar Association's Family Law Committee. Among the reports considered was one by the Honorable Alfred O. Holte, who designed the family court experiment for Snohomish County.

33. WASH. REV. CODE § 26.12.190 (1963).

34. *Id.*, § 26.09.140 was also amended to authorize the court to order payment of "other professional fees" in addition to the traditional attorney's fees and suit costs.

35. It should be remembered that no referral is authorized if both spouses have requested dissolution. *See* text accompanying section I. C. 1 *infra*. Perhaps the section here being discussed means that if the partners *ask* to be referred to a "counseling service of their choice" the court may permit such referral as an alternative to an appearance in the Family Court.

36. For an interesting argument questioning the justification for counseling see Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633 (1956).

37. WASH. REV. CODE § 26.12.170 (1963).

amended to authorize the court to *order* such aid. The requirement of consent no longer appears.

Doubt regarding the efficacy of coerced counseling was not the real reason why the Dissolution Act, as originally drafted, did not authorize the judge to order the parties to consult persons outside the judicial structure. The reason was more basic. To order parties to counsel with religious leaders has been held unconstitutional as a violation of the separation of church and state,[38] and an early Washington case held that ordering parties to consult with a medical practitioner was beyond the proper judicial role.[39] These questions are reopened by the amendment of the Family Court Act described above and by the language added by amendment to Section 3 (3)(b) of the Dissolution Act.[40]

Iowa has experimented with a mandatory counseling requirement.[41] The experience in that state indicates that at least two practical difficulties must be expected. The first of these is how to deal with a refusal of a party to complete the counseling session or to comply with an order to pay costs. Specific performance has long been thought counterproductive in most personal relation cases[42] and a refusal to dissolve an unworkable marriage seems poor public policy.

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38. People *ex rel.* Bernat v. Bicek, 405 Ill. 510, 91 N.E.2d 588 (1950).

39. State *ex rel.* Waughop v. Superior Court, 72 Wash. 535, 130 P. 1139 (1913).

40. The dissolution act in Florida provides that when minor children are involved or when one party denies breakdown, the court may "[o]rder either or both parties to consult with a marriage counselor, psychologist, psychiatrist, minister, priest, rabbi, or any other person deemed qualified by the court and acceptable to the party or parties ordered to seek consultation . . . ." FLA. STAT. § 61.052(2)(b) (Cum. Supp. 1973). This section was mentioned with approval in Riley v. Riley, 271 So. 2d 181 (Fla. 1972). The validity of the section was not in issue.

41. IOWA CODE § 598.16 (Cum. Supp. 1973) provides, in part:

> The court shall require such parties to undergo conciliation for a period of at least ninety days from the issuance of an order setting forth the conciliation procedure and the conciliator. Such conciliation procedures may include, but shall not be limited to, referrals to the domestic relations division of the court, if established, public or private marriage counselors, family service agencies, community mental health centers, physicians and clergymen. Conciliation may be waived by the court upon a showing of good cause; provided, however, that it shall not be waived if either party or the attorney appointed pursuant to section 598.12 objects.
>
> The costs of any such conciliation procedures shall be paid by the parties; however, if the court determines that such parties will be unable to pay the costs without prejudicing their financial ability to provide themselves and any minor children with economic necessities, such costs may be paid from the court expense fund.

For an analysis of the Iowa law see Peters, *Iowa Reform of Marriage Termination*, 20 DRAKE L. REV. 211 (1971).

42. Snedaker v. King, 111 Ohio St. 225, 145 N.E. 15 (1924) is the most fre-

The second problem is what to do with the counselor's report when one is furnished. The Iowa solution seems to be that the report is to be received as opinion evidence, available to corroborate the party's testimony of marital breakdown.[43] The counselor is subject to normal cross-examination. The implications are significant. Will parties talk freely when what is said may be used in litigation? This is a special problem under Iowa's statute, which leaves the ultimate determination of "the likelihood that the marriage can be preserved" to the judge rather than to the spouses. That difficulty should not arise in Washington, but discussions related to ancillary relief might prove equally embarrassing.

If mandatory counseling is either legally or practically unworkable, what viable alternative can be devised? The solution advanced by the Dissolution Act is to give new responsibility to the lawyer. He must use his professional skill to help the client decide whether a dissolution is the best available course. The Dissolution Act gives the client and the attorney much greater capacity to manage the ancillary aspects of a dissolution.[44] Such control substantially enhances the counseling potential of the lawyer and it does so in a context familiar to him; *i.e.*, evaluating the opportunity for and probable consequences of negotiation. Marital *counseling* is inevitable; marriage *reconciliation* may be a desirable spin-off as the parties are helped to a realistic appraisal of their situation.

Nothing in the Dissolution Act resolves one related, persistent worry of the lawyer. Can he, when requested, represent both parties? Antenuptial agreements have been found unenforceable when one party did not have independent advice.[45] But separation contracts have been sustained where one spouse, even though urged to do so, elected not to retain separate counsel.[46] Perhaps the attorney should "counsel the situation" so long as possible reconciliation is under discussion but should indicate clearly who is not his client when the discussion shifts to counseling for dissolution.

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quently cited judicial discussion. *See also* Comment. *Injunctive Control of Family Relations*, 18 KY. L.J. 207 (1930).

43. *In re* Marriage of Boyd, 200 N.W.2d 845 (Iowa 1972).

44. The authority is provided by Section 7 of the Dissolution Act. WASH. REV. CODE § 26.09.090 (Supp. 1973). *See* text accompanying section II A *infra*.

45. Hamlin v. Merlino, 44 Wn. 2d 852, 272 P.2d 125 (1954); Friedlander v. Friedlander, 80 Wn. 2d 293, 494 P.2d 208 (1972).

46. Halvorsen v. Halvorsen, 3 Wn. App. 827, 479 P.2d 161 (1970); Peste v. Peste, 1 Wn. App. 19, 459 P.2d 70 (1969).

C. *When Reconciliation Fails*

Given even the most favorable circumstances, reconciliation is difficult to arrange.[47] It is, therefore, usually necessary to provide an additional remedy. The Dissolution Act continues three traditional forms of relief: separate maintenance, declarations of invalidity, and —under the new name of dissolution—divorce. As will soon be shown, some changes are made in each of these actions. Hopefully the declaration of invalidity and the decree of legal separation will not be sought often. Dissolution of a bankrupt marriage is clearly the remedy of choice.

1. *Dissolution and the Role of the Judge*

Under the new Dissolution Act the judge may play basically a supporting role, especially if no dispute exists over economic matters or child problems. However, Section 3 of the Dissolution Act calls upon the judge to do something related specifically to the marital status in three different settings.

First, if the parties jointly petition for dissolution, or if the respondent does not deny the petitioner's allegation of irretrievable breakdown, the court *shall* enter the decree. The judge is not required to decide anything with respect to "irretrievable breakdown."

Second, if there is a denial of irretrievable breakdown, the judge has a more substantial role. He is to consider "all relevant factors, including the circumstances that gave rise to the petition, and the prospects for reconciliation." Based upon such evidence, the judge must follow one of two courses: find irretrievable breakdown and decree dissolution or, upon request by a party or on his own motion, continue the matter for a set time or refer the parties to counseling. No-fault statutes in some states permit the judge to refer the parties to counseling despite their mutual allegation of irretrievable breakdown. This cannot happen in Washington; although the referral need not be

47. A study of 170 husband-wife pairs in the Family Court for King County disclosed that "reconciliation agreements" were executed in 35% of the cases in which both spouses sought help, 11% of the cases in which one spouse petitioned for Family Court intervention, and 10% if the instances in which the referral was made by motion of the judge. M. GRISWOLD & S. MELD, KING COUNTY FAMILY COURT CONCILIATION SERVICE: RESEARCH-IN-PRACTICE DEVELOPMENT PROGRAM PROGRESS REPORT, 1968-1972 (Aug. 1972).

requested by either spouse, at least one spouse must deny that the marriage is beyond salvation. The philosophical gulf separating these two forms of legislation is immense.

The third situation in which the judge is to do something concerning marital status arises when the dispute returns from counseling or after the period of adjournment. Once again the judge must choose either of two courses. He must find that the parties have agreed to reconciliation (note that the finding relates to the agreement of the parties, not to the "fact" of reconciliation) and dismiss the matter, or find that no reconciliation has occurred (of which the allegation of a party is proof) and enter the decree of dissolution.

Apparently no other state has departed so sharply from tradition. As already shown, Delaware continues to talk of fault and Iowa requires corroborating evidence that the marriage cannot be preserved. The developments in Florida[48] and California[49] have been more sophisticated but the result, or at least the rhetoric, is still the same.

Although the Dissolution Act requires no independent evidence aside from the allegation of the petitioner, it does not follow that there is no judicial role for the judge concerning the dissolution of marital status. (Of course there are all the ancillary issues surrounding children and property. Here we are discussing only dissolution of the status.) Defenses merit our attention.

2. *Defenses to Dissolution*

Everyone casually acquainted with traditional divorce litigation recalls the unholy quadriga of collusion, condonation, connivance and

48. In Ryan v. Ryan, 277 So. 2d 266, 272 (Fla. 1973), the court stated:
[T]here must be appropriate *evidence* (albeit uncorroborated as the statute allows) that in truth and in *fact* the marriage is irretrievably broken . . . we stated the law still to be . . . '[that it] would be aiming a deadly blow at public morals to decree a dissolution of the marriage contract merely because the parties requested it . . . .'

49. The California court said that the legislature of that state:
rejected a proposal under which the court could have been required to dissolve a marriage on a showing that the parties had taken certain procedural steps and that a certain period of time had passed . . . . The court cannot perform this contemplated function [of trying to reconcile the spouses] without evidence as to the condition of the marriage. Therefore, section 4511 provides that "No decree of dissolution can be granted upon the default of one of the parties . . . but the court must . . . require proof of the grounds alleged . . . ."
McKim v. McKim, 100 Cal. Rptr. 140, 144, 493 P.2d 868, 872 (1972).

recrimination. Essentially all of these defenses reflected the same theme: divorce is an adversary proceeding, and there must be an innocent and guilty party. The resultant harm inflicted upon people and upon the legal system was substantial, and elimination of such injury provided a major reason for reform of the law. However, error on one extreme obviously does not merit equal error on the other, and to decree dissolution without any public control would be to err seriously. Where, then, is the balance?

The beginning point is obvious; there must be evidence of irretrievable breakdown. Section 3(2) of the Dissolution Act enables the responding party to allege that the petitioner was "induced to file the petition by fraud or coercion . . . ." This section supplements the rule of general practice "that a guardian [of a mental incompetent] has no standing to bring an action for the divorce of his ward without specific statutory authorization."[50] Inasmuch as proof of fraud, coercion or incompetence of the petitioner constitutes a defense, the judge is empowered to take evidence and, if one of these circumstances is found, is required to dismiss the petition.

