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The Divorce Act of 1949—One Decade Later

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THE DIVORCE ACT OF 1949—ONE DECADE LATER

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In the legislative session of 1949 a new divorce law was enacted. Proposed departures from the existing act had been reported to the State Bar Association.[1] The objectives and contemplated effects of the new legislation were discussed in an article immediately after the act was adopted.[2] Trouble was predicted.[3]

Today, with ten years of experience under the act and in light of 172 reported opinions dealing with it,[4] it seems appropriate to see what has occurred. The objective of this review is to identify, by placing together the related decisions of the Washington court, trends which have appeared and significant policies which have been established. It is not the purpose of the reviewer to subject these opinions to extensive criticism nor to question the wisdom of announced policies. The article is essentially a report. It is hoped that its possible value to the practicing lawyer is reason enough for its existence.

GROUNDS FOR DIVORCE AND DEFENSES

Several changes in the prior law concerning grounds for divorce were made by adoption of the new act. The most significant alterations, which are now found in RCW 26.08.020, were: 1) the addition of the lack of capacity to consent to marriage by reason of "want of legal age or a sufficient understanding"[5] to the prior ground dealing with force or fraud; 2) the reshaping of the ground based upon a five-year separation; and 3) the provision that insanity of the defendant spouse

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[1] Reports of the committee to the bar may be found at 22 WASH. L. REV. 17 (1947), and 23 WASH. L. REV. 320 (1948).

[2] Kaiser, *The Divorce Law of 1949,* 24 WASH L. REV. 123 (1949).

[3] Marsh, *The Uniform Divorce Recognition Act: Sections 20 and 21 of the Divorce Act of 1949,* 24 WASH. L. REV. 259 (1949).

[4] The case count will vary with the bias of the person doing the counting. For this review only cases dealing with the decree of divorce, annulment, nullity and separate maintenance have been included. No attempt has been made to report related problems in community property, adoption, juvenile matters or, with a few exceptions, conflict of laws even though a divorce may have been indirectly involved. The conflict problems have been ably and recently discussed. Stumberg, *The Migratory Divorce,* 33 WASH. L. REV. 331 (1958); Stumberg, *Foreign Ex Parte Divorces and Local Claims to Alimony,* 34 WASH. L. REV. 15 (1959).

[5] "Legal age" is not defined. It *could* mean: (a) majority; (b) the age at which a license to marry may be obtained without parental consent; (c) or with parental consent; (d) the common law age of consent, 14 and 12 years for the boy and girl respectively; (e) or even the age above which, at common law, the marriage was voidable but not void—usually regarded as age seven. If, as seems likely, the prior cases dealing with annulment for non-age are applicable in the interpretation of this section, the ages of 14 and 12 would be indicated. See, In re Hollopeter, 52 Wash. 41, 100 Pac. 159 (1909), which is still law in Washington.

should, in some instances, be the sole ground available to the plaintiff. Other amendments were minor in nature and have not produced litigation.[6] There were no new provisions dealing with defenses except the insanity complication mentioned above. However, the reported opinions have produced a few surprises concerning both defenses and grounds for relief.

Perhaps the major change came with the case of *Saville v. Saville*,[7] an action brought to annul a marriage for fraud. The trial court granted the relief sought and the prosecuting attorney appealed.[8] The court decided that, as between divorce and annulment, and where grounds for divorce exist, divorce is the *exclusive* relief available. Although the court declined to hold that annulment as a remedy for voidable marriages no longer exists in Washington, this is the result for all practical purposes.[9]

Reformation of the statute dealing with a five-year separation as grounds for divorce was desirable because of earlier cases holding that there must be an "injured party," that is, that someone must have been at fault.[10] The legislative remedy attempted was to delete all reference to "injured party" in the subsection (but not in the introductory sentence of the section itself which refers to the "following reasons"—i.e., grounds) and to add the words "without regard to fault in the separation." The controlling case, to date, is *Harp v. Harp*.[11] It decides that the parties need not have separated with the intent or the purpose of obtaining grounds for divorce, and that the "statute is very broad in its scope and is couched in plain and unambiguous language." Still, not *every* separation for five years provides a ground for divorce, for in some instances circumstances may be "such that the courts must say that the legislature did not intend the statute should apply. . . ." What

[6] Imprisonment in a federal penal institution was added to the prior provision which mentioned only a state prison. Habitual drunkenness and so-called nonsupport, previously one ground, are now stated separately.

[7] 44 Wn.2d 793, 271 P.2d 432 (1954).

[8] The prosecuting attorney received authority to appeal by RCW 26.08.080, in part new legislation in 1949, which overturned Lee v. Lee, 19 Wash. 335, 53 Pac. 349 (1898), holding that the prosecutor was not a party and could not appeal.

[9] The court suggested that annulment may still be possible concerning certain marriages prohibited by statute, citing RCW 26.04.030 which deals with marriage of habitual criminals, insane, or diseased persons. The difficulty with this suggestion is that concealment of such conditions would be fraudulent, thus a grounds for divorce and governed by Saville. If no fraud exists these defects have not normally been cause for annulment. The court also cites two illustrative cases, but one was clearly a fraud case, like Saville, and the other a "want of sufficient understanding" matter now covered by the divorce statute.

[10] Pierce v. Pierce, 120 Wash. 411, 208 Pac. 49 (1922); McGarry v. McGarry, 181 Wash. 689, 44 P.2d 816 (1935).