One additional observation should be made before leaving the subject of mental incompetence. Under the prior Washington law, the *plaintiff's* lack of competence to enter a contract could be grounds for divorce as could certain described chronic incompetence of the *defendant* existing after the marriage.[51] Contractual incompetence can still be used under the Dissolution Act to show the invalidity of a marriage,[52] but postcontractual incompetence of the respondent spouse is only one factor which may be weighed by a petitioner in deciding whether the marriage is irretrievably broken. It is interesting to notice that the California no-fault dissolution act makes insanity of the respondent an alternative ground for divorce and therefore is unlike the new Dissolution Act.[53] Presumably the California provision reflects a concession to legislative necessity, a different public policy or misguided sentiment.

The legal concepts of incompetence, fraud and coercion are rela-

50. For explanation of how the guardianship issue arose, see note 68 *infra*.
51. WASH. REV. CODE § 26.08.020 (1), (10) (1963).
52. WASH. REV. CODE § 26.09.040(4)(b)(i) (Supp. 1973).
53. CAL. CIV. CODE § 4506(2) (West 1970). The author does not know if the insanity ground is ever used in California. He has been told by California lawyers that, because of the evidentiary problems, the ground is simply ignored.

tively well understood and dismissal of a petition for these reasons will not jeopardize the nonadversarial quality of the Dissolution Act. Another possible argument, however, may not be so readily managed.

The Dissolution Act has eliminated *fault* as a factor, but this does not mean that a *basis* for dissolution need not be established. It must be shown that the marriage is irretrievably broken. The question is, what evidence will establish that fact? The Dissolution Act requires only the allegation of a spouse. It does not require corroboration of such testimony, but presumably it does require that the assertion be honestly made.

The Florida court has examined this issue and has stated that proof of "misrepresentations, concealments or untruth" in the petitioner's allegation is a defense not because of the need to show fault but simply because there is "a failure of proof that the marriage was irretrievably broken" and thus not "sufficient evidence upon which to grant the relief sought."[54] The disturbing feature suggested by the Florida decision is that a court may fail to differentiate between the absence of evidence concerning breakdown of marriage and the "sufficiency" of such evidence. Under the Washington Dissolution Act the former would be a proper defense while the latter would not.

An analogy (perhaps more complex than helpful) can again be made to the law of contracts. In determining whether a contract exists the court must find consideration or its substitute. Having found consideration, the court does not weigh its value or "adequacy," but leaves the "value" determination to the contracting parties.[55] So it is with the Dissolution Act requirement: The party determines the severity or "adequacy" of the breakdown while the judge finds whether the allegation is genuine or contrived.

3. Separate Maintenance and Declarations Concerning Validity

Disputing parties to a contract often arrange mutually satisfactory

54. Ryan v. Ryan, 277 So. 2d 266, 273 (Fla. 1973).

55. "[W]e speak of 'value' as if it were definite and exact . . . . In fact, it is always variable, always a matter on which opinions may differ . . . . If there are willing buyers and sellers . . . it is their willingness that determines value." A. CORBIN, CONTRACTS §127, at 185 (1 vol. ed. 1952). But Corbin then cautions the reader: "Inadequacy of consideration may be so gross as to be evidence of fraud . . . ." *Id.* This familiar doctrine should illustrate what the task of the judge now is when hearing a dissolution petition where the defense of fraud is asserted.

substitute performances. Failing this they may ask for specific performance as an alternative remedy to termination. Decrees of separate maintenance are of this nature. The decree derives from equity, not from canonical rules or legislation, and it was granted in Washington long before being authorized by statute.[56] There are negative aspects to the use of separate maintenance and the Washington court gradually has developed precedents which limit both the availability and duration of such decrees.[57] The Dissolution Act authorizes the court to decree legal separation if requested by a petitioner who would be entitled to dissolution, provided such request is not objected to by the respondent.[58] However, the Dissolution Act also honors Washington's prior experience by providing in Section 15, that any time after six months, on motion of either party, "the court shall convert the decree of legal separation to a decree of dissolution of marriage."[59]

Prior Washington law allowed an annulment for a voidable marriage and a decree of nullity for a void marriage. In deciding these cases, the court has drawn a wavering line between voidable and void marriages. *Voidable* marriages are those which, although defective in some manner, exist until avoided.[60] *Void* marriages, are those which, having never legally existed, need not be set aside, though "in the interests of society [it is] proper that the invalidity of such marriages be

56. In an action prior to the enactment of WASH. REV. CODE § 26.08.120 (1963). Washington's first legislative provision for separate maintenance, the court quoted with approval a statement that "the decree compels a 'specific performance' of the husbands' legal duty . . . ." Cohn v. Cohn, 4 Wn. 2d 322, 325, 103 P.2d 366, 367 (1940).

57. For a brief history of the development, see Rieke, *Divorce Act of 1949*, 35 WASH. L. REV. 16, 49-50 (1960).

58. WASH. REV. CODE § 26.09.030(4) (Supp. 1973). It should be noted that legal separation cannot be decreed until the end of the 90 day cooling-off period required by the Act. Immediate needs may, of course, be met by temporary orders pursuant to § 26.09.060. There is no more reason for a hasty entry of a coerced decree of legal separation than there is for a decree of dissolution. If the parties wish to resolve their economic affairs more rapidly, they may do so entirely by their contract under § 26.09.070(2) without the time and trouble of a court action.

59. *Id.*, § 26.09.150. Note that the court has no discretion concerning entry of the dissolution. If the parties to the original decree of legal separation have never been domiciled in Washington and are not in the military service, should the court refuse to decree dissolution because of lack of jurisdiction? Or does procurement of a legal separation plus six months constitute adequate contact between the parties and the state to justify jurisdiction to dissolve the marriage?

60. "[T]he marriage is not void but merely voidable, and until legally annulled is valid for all civil purposes." State v. McPherson, 72 Wash. 371, 375, 130 P. 481, 483 (1913).

adjucated, and the marital status of the parties be made a matter of record."[61]

However, Washington has been unfriendly to both petitions for annulment and decrees of nullity. Capacity to consent to the contract has been found readily;[62] the test for fraud has been stringent.[63] An early annulment provision has been read restrictively so as to allow only a party to the defective marriage to initiate the suit, thus precluding annulment actions by parents or other relatives.[64]

In 1949, as part of a new divorce act, the Washington legislature made the contractual defects permitting *annulment* also a ground for divorce.[65] It also enacted a new section to provide a *decree of nullity* for a void marriage.[66] This legislation was a valiant effort toward clarity, but in a lost cause. One immediate consequence was to raise the question whether a spouse with a defective, but not void, marriage might elect either annulment or divorce. The court denied such an option. It felt the legislative policy favored divorce over annulment, a decision which may have eliminated all annulments in Washington although the court expressly declined a request to make a statement to that effect.[67]

There were practical distinctions among these remedies. Only divorce required a prefiling residence and a post-filing "cooling-off" period. A petition for annulment, but not for divorce, could be brought by a guardian.[68] The decree of nullity, but not annulment or divorce,

61. Huard v. McTeigh, 232 P. 658, 663 (Ore. 1925).
62. *In re* Gallagher's Estate, 35 Wn. 2d 512, 213 P.2d 621 (1950); *In re* Romano's Estate, 40 Wn. 2d 796, 246 P.2d 501 (1952).
63. Harding v. Harding, 11 Wn. 2d 138, 118 P.2d 789 (1941).
64. WASH. REV. CODE § 26.04.130 (1963), not repealed by the Dissolution Act, provides for annulment "only at the suit of the party laboring under the disability, or upon whom the force or fraud is imposed." Parents of a minor have no standing, *In re* Hollopeter, 52 Wash. 41, 100 P. 159 (1909); nor do legatees of a will. *In re* Romano's Estate, 40 Wn. 2d 796, 246 P.2d 501 (1952).
65. WASH. REV. CODE § 26.08.020(1) (1963). The divorce ground is stated in essentially identical terms to those used in the annulment section, note 64 *supra*.
66. WASH. REV. CODE § 26.08.050 (1963).
67. Saville v. Saville, 44 Wn. 2d 793, 271 P.2d 432 (1954).
68. The latter point caused some difficulty in Jones v. Minc 77 Wn. 2d 381, 462 P.2d 927 (1969). A guardian sought relief for an incompetent ward, alleging that the contract of marriage was avoidable because of incompetence and fraud. The court, citing *Saville*, held that divorce was the necessary remedy and acknowledged that normally an action for divorce cannot be initiated by a guardian. However, where the basis for relief pre-*Saville* would have been annulment and thus could have been sought by the guardian, it is now proper for the guardian to sue for divorce.

could be obtained after the death of a party. These subleties were becoming unreasonably difficult to manage.

Section 4 of the Dissolution Act addresses all these problems. It eliminates the distinction between void and voidable marriages so far as a remedy is involved and simply authorizes a declaration of invalidity.[69] The jurisdictional requirement for a declaration of invalidity is the same as for dissolution. However, no cooling-off period is required. The court declaring invalidity has the same power to award ancillary relief as it does in dissolution and any child born or conceived during a marriage of record is legitimate. The decree of invalidity is, in short, very much like the decree of dissolution.

Three major changes result from this simplification of prior Washington law. First, the action must be brought while both parties are living. This change eliminates almost every reason for struggling to distinguish a void from a voidable contract. Second, invalidity because of bigamy may be alleged not only by a party to the contract but also by the legal spouse (*i.e.*, the spouse in the original marriage) or by a child of either party. The child, presumably, may be the issue of either party and *any* other person.

The third change is a bit more complex. As originally drafted Section 4 (2)[70] was intended to permit a spouse whose marriage is questioned by another entity, perhaps an insurer or an obligor of a fund from which a spouse might claim benefit, to establish the validity of the marriage. The statute permits this action to be brought "at any time," thus after as well as before a death. The moving party, the petitioner, was to be the spouse whose marriage was disputed and the entity questioning the validity of the marriage was to be the respondent. By an unfortunate misunderstanding, an amendment substituted the word "petitioner" in place of "respondent" and the subsection, as enacted, has little or no utility. Legislative correction is clearly needed.

Except for the absence of a cooling-off period, there is little differ-

69. The grounds for a declaration of invalidity are lack of competence to consent because of age, existing prior marriage, consanguinity, mental incompetence or intoxication and for lack of consent because of fraud or duress. *See* WASH. REV. CODE § 26.09.040(4)(b)(i) (Supp. 1973).

70. WASH. REV. CODE § 26.09.040(2) (Supp. 1973) provides: "If the validity of the marriage is denied or questioned at any time, either or both parties to the marriage may petition the court for a judicial determination of the validity of such marriage. The petitioner in such action shall be the person or entity denying or questioning the validity of the marriage."

ence between dissolution and the declaration of invalidity. The latter remedy exists only because some persons, for religious or other reasons, may prefer a declaration that they were not married, rather than a decree of dissolution. As authorized in the Dissolution Act, the declaration of invalidity does meet the doctrinal niceties involved in providing ancillary relief and in preserving legitimacy of issue even when the contract was "void." It also establishes a means of handling the conflict of laws questions which might arise when, under the law of the state where the marriage was attempted, the marriage would be characterized as void.

II. THE ECONOMIC DETERMINATIONS

The state is instinctively paternalistic. A firmly ingrained feature of previous divorce law was that separating parties could not be trusted to resolve their own problems. At least the judge, and until recently the prosecuting attorney,[71] had to scrutinize the circumstance of the divorce to protect against unfairness.[72]

A petition for divorce also seemed, to the state, a good opportunity to enforce support obligations. Thus when a judge suspected nonsupport he could "in his discretion, refuse to grant an order of divorce until the suspected party is prosecuted and finally found guilty or innocent."[73] Whether such thralldom is constitutional was never tested in Washington, but it seems bad policy. The right to dissolution of an unworkable marriage is one matter; the enforcement of an obligation to support is another. The new Dissolution Act addresses these issues. The provisions for property division and alimony or maintenance as it

71. Until 1972 the prosecuting attorney was, for all practical purposes, a party to divorce actions. He was to be served with all pleadings and other papers. It was his duty to appear in all default and uncontested cases. He had the right of appeal. He or his proctor advised the court with respect to property and support provisions. *See* WASH. REV. CODE § 26.08.080 (Supp. 1972). This section was amended in 1972 to relieve the prosecutor of these duties except where the court expressly ordered an appearance.

72. A fair description of this duty, although the statement is dicta, can be found in State *ex rel.* Atkins v. Superior Court, 1 Wn. 2d 677, 685, 97 P.2d 139, 142 (1939):

> In an action for divorce, a property settlement or agreement between the parties may be entirely disregarded by the court, and should be followed . . . only when the court is satisfied that the agreement is fair and just and . . . conforms to the views of the court as to a proper division . . . .

See also Lee v. Lee, 27 Wn. 2d 389, 178 P.2d 296 (1947).

73. WASH. REV. CODE § 26.08.070 (1963).

is now called, will be examined here. The provisions for child support are delayed to a later point.

A. Should the Parties Decide for Themselves

Section 7 may be the keynote of the entire Dissolution Act. Stated tersely, it gives the parties broad powers to arrange their own fiscal affairs. They may not, however, exercise such presumptively binding control with respect to matters of child custody, visitation or support.

Two quite different situations are covered by the section: (1) The legal needs of parties who wish to protect themselves in an orderly separation without termination of their marital status and (2) the legal needs which arise when a change of marital status is involved.[74]

1. Contract Separation Without a Decree of Court

Spouses often separate without resort to litigation, and Washington case law has long permitted such parties to relieve each other from future, *inter sese,* obligation.[75] They could also, as between themselves, change their property from community to separate.[76] What was unclear was the effect of their actions upon third parties. It would be clearly inappropriate to upset, by such agreement, the rights of creditors whose claims predated the agreement,[77] but would it be reasonable to protect one spouse from debts subsequently incurred by the other?

The analysis must begin with the fact that one spouse is obligated for many obligations of the other by the family expense statute[78] and by Washington's community property system.[79] However, neither of these statutory schemes will bind the noncontracting spouse if the creditor knows, when the credit is extended to the contracting spouse,

74. WASH. REV. CODE § 26.09.070 (Supp. 1973).
75. Parsons v. Tracy, 127 Wash. 218, 220 P. 813 (1923).
76. *In re* Estate of Osicka, 1 Wn. App. 277, 461 P.2d 585 (1969).
77. Baffin Land Corp. v. Monticello Motor Inn, 70 Wn. 2d 893, 425 P.2d 623 (1967), holds that such rights are not disturbed by separation contract or by termination of the marital status.
78. WASH. REV. CODE § 26.16.205 (Supp. 1972).
79. WASH. REV. CODE ch. 26.16 (1963 & Supp. 1972). *See generally* Cross, *The Community Property Law in Washington,* 15 LA. L. REV. 640, 656 (1955), and Cross, *Equality for Spouses in Washington Community Property Law—1972 Statutory Changes,* 48 WASH. L. REV. 527 (1973).

that no family relation then exists and that the antecedent conditions for the community property agency in fact do not exist.[80] The concern of a separated spouse is to be certain that prospective creditors will have such knowledge.

The formal reason why termination of marital status ends the exposure of a former spouse to future obligations of the other is because without a marriage there is neither a "family" nor a "community." But how does that formality help the creditor who, perhaps very reasonably, assumes that the former marriage still exists? Why is he not permitted a recovery based upon apparent agency or some form of estoppel? Surely the answer is that the decree of dissolution is a matter of public record and the creditor has a practical means of protecting himself. Credit managers do just that. Section 7 builds upon this reasoning to enable separating spouses to obtain, by contract, the same protection against future obligation which they could obtain by dissolution of their marriage.

Section 7(2) requires separating spouses to record their contract of separation and publish notice thereof in a "legal newspaper" if they wish the advantage of "notice to all persons of such separation and of the facts contained in the recorded document." The publication (and presumably the recording) must be made in the county where the parties resided prior to the separation.[81] If a contract is made after a separation has occurred, prudence might indicate recording and publishing in more than one location.

2. *Separation Contract as Part of the Judicial Determination*

The Dissolution Act made two major changes regarding separation agreements used in conjunction with a status change. First, the prior rule held that a separation agreement had no binding effect upon the court. The agreement was to be adopted only if its terms were deemed fair and equitable by the judge.[82] The Dissolution Act reverses this. The agreement, except for terms relating to children, "shall be binding upon the court unless it finds . . . that the separation contract was unfair at the time of its execution."[83]

80. Yates v. Dohring, 24 Wn. 2d 877, 168 P.2d 404 (1946).
81. WASH. REV. CODE § 26.09.070(2) (Supp. 1973).
82. *See* note 72 *supra*.
83. WASH. REV. CODE § 26.09.070(3) (Supp. 1973).

This provision follows closely the suggestion of the Uniform Marriage and Divorce Act except that the Commissioners use the term "unconscionable" in place of "unfair."[84] Either version reflects the view that amicable arrangements are to be preferred over adversary determinations. Only when the parties have not elected to contract or when their contract is found to have been unfair will the judge make original provision for the disposition of property, maintenance and the discharge of existing obligations.

The second change is technical but significant. Separation contracts are frequently incorporated into the court's decree in order to gain access to such enforcement advantages as contempt citations and judgment liens, which are not available for a simple contract.[85] Under prior law, moreover, a contract which made provision for the economic affairs of the litigants, if not incorporated, became a nullity upon the entry of a decree of divorce.[86] On the other hand, an agreement which was incorporated lost its identity as a contract, by reason of the doctrine of "merger,"[87] and thereafter could be modified only by modification of the decree itself.[88] Is it possible to have both a contract and a judgment at once?

The principal advantage in preserving the contract arises when enforcement is sought outside the United States, where the full faith and credit provision of the Federal Constitution is inapplicable.[89] The Commissioners on Uniform Laws first thought that allowing the con-

84. UNIFORM MARRIAGE AND DIVORCE ACT § 306(b). The comment to this section indicates that the word "unconscionable" has acquired sufficient meaning in commercial dealings to protect "against overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other." The commissioners stress the fact that "unconscionability" has acquired definition because of its use in the UNIFORM COMMERCIAL CODE § 2-302. It is worth noting that the UNIFORM COMMERCIAL CODE section tests the conscionability of the term as of the date of contracting, as does WASH. REV. CODE § 26.09.070(3) (Supp. 1973).

85. *Ex rel.* Ridenour, 174 Wash. 152, 24 P.2d 418 (1933) held that a citation for contempt is not available to enforce contracts which are not incorporated. A good discussion of the use of judgment liens in connection with support obligations can be found in Swanson v. Graham, 27 Wn. 2d 590, 179 P.2d 288 (1947).

86. Mathews v. Mathews, 1 Wn. App. 838, 466 P.2d 208 (1970).

87. In Mickens v. Mickens, 62 Wn. 2d 876, 881, 385 P.2d 14, 17 (1963), the Washington court said: "Where the property settlement agreement is approved by a divorce decree, the rights of the parties rest upon the decree rather than the property settlement." United Benefit Life Ins. Co. v. Price, 46 Wn. 2d 587, 283 P.2d 119 (1955) is cited as authority.

88. Corson v. Corson, 46 Wn. 2d 611, 283 P.2d 673 (1955).

89. For a discussion of the problem see A. EHRENZWEIG, CONFLICT OF LAWS § 82 n.1 (1962).

tract to exist concurrently with a judgment would, because of possible modification of one but not of the other, cause "intolerable confusion or injustice . . . ."[90] As they then viewed it, an election between contract or judgment was necessary. Subsequently this issue was resolved in the proposed Uniform Act as it has been in the Washington Dissolution Act: Unless the contract provides otherwise, its terms are to be set forth in the decree and become an order. However, Subsection (6) of Section 7 prevents a "merger" and subsection (7) settles part of the concern about disparate modification of the contract vis-à-vis the judgment by providing that the contract terms are "automatically modified by modification of the decree."[91] The reverse problem (modification of the decree by amendment of the contract) is not mentioned, but Washington law has been emphatic in saying that court decrees may not be altered by contract[92] and presumably the legislature had no intention of changing that rule.

Subsection (8) of Section 7 may, however, cause a problem.[93] That subsection permits the parties "by mutual agreement . . . to terminate the separation contract . . . without formality unless the contract was recorded . . . ." This provision, which was added to the original bill by an amendment, must have been intended to permit the parties to terminate an unrecorded separation agreement by mutual rescission only when their marriage still existed and when the contract had not been incorporated into a decree. However, this intention is nowhere stated, and because of its placement immediately after subsection (7), which deals with modification of the *contract* by modification of the *decree,* one might contend that the intent was to permit termination of the *decree* by recission of the *contract.* It seems probable that the legislature intended only to enable parties to remove their contract from

90. UNIFORM MARRIAGE AND DIVORCE ACT § 306(e). Comment.
91. WASH. REV. CODE § 26.09.070(6). (7) (Supp. 1973).
92. The clearest cases are those dealing with child support. Griggs v. Morgan, 4 Wn. App. 468, 481 P.2d 913 (1971) is one example. The court suggests that a different result might be reached in a contest between the former spouses which does not involve child support. Assuming that *spouses* can, under the Dissolution Act of 1973, modify future *maintenance* by contract, it would be desirable to conform the decree by modification proceedings.
93. WASH. REV. CODE § 26.09.070(8) (Supp. 1973) provides: "If at any time the parties to the separation contract by mutual agreement elect to terminate the separation contract they may do so without formality unless the contract was recorded as in subsection (2) of this section, in which case a statement should be filed terminating the contract."

the public record and did not intend to suggest that a decree of court could be affected. However, the argument that a decree can be modified by "mutual agreement . . . without formality" may look attractive to an obligor-spouse who, for a fair price, bought what he assumed was a discharge from *all* future duty.

3. *Some Tax Considerations*

It will be noticed that the contracting spouses by agreement "may expressly preclude or limit modification of any provision for maintenance set forth in the decree."[94] This is contrary to prior law under which future alimony was subject to modification.[95] This new provision is consistent with the Dissolution Act's general objective of permitting spouses to settle their own affairs. One consequence is that the spouses now can exert more control over the tax aspects of their actions. This is not the place to treat the tax issues extensively, but the following illustrations may suggest some initial considerations.

The *Lester* case[96] marked the significant tax distinctions between alimony and property division: alimony is treated as income to the payee and is deductible by the payor, while in the case of a division of property there is no income to the payee and no deduction available to the payor. The advantage of having the major income producer pay alimony and thus be entitled to an income tax deduction has of course been recognized. However, because of Washington's frequently stated opposition to long-term alimony[97] and the inability of the parties to control termination of the order, it has been considered unwise to plan upon the advantage. Now that the parties may formulate their own separation agreement which must be adopted by the court unless found unfair and because the parties may preclude modification of alimony by the contract terms, alimony may now be relied upon as a viable tax planning tool. If it is desired to take the opposite approach

94. WASH. REV. CODE § 26.09.070(7) (Supp. 1973).
95. WASH. REV. CODE § 26.08.110 (1961).
96. Commissioner v. Lester, 366 U.S. 299 (1961).
97. The duration of alimony has been litigated frequently in Washington and the decisions are not entirely in harmony. However, the following language from Berg v. Berg, 72 Wn. 2d 532, 534, 434 P.2d 1, 2 (1967) is probably a fair summary: "It is not the purpose of the law to place a permanent responsibility upon a divorced spouse to support a former wife indefinitely. She is likewise under an obligation to prepare herself so that she might become self-supporting. The allowance of alimony is to provide such an interval for her reasonable preparation."

and to make a property division with periodic payments of a "fixed" amount, using the so-called "ten-year rule"[98] which does not impose the tax obligation upon the payee nor give the deduction to the payor, care must be taken to provide that payment is to be completed despite the death of either spouse or the remarriage of the payee. Under Section 17 of the Dissolution Act,[99] either of these events would terminate a duty to pay maintenance unless contrary provision is made. Likewise, if the total amount to be paid is regarded as uncertain, the tax plan may be upset.

One other tax aspect deserves mention. A wife may now deduct from her income the child's expenses *if the child is dependent upon her.*[100] Given this opportunity, the spouses may wish to describe all of the husband's periodic payments to the wife as maintenance rather than child support. This approach would allow the payor to deduct the payments as maintenance while enabling the wife to claim the child dependency deduction.

B. Ancilliary Relief in the Absence of a Separation Agreement

When the parties have not resolved their own affairs or when their efforts to do so have been found unfair, a court must divide the property, decide whether a request for maintenance will be granted and respond to requests for temporary orders.[101] What changes does the Dissolution Act of 1973 make with respect to these determinations?

1. Temporary Orders

Section 6 of the Dissolution Act deals with temporary maintenance

98. INT. REV. CODE OF 1954, § 71(c)(2).
99. WASH. REV. CODE § 26.09.170 (Supp. 1973).
100. INT. REV. CODE OF 1954, § 152(e)(1).
101. WASH. REV. CODE § 26.09.050 (Supp. 1973) imposes the duty upon the court to "consider, approve, or make" such provision "[i]n entering a decree of dissolution of marriage, legal separation, or declaration of invalidity . . . ." The status determination and ancillary relief, except in the exceptional situations discussed below, are to be ordered at the same time.

The words "consider, approve, or make" reflect the fact that maintenance may not always be appropriate but may be "considered"; that a separation contract may be "approved"; and that disposition of property and obligations shall, when jurisdiction to do so exists, be "made".

Specific guidance for the division of property is found in § 26.09.080; maintenance is dealt with in § 26.09.090; and the authority for temporary orders is in § 26.09.060.

for a spouse and temporary support for a child.[102] It does not govern temporary custody, that issue being provided for elsewhere.[103] The motion for temporary support may be made either under Section 6 (1)(a) as part of an action for dissolution, separation or declaration of invalidity,[104] or it may be made under Section 6 (1)(b) at a subsequent proceeding when the court has acquired jurisdiction over assets or over a spouse not previously before the court.[105]

The motion must be accompanied by an affidavit of the party seeking support or maintenance. As a part of the motion for temporary maintenance or support or by a separate motion and affidavit, the petitioner may also request a temporary restraining order or a preliminary injunction. The relief requested may run against *any* person when the object is to conserve assets or to avoid removal of a child from the jurisdiction but only against a party to the action when the object is to prevent molestation or the entry into a dwelling of the family or of the moving spouse.[106] Bringing third parties before the court to avoid loss or removal of property has been common practice and any extension of jurisdiction in the Dissolution Act is slight.[107]

Although the distinction is not always observed, the rules for civil practice in Washington clearly distinguish a preliminary injunction from a temporary restraining order.[108] The preliminary injunction cannot be issued without notice to the adverse party, while, under the limited circumstances prescribed in the rule, a temporary restraining order may be so issued. Furthermore, in most situations a temporary restraining order automatically terminates in a few days, and if a longer period of injunction is desired it is necessary to give notice and to obtain a preliminary injunction. Inasmuch as civil practice governs proceedings under the Dissolution Act, as provided in Section 1(1),[109] the notice rules apply. Section 6(3) of the Dissolution Act does, how-

102. *Id.*, § 26.09.060.
103. *Id.*, § 26.09.200.
104. *Id.*, § 26.09.060(1)(a).
105. *Id.*, § 26.09.060(1)(b).
106. *Id.*, § 26.09.060(2) provides for an order "restraining or enjoining any person" and § 26.09.060(2)(a), relating to assets, and § 26.09.060(2)(d), relating to child removal, are not limited in scope. However, the subsections referring to molestation, § 26.09.060(2)(b), and to entering a home, § 26.09.060(2)(c), extend protection only to the "other party," *i.e.*, to the spouse who is not restrained or enjoined.
107. *See* WASH. SUPER. CT. (CIV.) R. 64, 65. *See also* Kelley v. Bausman 98 Wash. 686, 168 P. 181 (1917); Harding v. Harding, 11 Wn. 2d 138, 118 P.2d 789 (1941).
108. WASH. SUPER. CT. (CIV.) R. 65(a), (b).
109. WASH. REV. CODE § 26.09.010(1) (Supp. 1973).

ever, reduce slightly the proof required before a temporary restraining order may be issued without notice;[110] under the provision of the Dissolution Act, the moving party need show only that irreparably injury *could* result in the absence of an order, whereas the civil rule requires a showing that such harm *will* result.

Subsections (4) and (5) of Section 6 refer to temporary orders and to a temporary injunction.[111] Washington practice does not have a "temporary injunction" and the words, as used in Section 6, mean temporary injunctive relief—whether in the form of a preliminary injunction or of a temporary restraining order.

2. *In What Court and at What Time May Economic Relief Be Sought?*

Authority to divide property "as shall appear just and equitable" (as distinguished from a partition according to existing although undivided interests) or to order a party to pay maintenance to another to whom the obligor is no longer related, are not common law powers. Such jurisdiction is founded upon statutory grant.[112] Divorce statutes often have provided such authority to judges but it has not been clear whether the power existed only at the time of the termination of the marital relation or whether it could also be exercised later on behalf of a *former* spouse. Because so many divorces have been ex parte, litigation and legislation concerning the issue have flourished. Good authority exists for both sides of the debate.[113]

In 1899, Washington decided that even though a valid divorce had already been entered in another jurisdiction, a Washington court could make a subsequent "equitable" division of property.[114] Years later a former husband, having been divorced ex parte in California,

110. *Id.*, § 26.09.060(3).
111. *Id.*, § 26.09.060(4), (5).
112. Loomis v. Loomis, 47 Wn. 2d 468, 288 P.2d 235 (1955).
113. *See, e.g.* Vanderbilt, 354 U.S. 416 (1957). Armstrong v. Armstrong, 350 U.S. 568 (1955) for case discussion; N.J. REV. STAT. §§ 2A:34.23-.24 (Supp. 1973–74). MASS. GEN. LAWS ANN. ch. 208, § 34(1969) and R.I. GEN. LAWS ANN. § (15)-(5)-(6) (1970) for statutory provisions and Annot., 28 A.L.R.2d 1378 (1953) for general discussion.
114. Adams v. Abbott, 21 Wash. 29, 56 P. 931 (1899). The fact that the real property was located in Washington was, no doubt, thought important to this decision. However, the court might well have found the former spouses tenants in common of the former community property and divided the asset equally.

asked the Washington court: "Is there any duty to support an ex-wife when the original divorce decree contained no valid order for alimony?" The court replied: "There may be, depending upon the facts in each case."[115] One can conclude that where a divorcing court had in personam jurisdiction over only the petitioning party and entered an ex parte decree that the nonappearing spouse has a "personal right" to support which was never before the court and thus could not have been lost.[116]

On the other hand, if both parties were before the court, must we conclude that a failure to receive ancillary relief was a denial by the court and, furthermore, is res judicata?[117] A good argument can be made that the failure to award relief should not be res judicata. Maintenance is supposedly based upon the need of one spouse and the financial ability of the other. A finding of no need or of inability to provide maintenance at one date ought not to be final and to preclude a contrary determination at a later date if circumstances change. The Washington court has flirted with the last expressed theory[118] as well as with the res judicata theory.[119] Legislative help was needed and it is given in the new law.

The Dissolution Act provides that a property division and an award of maintenance may be made by a court which lacked jurisdiction over an absent spouse in a prior dissolution proceeding.[120] The same sections of the Act also authorize the courts, subsequent to a dissolution, to award property with respect to which it earlier lacked jurisdiction. The Dissolution Act does not specifically state that the principle

115. Davidson v. Davidson, 66 Wn.2d 780, 785, 405 P.2d 261, 265 (1965), the court said:

> Where the right, if any, to support, or to a division of the community property, if any, could not be determined in the divorce action because of the absence of the respondent from the state in which the decree of divorce was granted, those questions may still be adjudicable in the state where the respondent resides.

116. This reasoning was used by Mr. Justice Douglas in the famous "divisible divorce" opinion, Estin v. Estin, 334 U.S. 541 (1948).

117. This position appears to have been adopted by New York in Lynn v. Lynn, 302 N.Y. 193, 97 N.E.2d 748 (1951). This theory explains why lawyers sometimes struggle for a one dollar a year alimony award to avoid the res judicata effect, counting upon the court's power to later modify the nominal sum to a larger amount if circumstances later should make this necessary.

118. Brown v. Brown, 8 Wn. App. 528, 507 P.2d 157 (1973). Hanson v. Hanson, 47 Wn. 2d 439, 287 P.2d 879 (1955).

119. Fleckenstein v. Fleckenstein, 59 Wn. 2d 131, 366 P.2d 688 (1961); Hudson v. Hudson, 8 Wn. 2d 114, 111 P.2d 573 (1941).

120. WASH. REV. CODE § 26.09.080 .090 (Supp. 1973).

of res judicata governs in other situations but the negative implication seems obvious.

3. *What Criteria Are To Be Used?*

The court's duty to fashion the ancillary features of a dissolution, especially without contractual guidance from the parties, is a heavy responsibility. While statutory criteria may help, in the last analysis, "it is the economic condition in which the decree will leave the parties that engenders the paramount concern in providing for child support and alimony and in making a property division."[121] The court has had and continues to have broad discretion to consider the factors of indebtedness, available property and support orders in formulating a reasonable solution. In Washington, " 'the allowance of alimony depends on two factors: (1) The necessities of the wife; (2) the financial ability of the husband' . . . [and] we are of the opinion that one of the criteria in making a property settlement between the parties is, likewise, the necessities of the wife and the financial ability of the husband . . . ."[122]

Nothing in the Dissolution Act changes these basic criteria.[123] The Dissolution Act continues the long-standing Washington rule that all community and separate property of the spouses is before the court for disposition but does not attempt to settle the vexing problem of what constitutes property.[124] We must also anticipate a continuation of the difficulty of distinguishing a division of property from an award of alimony.

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121. Rehak v. Rehak, 1 Wn. App. 963, 966, 465 P.2d 687, 689 (1970).

122. Luithle v. Luithle, 23 Wn. 2d 494, 502, 161 P.2d 152, 156 (1945).

123 WASH. REV. CODE § 26.09.080(4) expressly refers to "[t]he economic circumstances of each spouse at the time the division of property is to become effective . . . ." and § 26.09.090(f) refers to "[t]he ability of the spouse from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance."

124. Washington cases have reflected special doubt over how to classify retirement benefits. The problem intensified in 1971 with the decision of DeRevere v. DeRevere, 5 Wn. App. 446, 488 P.2d 763 (1971), *rev'd on rehearing*, 5 Wn. App. 741, 491 P.2d 249 (1971), where the court of appeals first found that a "not yet fully vested" retirement plan was not property available for division although it could be considered in fixing an alimony award. On rehearing, the court replaced its earlier opinion and expressed the view that such an interest was property available for division.

The Washington Supreme Court has recently reduced much of the confusion by holding that even a military pension, though not available to the husband for another 13 months, was property which could be divided. Payne v. Payne, 82 Wn. 2d 573,

However, there are some changes. One change, foreshadowed by the equal rights movement, is that a wife may now be required to provide maintenance for her former husband.[125] Technically this is a new law for Washington,[126] but in some instances husbands had already been awarded such relief.[127] Second, "[t]he standard of living established during the marriage" may now be considered in fixing maintenance.[128] This is precisely the opposite of the court's recent dictum that: "The maintenance of a lifestyle to which one has become accustomed is not a test [for awarding alimony]."[129] A third change from the prior Washington law is that fault is no longer to be considered in fixing maintenance or in dividing property.[130] States adopting "no-fault" divorce legislation are sharply divided over the issue whether evidence of fault is appropriate and useful in deciding property division and alimony questions. It seems that where a no-fault ground has been added to traditional fault grounds in an existing statute, the general tendency has been to continue consideration of fault in connection with other relief.[131] Jurisdictions which have eliminated all fault

512 P.2d 736 (1973). One method of calculating the present value of such an interest can be seen in Weiss v. Weiss, 75 Wn. 2d 596, 452 P.2d 748 (1969). These benefits, and others such as social security, are all too easily overlooked in settling accounts between the spouses. It can be expensive for the lawyer to make this mistake—as a $100,000 malpractice recovery in California this year demonstrates. Smith v. Lewis, 31 Cal. App. 3d 677, 107 Cal. Rptr. 95 (1973).

125. WASH. REV. CODE § 26.09.090(1) (Supp. 1973) provides: "[t]he court may grant a maintenance order for either spouse."

126. "It is elementary that in states and countries having the source of their jurisprudence in the common law, a husband has no legal right to an award of alimony, as against the wife, in the absence of a statutory enactment so providing." State *ex rel.* Jacobson v. Superior Court, 120 Wash. 359, 360, 207 P. 227, 228 (1922). Nor was the wife's separate property a "resource" to the husband so as to preclude him from social security. Christiansen v. Department of Social Security, 15 Wn. 2d 465, 131 P.2d 189 (1942).

127. The court has taken advantage of the blurred line between property division and alimony so as to require a wife to make periodic payments to a husband. Walls v. Walls, 179 Wash. 440, 38 P.2d 205 (1934) and has held that the spouses could, by their property settlement contract, enable the judge to include alimony for the husband in the decree. McKendry v. McKendry, 2 Wn. App. 882, 472 P.2d 569 (1970). One is reminded of the ancient adage that hard cases make bad law. The Dissolution Act makes such excessive refinements unnecessary.

128. WASH. REV. CODE § 26.09.090(c) (Supp. 1973).

129. Friedlander v. Friedlander, *supra* note 7, at 297.

130. Fault was, in alimony, a "persuasive force and [could] always be inquired into . . . ." Memmer v. Memmer, 27 Wn. 2d 414, 178 P.2d 720, 723 (1947). Concerning property division, "fault [was] also a factor to be considered . . . ." Wagner v. Wagner, 1 Wn. App. 328, 331, 461 P.2d 577, 579 (1969). *See also* Colson v. Colson, 2 Wn. App. 837, 470 P.2d 236 (1970).

131. Statutes which appear to have added a no-fault ground without excluding fault as a factor in property disposition include: ARK. STAT. ANN. § 34-1202(7)

grounds for dissolution are also divided, but the trend in these states appears to favor elimination of fault for all purposes.[132]

It has been estimated that, prior to the adoption of a new dissolution act in California, fault was introduced to obtain a larger share of property in "over 96 per cent of the cases."[133] The Washington modification may produce significantly different behavior on the part of clients and lawyers. If such a change were actually accomplished, it would not be easy. An informal poll among judges and lawyers in Michigan, which has adopted a "breakdown of marriage" basis for dissolution (but has not expressly changed its statutory provisions relating to division of property), disclosed that an overwhelming majority of lawyers believed that fault will continue to be a factor in setting ancillary relief.[134]

4. *Modification of Property Division and Maintenance*

Section 17 of the Dissolution Act governs modification of orders for support and maintenance as well as the finality of a court ordered division of property.[135] The section begins by referring to Section 7(7), thus reminding the reader that the parties can, by contract, largely control the modification issues.[136] The section then provides for cases not governed by contract of the parties.

As in prior Washington divorce law, a judicial property division is

(Supp. 1971); IDAHO CODE § 32-616 (Supp. 1973); TEX. FAM. CODE § 3.01 (Supp. 1972); W. VA. CODE ANN. § 48-2-4(7) (Supp. 1973). An exception to this trend is New Jersey, which has added voluntary separation as a no-fault ground but appears to exclude fault as a factor in economic relief. N.J. REV. STAT. 2A:34-2, 23 (Supp. 1973–74).

132. California eliminates fault in division of property by an express provision of the statute. Its statute provides for an equal division of community property. CAL. CIV. CODE §§ 4500—40 (West Supp. 1973). Florida, by express statutory provision, permits adultery to be considered in deciding upon alimony. FLA. STAT. ANN. § 61.08 (Supp. 1973). Iowa does not make express statutory provision, but its court has said that the admission of fault in connection with alimony or property division would necessarily reintroduce the entire issue of relative fault and virtue for both parties and thus defeat the objective of the new act. Therefore, Iowa does exclude evidence of fault. *In re* the Marriage of Williams, 199 N.W.2d 339 (Iowa 1972); *In re* the Marriage of Boyd, 200 N.W.2d 845 (Iowa 1972).

133. Hayes, *California Divorce Reform: Parting is Sweeter Sorrow*, 56 A.B.A.J. 660 (1970).

134. Snyder, *Divorce Michigan Style—1972 and Beyond*, 50 MICH. ST. B.J. 740, 744 (1971).

135. WASH. REV. CODE § 26.09.170 (Supp. 1973).

136. *Id.*, § 26.09.070(7).

final "unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state."[137] Finality of a property award is familiar case law[138] and the Washington decisions have articulated reasonably well what will, and what will not, support collateral attack.[139]

Prior case law concerning accrued alimony obligation is continued in the Dissolution Act: Absent a provision to the contrary in a contract or the decree, maintenance may be modified as to future installments but not retroactively.[140] However, assuming that neither the contract nor the decree provides otherwise, the remarriage of the spouse receiving maintenance terminates the obligation.[141] This is a change from Washington decisions which have not regarded remarriage of either the obligor[142] or the obligee[143] as an event automatically terminating alimony. The Dissolution Act also provides that the death of either spouse, unless contrary provision has been made, ends the maintenance payments.[144] This provision, however, is consistent with prior Washington law.[145]

III. PROBLEMS RELATED TO CHILDREN

A. Custody and Visitation

The last half of the Dissolution Act might properly be called a "child protection statute." The changes are basic and permit custody proceedings to be brought under novel circumstances and by people

137. *Id.*, § 26.09.170. The prior Washington law, WASH. REV. CODE § 26.08.110 (1963), provided that "the division of property shall be final and conclusive upon both parties subject only to the right to appeal . . . ."

138. McLaughlin v. McLaughlin, 43 Wn. 2d 111, 260 P.2d 875 (1953).

139. Peste v. Peste, 1 Wn. App. 19, 459 P.2d 70 (1969); Rehak v. Rehak, 1 Wn. App. 963, 465 P.2d 687 (1970); Peterson v. Peterson, 3 Wn. App. 374, 475 P.2d 576 (1970).

140. WASH. REV. CODE § 26.09.170 (Supp. 1973) says maintenance "may be modified only as to installments accruing subsequent to the motion for modification and only upon a showing of a substantial change of circumstances." Once vested, the claim for alimony payments has been considered a property interest of which the obligee may not be deprived. Prior to the 1933 amendment, REM. REV. STAT. ANN. § 988—2 (Supp. 1940), the Washington court did not have authority to modify even the future payments of an alimony award. Blethen v. Blethen, 177 Wash. 431, 32 P.2d 543 (1934).

141. WASH. REV. CODE § 26.09.170 (Supp. 1973).

142. Hanson v. Hanson, 47 Wn. 2d 439, 287 P.2d 879 (1955).

143. Fisch v. Marler, 1 Wn. 2d 698, 97 P.2d 147 (1939).

144. WASH. REV. CODE § 26.09.170 (Supp. 1973).

145. Sutliff v. Harstad, 5 Wn. App. 539, 488 P.2d 288 (1971).

who, previously, would have had no standing. Possibly the most dramatic change is in Section 11, which allows the child to be represented by separate counsel.[146] Judges in the past often appointed a guardian ad litem to advise the court concerning the child's welfare, but the guardian had neither a well defined nor a statutory position. The child's right to be heard and presumably to present evidence and to appeal is a significantly greater protection than that which could be provided by a guardian. By this section a judge may obtain information and argument which are not conditioned by the special interests of the parents. Expenses of the representation may be assigned to the spouses or, if they are indigents, may be charged against the county. By statute, the child's attorney may speak to the issues of custody, support and visitation.

The foregoing provision, together with other sections of the Dissolution Act, suggest a purposeful movement away from the philosophy that parents "own" children and can be "deprived" of their rights only by a showing of unfitness. The trend is toward a premise that the child's welfare is more significant than the claim of parental rights.[147]

1. Initiating a Custody Prodeeding

A custody question arises naturally in conjunction with changes in marital status, but under Section 18 (1) the proceeding may also be initiated by a parent independently of a marital action.[148] This provision has obvious utility for separated parents.

146. A review of a new book, A. FREUD, J. GOLDSTEIN & A. SOLNET, BEYOND THE BEST INTEREST OF THE CHILD (1973), *reviewed*, N.Y. Times, Oct. 7, 1973, § 6 (Magazine), at 70, 80, advances the argument that "a child is being deprived of his rights in any legal proceedings concerned with his future unless he is represented by a lawyer of his own who has no other goal than to determine what is the least harmful alternative for his child client." It is not fanciful to contend that deprivation of parents, support and a home without an opportunity to be heard is violative of due process.

147. The shift away from a theory that parents have a property interest in their children toward a test which emphasizes the performance of the parental responsibilities is consistent with other portions of the Dissolution Act. It stresses what Chief Justice Burger has called "an essentially contractual relationship, the parties to which have legally enforceable rights and duties, with respect both to each other *and to any children born to them*." Stanley v. Illinois, 405 U.S. 645, 633 (1972) (dissenting opinion) (emphasis added).

Departure from the "status" concept of the parent-child relation also would pose significant jurisdiction questions. *See* Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW & CONTEMP. PROB. 819 (1944); Stumberg, *The Status of Children in the Conflict of Laws*, 8 U. CHI. L. REV. 42 (1940).

148. WASH. REV. CODE § 26.09.180(1)(a) (Supp. 1973).

A feature of Section 18 which is entirely new to divorce law is that a person other than a parent may begin a custody proceeding.[149] Washington has awarded custody to a nonparent, usually a relative,[150] as a means of serving the welfare of the child,[151] but such awards previously have been in the context of a marital status action. Nonparents who wished to present questions concerning children were required to resort to the juvenile court where the petitioner had to meet a high burden of proof to obtain action.[152] When a nonparent requests custody under the Dissolution Act, he need only show that "neither parent is a suitable custodian."[153] Even so, the test of unsuitability is a greater hurdle than the standard of "the best interests of the child" which, under Section 19, governs custody disputes between parents.[154] By this gradually diminishing burden of proof, the Dissolution Act provides a scheme for balancing the child's needs with the legitimate interests of the parents. Of course the parent or other custodian must be given notice and an opportunity to be heard.[155]

2. *Criteria To Be Used*

In determining the competing custody claims of parents, the Washington court repeatedly has said the governing test is the *welfare* of the child. This is also the controlling criterion of the Dissolution Act, although the exact words used in Section 19 are the *best interests* of the child. What may be considered in determining "best interests" is of

149. *Id.*, § 26.09.180(1)(b).

150. Christian v. Christian, 45 Wn. 2d 387, 275 P.2d 422 (1954); Merkel v. Merkel, 39 Wn. 2d 102, 234 P.2d 857 (1951); Braun v. Braun, 31 Wn. 2d 468, 197 P.2d 442 (1948).

151. Fleck v. Fleck, 31 Wn. 2d 114, 195 P.2d 100 (1948). "Welfare" has not been extended to include greater financial resources. Allen v. Allen, 28 Wn. 2d 219, 182 P.2d 23 (1947).

152. A typical case is *Ex parte* Day, 189 Wash. 368, 65 P.2d 1049 (1937). The court says that the "right of the parent [should not be] abridged, save for the most powerful reasons." *Id.* at 382, 65 P.2d at 1055.

153. WASH. REV. CODE § 26.09.180(1)(b) (Supp. 1973). In two recent Iowa cases the custody of a child who was not shown to be either dependent or delinquent and whose parents were not shown unfit, was awarded to a custodian other than a parent simply for the best interest of the child. Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152 (1966) (grandparents refused to return a boy voluntarily left with them by the father after the death of the boy's mother); *In re* McDonald, 201 N.W.2d 447 (Iowa 1973) (removal of infants from parents who had a low intelligence quotient).

154. WASH. REV. CODE § 26.09.190 (Supp. 1973).

155. *Id.*, § 26.09.180(2). This has been the law in Washington. *See In re* Baum, 8 Wn. App. 337, 506 P.2d 323 (1973).

course crucial. Section 19(1) mentions the wishes of the parents, a common standard;[156] Subsection (2) gives equal attention to the wishes of the child, another factor recognized by Washington cases.[157] The other Subsections of Section 19 relate to interaction among parents and siblings, adjustment to home and community and the mental and physical health of all parties involved.[158] These factors are commonplace in Washington decisions and are really inherent in the "best interest" principle.[159]

A change in criteria may be required by a sentence in the Dissolution Act dealing with fault. Section 19 says that the court shall not consider conduct "that does not affect the welfare of the child."[160] Previously Washington cases regarded moral fitness, and especially conduct related to sexual behavior, a relevant and significant factor.[161] The intent of Section 19 is that custody should not be denied simply to punish a parent for conduct which, while perhaps immoral, will in no tangible way harm the child. This test is not easy to apply However, the Washington court has awarded custody in circumstances which appear consistent with the standard just expressed.[162]

156. Warnecke v. Warnecke, 28 Wn. 2d 259, 182 P.2d 699 (1947).

157 Horen v. Horen, 73 Wn. 2d 455, 438 P.2d 857 (1968). Presumably the test includes the established requirement that the child is "sufficiently mature to have intelligent views and wishes on the subject." Nelson v. Nelson, 43 Wn. 2d 278, 279–80, 260 P 2d 886, 887 (1953), a level of maturity which has been found as early as age 9. Habich v. Habich, 44 Wn. 2d 195, 266 P.2d 346 (1954).

158. WASH. REV. CODE § 26.09.190(3)–(5) (Supp. 1973).

159. The cases are too numerous to cite, but factors which have been considered, with an illustrative holding, include the following:

(1) Sex: preference of mother for a girl, Horen v. Horen, *supra* note 157.

(2) parental attitude toward child, Atkinson v. Atkinson, 38 Wn. 2d 769, 231 P.2d 641 (1951);

(3) mental health of parent, Schultz v. Schultz, 66 Wn. 2d 713, 404 P.2d 987 (1965);

(4) school opportunity and clean home, Lindblom v. Lindblom, 22 Wn. 2d 291, 155 P.2d 790 (1945);

(5) "tender years" (recently of less importance), Patterson v. Patterson, 51 Wn. 2d 162, 316 P.2d 902 (1957).

160. This section is nearly the same as Section 402 of the UNIFORM MARRIAGE AND DIVORCE ACT which, however, states the test as "conduct that does not affect his relationship to the child."

161. Adultery does not always preclude an award of custody, Westlake v. Westlake, 52 Wn. 2d 77, 323 P.2d 8 (1958); Rogers v. Rogers, 25 Wn. 2d 369, 170 P.2d 859 (1946), but may disqualify a parent when the behavior is of a continuing nature, Taylor v. Taylor, 14 Wn. 2d 293, 126 P.2d 855 (1942), or involves a number of different partners, Mitchell v. Mitchell, 24 Wn. 2d 701, 166 P.2d 938 (1946).

162. Norman v. Norman, 27 Wn. 2d 25, 176 P.2d 349 (1947). Concerning an adulterous mother, the court said it was not concerned with punishment. The question is "will she take good care" of the child. *Id.* at 27, 176 P.2d at 351.

3. *Interviews and Expert Opinion*

Gathering and evaluating reliable data for custody determinations is difficult and the court usually needs all available assistance. Interviewing the child is sometimes helpful and is permitted by Section 21 of the Dissolution Act. This section also settles some recurrent problems related to interviews: counsel may—not must—be present during the interview and a record shall—not may—be made and it shall become part of the record. Furthermore, the judge may ask a professional child expert or other person for an opinion, but the advice shall be in writing and both the report and the expert shall be available for examination upon request of counsel.[163]

In-depth, professional studies of the child or investigation of custodial alternatives are expensive. Section 22 permits such investigation to be ordered only when custody is contested or the study is requested by a parent or by the child's custodian. Investigation of the child's medical history requires the child's consent if he is 12 years old or older. The results of such a study are available to all interested parties and the right to cross-examine all persons is expressly provided.[164]

Section 14 permits payment of "other professional fees" in addition to the usual attorney's fees and court costs,[165] and Section 23 allows the court to authorize travel and expense money for witnesses necessary for a custody determination.[166]

4. *The Question of Visitation*

Section 24 of the Dissolution Act continues the generous policy of prior Washington law concerning visitation by a noncustodial spouse. Visitation is to be denied only on a showing that it would endanger the "physical, mental, or emotional health" of the child. Persons other than parents may also be granted visitation rights. This feature, not in the Uniform Act, makes a significant differentiation between parents

163. WASH. REV. CODE § 26.09.210 (Supp. 1973).
164. *Id.*, § 26.09.220.
165. *Id.*, § 26.09.140.
166. *Id.*, § 26.09.230. The first of these provisions has no counterpart in the UNIFORM MARRIAGE AND DIVORCE ACT. It was added during legislative consideration at the request of social work and counseling agencies. The second provision, a weakened version of UNIFORM ACT § 406(b), was sought by lawyers who wanted a procedure by which reimbursement of witnesses' costs could be assured *before* the money was expended.

and nonparents with regard to the evidence required to obtain a modification. Visitation permitted a nonparent may be changed in the "best interests of the child" but a parent's visitation is not to be restricted unless it would *endanger* the child's "physical, mental, or emotional health."[167]

5. *Supervision and Modification of Custody*

The difficulties concerning custody and visitation are prone to appear after the decree rather than before, often in such accusations as that the custodial spouse is not caring for the child, is squandering and misusing support money payments or is uncooperative in arranging visitations. The reflex action is a petition to modify. The Dissolution Act provides guidance.

Section 25 takes the helpful step of defining custodial prerogatives. It also enables the court to order supervision by an "appropriate agency" when the need is shown.[168] The Dissolution Act makes clear, as have the Washington cases, that the duty to pay support and the duty to permit visitation are not mutually conditioned.[169]

The Dissolution Act disfavors modification of custody, although not nearly as vigorously as the section recommended by the Commissioners on Uniform Laws.[170] The Washington Act does attempt, in a modest fashion, to discourage petitions. The judge may, under Section 26 (2), assess attorney's fees and court costs against the petitioner when the court finds evidence of "bad faith."[171] The petitioner must also make a preliminary case by affidavit before a modification hearing will be set.[172]

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167. WASH. REV. CODE § 26.09.240 (Supp. 1973).

168. *Id.*, § 26.09.250.

169. Corson v. Corson, 46 Wn. 2d 611, 283 P.2d 673 (1955). The rule is stated expressly in WASH. REV. CODE § 26.09.160 (Supp. 1973).

170. WASH. REV. CODE § 26.09.260 (Supp. 1973) denies modification except upon a showing of changed circumstances and after a showing that the prior custodian has consented, or the child is living with petitioner *with consent of the custodian,* or that the danger to the child in the present arrangement outweighs the harm likely to be caused by the change.

The UNIFORM ACT. § 409, prohibits any modification for a year after the initial decree, and for two years after the first petition for modification, except in unusual circumstances.

171. WASH. REV. CODE § 26.09.260(2) (Supp. 1973).

172. This is required by WASH. REV. CODE § 26.09.270 (Supp. 1973). The requirement also applies to a petition for temporary custody. WASH. REV. CODE § 26.09.200 (Supp. 1973) provides that a temporary order may be entered either after a hearing

B. Child Support[173]

1. The Court's Jurisdiction

In any marital action involving parents of children, child support may be appropriate ancillary relief. Normally, as indicated by Section 5 of the Dissolution Act, the order will be entered as a part of a decree changing marital status,[174] but this may not be possible where in personam jurisdiction has not been obtained over one spouse. Therefore Section 10 of the Act permits an independent child support proceeding.[175] Alternatively, the parents may wish to utilize Section 7 to contract between themselves concerning child support, though this contract serves only as a recommendation to the court.[176] This does not change prior support law in Washington.

However, there is at least one significant increase in the support jurisdiction of the court. The prior Divorce Act enabled the court to provide support for "the minor children of such marriage."[177] Two limitations are apparent: The children must be minors, and they must be children of the marriage being terminated. The second limitation is continued by Section 10 of the Dissolution Act: The child must be "of the marriage."[178] The practical effect of this is that some recognized child support obligations cannot be enforced in proceedings under the Dissolution Act. One obvious illustration is the support duty owed by stepparents,[179] and another is the obligation of a parent to support a child born outside a marriage.[180]

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or, if the motion and affidavit have been served on the other spouse as required and no objection is raised, "solely on the basis of the affidavits."

173. Child support is covered by WASH. REV. CODE § 26.09.100 (Supp. 1973). §§ 26.09.180–280 deal with custody and visitation, but not with support.

174. *Id.*, § 26.09.050.

175. *Id.*, § 26.09.100.

176. *Id.*, § 26.09.070.

177. WASH. REV. CODE § 26.08.110 (1963).

178. WASH. REV. CODE § 26.09.100 (Supp. 1973).

179. WASH. REV. CODE § 26.16.205 (Supp. 1973), *amending* WASH. REV. CODE § 26.16.205 (Supp. 1972). The extension of support obligation to stepchildren was made by amendment in 1969. The section was again amended in 1973. The section had provided that the support obligation for stepchildren would "cease upon termination of the relationship of husband and wife." To this the legislature added "through separation or divorce [sic] pursuant to the provisions of [the new dissolution act]."

180. Even though a divorce cannot directly provide for an illegitimate child, it may recognize the need of the child and the state's interest that provision should be made, thus in effect adjusting the obligations to accommodate support payments to such child. *See* Heney v. Heney, 24 Wn. 2d 445, 165 P.2d 864 (1946). On the general support duty owed an illegitimate child, see Gomez v. Perez, 409 U.S. 818 (1973).

The other limitation upon the court's authority has been removed by the Dissolution Act. The child need not be a minor. The age limitation had caused difficulty. For example, the Washington court had already decided that the parents of an adult incompetent son must provide for his support, but not because of any provision in the divorce law.[181] Since the age of majority in Washington was lowered to 18 years,[182] the difficulties resulting from the limitation have multiplied. This has been felt most keenly with regard to 18 year olds who, while adults by law, had not yet graduated from school and who needed further support.[183] The time seemed right to extend the court's power in marital actions.

Under Section 10 of the Dissolution Act, support may be ordered for "any child of the marriage dependent upon either or both spouses . . . ."[184] The test is now dependency, not minority. Since minority does not limit the obligation, the criteria for support take on new significance.

2. *Criteria For Support*

The Uniform Marriage and Divorce Act lists criteria to be considered in fixing child support,[185]but Washington did not follow this model. Section 10 of the Dissolution Act simply directs the court to consider "all relevant factors but without regard to marital misconduct."[186] The Washington court previously has stated that fault "is not to be ignored" in fixing child support[187] and the new Dissolution Act, in that particular, requires a change. Other traditional criteria found

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State v. Tucker, 79 Wn. 2d 451, 486 P.2d 1072 (1971) and State v. Russell, 68 Wn. 2d 748, 415 P.2d 503 (1966) and 73 Wn. 2d 903, 442 P.2d 988 (1968).

181. Van Tinker v. Van Tinker, 38 Wn. 2d 390, 229 P.2d 333 (1951).

182. WASH. REV. CODE § 26.28.010 (Supp. 1972).

183. Baker v. Baker, 80 Wn. 2d 736, 498 P.2d 315 (1972).

184. WASH. REV. CODE § 26.09.100 (Supp. 1973).

185. The factors suggested by § 309 of the UNIFORM MARRIAGE AND DIVORCE ACT are:

(1) [T]he financial resources of the child;

(2) the financial resources of the custodial parent;

(3) the standard of living the child would have enjoyed had the marriage not been dissolved;

(4) the physical and emotional condition of the child, and his educational needs; and

(5) the financial resources and needs of the noncustodial parent.

186. WASH. REV. CODE § 26.09.100 (Supp. 1973).

187. Stacy v. Stacy, 68 Wn. 2d 573, 577, 414 P.2d 791, 794 (1966).

in the Washington decisions appear to be consistent with the Dissolution Act and will undoubtedly be preserved. These factors focus primarily upon the child's need and the respective financial ability of the spouses.[188] Interestingly enough, the Washington court has included among relevant considerations the desire to "perpetuate for the children . . . a standard of living in some degree compatible with that provided them before the divorce."[189] That aspiration is consistent with the criteria of the Uniform Marriage and Divorce Act but is contrary to the prior Washington standard for determining alimony.[190]

3. *Modification of the Order*

No change from prior law is made with regard to modification of a support order. Accrued amounts "are not subject to modification,"[191] and the usual means of enforcement may not be denied.[192] Of course an order granting or terminating support, except for fixed obligations, can be vacated by an appellate court,[193] and the cases hint at offsetting credits under "special considerations of an equitable nature" which are not yet well defined.[194] With reference to future support, the Dissolution Act simply restates the well established rule that modifications are possible "upon a showing of a substantial change of circumstances."[195]

4. *Termination of the Order*

Washington decisions prior to 1973 held that termination of the

188. Garrett v. Garrett, 67 Wn. 2d 646, 409 P.2d 470 (1965); Gaidos v. Gaidos, 48 Wn. 2d 276, 293 P.2d 388 (1956).

189. Puckett v. Puckett, 76 Wn. 2d 703, 706, 458 P.2d 556, 557-58 (1969).

190. *See* notes 128–29 and accompanying text *supra*.

191. Starkey v. Starkey, 40 Wn. 2d 307, 313, 242 P.2d 1048, 1051 (1952). *See also* Kain v. Kain, 51 Wn. 2d 387, 318 P.2d 955 (1957); Sanges v. Sanges, 44 Wn. 2d 35, 265 P.2d 278 (1953).

192. Pace v. Pace, 67 Wn. 2d 640, 409 P.2d 172 (1965); Corson v. Corson, 46 Wn. 2d 611, 283 P.2d 673 (1955).

193. Foutch v. Foutch, 69 Wn. 2d 595, 419 P.2d 318 (1966).

194. Mathews v. Mathews, 1 Wn. App. 838, 843, 466 P.2d 208, 211 (1970), *citing* French v. French, 74 Wn. 2d 708, 712, 446 P.2d 332, 334 (1968).

195. WASH. REV. CODE § 26.09.170 (Supp. 1973). Corson v. Corson, *supra* note 192, discusses the case law pertaining to the change in circumstances required to modify a support order.

child's dependency suspended an order for support.[196] The Dissolution Act, in Section 17, incorporates this case rule by stating that duty to support is "terminated by emancipation of the child."[197] Emancipation, discussed briefly in the cases just cited, is not as clear a test as one might desire. According to Washington decisions, emancipation may be express, implied from conduct or a result of law.[198] In many emancipation cases the issue is whether the parents have relinquished control of the child, not specifically whether a support duty continues.[199] There is conflicting authority as to whether emancipation is automatic when the age of majority is reached.[200] In Washington, at least under the Dissolution Act, emancipation and age of majority are not synonomous.

The termination of support "by death of the parent obligated" is a continuation of prior law.[201] Under Section 17 of the Dissolution Act, termination by either emancipation or death of the obligor is automatic unless "otherwise agreed in writing or expressly provided in the decree . . . ."[202] Since the court's jurisdiction is no longer limited to the period of the child's minority, the possibility of contractual arrangements, and the use of trusts, insurance plans, and similar devices should be facilitated.[203] The cases reviewed above should persuasively point out the advantages of long term contractual arrangements.

196. "Support is predicated upon the continued dependency of the children in question." Ditmar v. Ditmar, 48 Wn. 2d 373, 374, 293 P.2d 759, 760 (1956). *See also* Koon v. Koon, 50 Wn. 2d 577, 313 P.2d 360 (1957).

197. WASH. REV. CODE § 26.09.170 (Supp. 1973).

198. American Products v. Villwock, 7 Wn. 2d 247, 109 P.2d 570 (1941); Riser v. Riser, 7 Wn. App. 647, 501 P.2d 1063 (1972).

199. An interesting case from New York suggests that the parental duty of support is conditioned upon obedience of the child. Roe v. Doe, 36 App. Div. 2d 162, 318 N.Y.S.2d 973 (1971). This is questionable policy, but some authority exists that a parent can emancipate a child by abandonment. Annot., 165 A.L.R. 723, 727 (1946).

200. *See* H. CLARK, LAW OF DOMESTIC RELATIONS § 8.3 (1968).

201. Scudder v. Scudder, 55 Wn. 2d 454, 348 P.2d 225 (1960).

202. WASH. REV. CODE § 26.09.170 (Supp. 1973).

203. Under prior law the support liability could not be extended beyond the child's minority and a trust or other provision for support could not be enforced after the age of majority was reached. Sutherland v. Sutherland, 77 Wn. 2d 5, 459 P.2d 397 (1969); Mallen v. Mallen, 4 Wn. App. 185, 480 P.2d 219 (1971). *But see* Bauer v. Bauer, 5 Wn. App. 781, 490 P.2d 1350 (1971) and Smith v. Smith, 4 Wn. App. 608, 484 P.2d 409 (1971), which permit enforcement of support beyond majority when provided by a separation contract incorporated into a decree of divorce. It is uncertain why the contract obligation was not lost by merger into the decree. *See* notes 85–88 and accompanying text *supra*.

IV. PROCEDURAL CHANGES

Domestic relation matters should be handled differently from other civil actions only for good cause. For this reason, Section 1(1) states: "except as otherwise specifically provided herein, the practice in civil action shall govern all proceedings under this chapter, except that trial by jury is dispensed with."[204] Certain variations from, or additions to, usual practice merit mention.

A. Enforcement of Orders

Before 1973, Washington had developed impressive enforcement procedures to be used in connection with alimony and support orders. All of the usual debt collection processes were available,[205] and contempt citations had been extended to what seems the maximum degree permitted by the constitutional restriction prohibiting imprisonment for debt.[206] To these existing remedies the Dissolution Act has added an administrative enforcement process probably unequaled in the nation. Section 12 of the Dissolution Act makes available, at nominal cost, the powerful mechanisms employed by the support and collection unit of the Department of Social and Health Services.[207] The statute also enables one to enlist the aid of the clerk of court and if necessary, the prosecuting attorney to maintain regularity of payments.[208] Section 13 provides an arrangement involving assignment of periodic earnings and of trust income.[209] Thus the obligee spouse and the child have a formidable array of enforcement options.

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204. WASH. REV. CODE § 26.09.010(1) (Supp. 1973). The phrase which dispenses with trial by jury was added to the Dissolution Act by legislative amendment and does not appear in the UNIFORM MARRIAGE AND DIVORCE ACT. Section 406(c) of the Uniform Act (*cf.* WASH. REV. CODE § 26.09.230 (Supp. 1973)) says the court without a jury shall determine questions of law and fact, but that Section is probably limited to custody proceedings.

205. *See* Swanson v. Graham, 27 Wn. 2d 590, 179 P.2d 288 (1947) for a discussion of the use of judgment liens, garnishment, attachment and general execution.

206. Brantley v. Brantley, 54 Wn. 2d 717, 344 P.2d 731 (1959); Decker v. Decker, 52 Wn. 2d 456, 326 P.2d 332 (1958).

207. WASH. REV. CODE § 26.09.120 (1)(b) (Supp. 1973). The powers of the Department of Social and Health Services are defined by WASH. REV. CODE chs. 74.20 and 74.20A (Supp. 1972). WASH. REV. CODE § 74.20.040 (Supp. 1972) authorizes the Secretary of the Department to accept applications for support enforcement for persons who are not recipients of public assistance.

208. WASH. REV. CODE § 26.09.120(2) (Supp. 1973).

209. *Id.*, § 26.09.130.

B. Costs and Fees

Section 14 of the Dissolution Act provides for costs and fees.[210] Except for the amendment extending fees to professionals other than lawyers and one other feature discussed below, the section simply restates existing law. No attempt is made in the section to deal with the question of indigency.[211] The prior divorce act of Washington had two sections dealing with costs and fees, one for the trial and appeal and the other for enforcement and modification proceedings.[212] In part because of the community property laws, which, until recently, gave the managerial powers almost exclusively to the husband, trial expenses could be imposed only against him although expenses of appeal and post divorce proceedings could be assessed against either spouse. The new provision treats both spouses equally in all situations.[213]

The discretionary grant of power in Section 14, permitting an appellate court to award costs or fees, is substantially identical to the previous statutory provision.[214] Therefore it should not disturb existing case law permitting the superior court to hear the request for an allowance even after an appeal has been taken.[215]

In *Dille v. Dille*,[216] the court held that the statute authorizing fees for a party could not justify an award directly to the attorney. Earlier, however, the court had recognized that the party held the fee award as

210. *Id.*, § 26.09.140.

211. Boddie v. Connecticut, 401 U.S. 371 (1971), held that "due process does prohibit the State from denying, solely because of the inability to pay, access to its courts to individuals who seek judicial dissolution of their marriage." Given this specific guidance, and in light of the general principles dealing with indigency, specific provision in the Dissolution Act does not appear necessary.

212. WASH. REV. CODE § 26.08.090, .190 (1963).

213. WASH. REV. CODE § 26.09.140 (Supp. 1973).

214. *See* note 212 *supra*.

215. In Bennett v. Bennett, 63 Wn. 2d 404, 387 P.2d 517 (1963), the court reaffirmed its prior position that Rule on Appeal 15, defining the jurisdiction of the appellate court, did not deprive the trial court of jurisdiction to hear the request for fees and costs on appeal. A recent decision, Baker v. Baker, 80 Wn. 2d 736, 498 P.2d 315 (1972), again stated that allowance of appeal fees may be granted by the trial court. The *Baker* decision cites Morgan v. Morgan, 59 Wn. 2d 639, 369 P.2d 516 (1962) and State *ex rel.* Atkinson v. Church, 37 Wn. 2d 814, 226 P.2d 862 (1951) which reach the same decision in construing WASH. REV. CODE § 26.08.090 (1963). *Baker* also cites Malfait v. Malfait, 54 Wn. 2d 413, 341 P.2d 154 (1959) which bases the trial court's authority on WASH. REV. CODE § 26.08.190 (1963). Inasmuch as the Dissolution Act combines the prior two sections into one, the possible overlap is no longer significant.

216. 64 Wn. 2d 856, 394 P.2d 901 (1964).

a "dry trustee" and had no power to discharge the judgment obligor until the obligee's attorney was paid.[217] This judicial cue prompted Section 14, which allows the award to be made to the attorney and permits him to enforce it in his own name.[218]

C. *Finality and Enforcement Pending Appeal*

Washington has not had interlocutory decrees in marital actions since the Divorce Act of 1949.[219] The trial court decree was final in the sense that it would not be vacated by the abatement principle even upon the death of a party pending appeal.[220] This understanding of finality is carried forward by Section 15 of the Dissolution Act.[221] That section also provides that an appeal from some portions of the trial court's decree, *e.g.*, the property and custody awards, may be taken without necessarily challenging the dissolution or decree of invalidity.[222] Thus a party may safely remarry when he determines that the scope of the appeal is so limited.

The prior divorce act also provided that "the trial court shall at all times including the pendency of any appeal, have the power to grant any and all restraining orders that may be necessary to protect the parties and secure justice."[223] No comparable language appears in the Dissolution Act. Does this mean that the decree is suspended or at least becomes unenforceable by the trial court during appeal? Such a result seems unlikely.

Years ago the Washington court stated that: "A proceeding on appeal to reverse a judgment, where no supersedeas bond is given, is no obstacle to the enforcement of the rights established by the judgment appealed from . . . ."[224] More recently, the court explained that even if a trial court lost jurisdiction to *change* its decree pending an appeal,

217. Yoder v. Yoder, 105 Wash. 491, 178 P. 474 (1919).
218. WASH. REV. CODE § 26.09.140 (Supp. 1973).
219. WASH. REV. CODE § 26.08.110 (1963) provided for "a decree of full and complete divorce . . . final and conclusive upon the parties subject only to the right of appeal as in civil cases . . . ."
220. Jones v. Minc, 77 Wn. 2d 381, 462 P.2d 927 (1969). The rule that divorce actions abate on the death of a party is stated in Osborne v. Osborne, 60 Wn. 2d 163, 372 P.2d 538 (1962).
221. WASH. REV. CODE § 26.09.150 (Supp. 1973).
222. *Id.*
223. WASH. REV. CODE § 26.08.110 (1963).
224. Baisch v. Gibson, 138 Wash. 127, 130, 244 P. 259, 260 (1926).

it still has enforcement powers "where an appealable order is not or cannot be superseded."[225] The *Bennett*[226] decision illustrates that even though the appellate court may assume jurisdiction to modify or enforce orders, it may also decline that responsibility and leave the task to the trial court. Presumably portions of the decree in a marital action, *e.g.*, an order to dispose of property, can be superseded, in which event the rules on appeal would govern.[227]

As already noted, Washington has not used interlocutory decrees in divorce for nearly a quarter century. However, there undoubtedly are persons who, having obtained an interlocutory decree prior to 1949, have never returned to court for a final decree of divorce. Some of those persons, even though not finally divorced, will have attempted to contract subsequent marriages. It is for them that the court's power to enter a final decree *nunc pro tunc* is important.[228] The legislature wisely by amendment added Section 29 to the Dissolution Act and thus continued this special power of the prior law.[229]

D. Venue

The venue for action on a contract is usually the residence of the defendant[230] while venue for an action dealing with a res, such as real property, is the county where the subject matter is located.[231] Washington's prior divorce law provided that venue for a divorce proceeding would be in the county where the plaintiff resided,[232] thus indicating acceptance of the traditional concept that divorce is the

225. Sewell v. Sewell, 28 Wn. 2d 394, 396–97, 184 P.2d 76, 77 (1947). The case dealt with a custody order which the respondent refused to obey, contending that it had been superseded. The court said: "We do not agree with the contention that such an order can be superseded on appeal." *Id.* at 395, 184 P.2d at 76. Three judges dissented.

226. *See* note 215 *supra*.

227. WASH. SUP. CT. RULES ON APPEAL 1–23; WASH. CT. APP. RULES ON APPEAL 23. See also, on the point of appellate court jurisdiction, WASH. SUP. CT. RULES APPEAL 1–60 and 1–61 and WASH. CT. APP. RULES ON APPEAL 60 and 61.

228. An interesting use of the *nunc pro tunc* statute is described in *In re* Kelley's Estate, 310 P.2d 328 (Ore. 1956). There is an inherent judicial power to enter decrees *nunc pro tunc*. The inherent authority is "to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken." State v. Ryan, 146 Wash. 114, 117, 261 P. 775, 776 (1927). *See also* Osborne v. Osborne, *supra* note 220, and Bruce v. Bruce, 48 Wn. 2d 635, 296 P.2d 310 (1956).

229. WASH. REV. CODE § 26.09.290 (Supp. 1973).

230. WASH. REV. CODE § 4.12.050 (1963).

231. *Id.*, § 4.12.010.

232. *Id.*, § 26.08.030.

termination of a status—a res—rather than an action based upon contract.[233] Because the Dissolution Act emphasizes the contractual aspect of marriage, it does not have a special venue section as the prior Divorce Act did. Presumably the normal rules of civil practice govern. It of course follows that if the respondent is not resident in Washington, venue would, under Civil Rule 82(3), usually be in the county in which the plaintiff resides.[234]

As introduced into the legislature, the Dissolution Act provided that venue for custody actions brought independently of actions dealing with the marriage should be initiated "in the county where the child is permanently resident or where he is found."[235] The legislature added Section 28 to the Dissolution Act to provide venue for proceedings to modify or enforce orders "in relation to the care, custody, control, support, or maintenance of the minor children . . . ."[236] When the custody issue is not ancillary to a petition for dissolution or for a declaration of invalidity, the principal question before the court is the child's interest and it is appropriate to place venue in the county of his residence.

V. CONCLUSION

As originally introduced, H.B. 392 proposed amendment of the marriage act as well as the divorce law. The reasons for this dual proposal are stated in the following paragraph taken from the Prefatory Note to the proposed Uniform Marriage and Divorce Act.[237]

> A review of the legal and nonlegal literature on marriage and divorce suggests that, although the experts may be divided on other issues, there is virtual unanimity as to the urgent need for basic reform in both areas: not only of specific provisions but of the entire conceptual structure. The traditional conception of divorce based on fault has been singled out particularly, both as an ineffective barrier to mar-

233. Schroeder v. Schroeder, 74 Wn. 2d 854, 447 P.2d 604 (1968).
234. WASH. SUPER. CT. (CIV.) R. 82(3).
235. WASH. REV. CODE § 26.09.180(1) (Supp. 1973).
236. The references in this section to "maintenance" and to "minor" children are unfortunate, but presumably not significant, oversights.
Venue under WASH. REV. CODE § 26.09.280 (Supp. 1973) is "where the minor children are then residing, or in the county where the parent or other person who has the care, custody, or control of the said children is then residing."
237. UNIFORM MARRIAGE AND DIVORCE ACT at 4.

> riage dissolution which is regularly overcome by perjury, thus promoting disrespect for the law and its processes, and as an unfortunate device which adds to the bitterness and hostility of divorce proceedings. In recent years, persistent demands for reform finally have been heeded. Statutory reform has been accomplished in countries so diverse as England and Italy and in a number of American states as well. Although less attention has been given to the anachronisms of marriage law, the need for modernization of state regulatory patterns in the light of a new approach to divorce is undeniable.

Late in the Washington legislative session, the original bill was divided into Substitute H.B. 8, dealing with marriage, and Substitute H.B. 392, the Dissolution Act. The dissolution proposal became law. The other part of the task, perhaps the more significant and difficult part, remains for future attention.