[11] 43 Wn.2d. 821, 823, 824, 264 P.2d 276, 277, 278 (1953).

these special circumstances may be is not indicated. It has been held that the existence of a separate property agreement, and the request by the defending wife for separate maintenance in lieu of divorce, will not preclude use of this section.[12] There is as yet no firm indication of what the court would say about a five-year separation under the provisions of a separate maintenance decree. It would seem that the ground for divorce should be available, but the question is open.

Continued reliance upon cruelty and personal indignities as ground for divorce under the new act was of course expected. At times the court has reiterated its position that incompatibility, unhappiness, and general dissatisfaction with the marriage do not constitute cruelty,[13] nor does a showing of disagreement concerning religious[14] or political[15] belief *alone* establish this statutory ground. Frequently these comments are made in the easy cases—where the other spouse is granted relief anyway[16]—and by and large the court has been quite content to affirm the finding and conclusion of trial courts that cruelty or personal indignities were adequately shown.[17] Although the statute requires the decree be granted "for cause distinctly stated in the complaint,"[18] a general allegation that "through incompatibility of temperament, plaintiff has been the victim of mental cruelty" was found sufficient, at least where the defendant, by defaulting and failing to demur, waived his right to attack the sufficiency of the pleading.[19] The crucial point for counsel to keep in mind is that the test for cruelty is subjective rather than objective.

> It is easy to establish that a physical beating of one spouse by the other is cruel treatment *per se*; it is much harder to determine whether any particular language or attitude amounts to cruel treatment *per se*. The determinative test as to whether or not a divorce should be granted, therefore, is not the words used or attitude adopted, but rather their effect upon the aggrieved party.[20]

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[12] Graham v. Graham, 38 Wn.2d 796, 232 P.2d 100 (1951); Morse v. Morse, 42 Wn.2d 229, 254 P.2d 720 (1953).

[13] Metcalf v. Metcalf, 50 Wn.2d 167, 310 P.2d 254 (1957).

[14] Mertens v. Mertens, 38 Wn.2d 55, 227 P.2d 724 (1951).

[15] Donaldson v. Donaldson, 38 Wn.2d 748, 231 P.2d 607 (1951).

[16] Best v. Best, 48 Wn.2d, 252, 292 P.2d 1061 (1956).

[17] Guiles v. Guiles, 41 Wn.2d 377, 249 P.2d 368 (1952); Roberts v. Roberts, 51 Wn.2d 499, 319 P.2d 545 (1957); Blakey v. Blakey, 51 Wn.2d 404, 318 P.2d 958 (1957); Short v. Short, 154 Wash. Dec. 287, 340 P.2d 168 (1959).

[18] RCW 26.08.110.

[19] Moody v. Moody, 47 Wn.2d 397 at 406, 288 P.2d 229 (1955). Justice Finley, concurring, expressed the opinion that the pleading would not have been demurrable at all. "[T]he language of the complaint . . . accorded reasonable and ordinary interpretation . . . *provides adequate notice* . . . that cruelty on the part of defendant husband was urged. . . ."

[20] Metcalf v. Metcalf, 50 Wn.2d 167, 170, 310 P.2d 254, 257, (1957).

Under this test, verbal abuse, indifference, and public humiliation which "caused defendant great mental anguish and suffering" is cruelty.[21] Also under this category is a husband's deliberate and prolonged teasing and criticism of a wife, known by him to be of a sensitive nature, when her life is thereby rendered burdensome.[22] In this connection the court's recent statement concerning proof of nervousness or emotional distress, even though appearing in a custody dispute rather than on the effect of cruelty, is well worth noting.[23] It is entirely possible that this "medical question" should now be established by the use of expert opinion.

Abandonment as a divorce ground received passing attention in one case,[24] and a helpful discussion of the "neglect or refusal of the husband to make suitable provision for his family" appears in *Baselt v. Baselt*.[25] This opinion should be enough to demonstrate that "neglect" involves deliberate conduct, that "suitable" is a relative term depending upon the circumstances of each case, and that the fact that the wife can and does support herself, though with some difficulty, does not relieve the husband of his obligation to her. Adultery has also been relied upon, with the argument usually centering around the question of proof. The *Barrinuevo* case[26] emphasizes the rule that in civil cases, only a preponderance of evidence is required and furnishes an outline of what proof will suffice.

Because the act permits a divorce to be awarded to "either or both" of the parties, it frequently happens that both spouses seek the decree. Repeatedly disappointed spouses have appealed from a denial of their prayer even though a divorce was granted to the other litigant. These appeals have required the court to explain on numerous occasions that, "Respondent has not cross-appealed. The parties will, therefore, remain divorced regardless of whether or not the respondent should have been granted the divorce. If the court erred in this regard, it is not prejudicial."[27] In a case where both parties were awarded a divorce, the wife's contention on appeal that the decree should have been given to her

[21] Fallin v. Fallin, 154 Wash. Dec. 445, 340 P.2d 791 (1959).
[22] Detjen v. Detjen, 40 Wn.2d 479, 244 P.2d 238 (1952).
[23] Johnson v. Johnson, 50 Wn.2d 56, 308 P.2d 967 (1957).
[24] Guiles v. Guiles, 41 Wn.2d 377, 249 P.2d 368 (1952).
[25] 37 Wn.2d 461, 224 P.2d 631 (1950).
[26] Barrinuevo v. Barrinuevo 47 Wn.2d 296, 287 P.2d 349 (1955).
[27] Akins v. Akins, 51 Wn.2d 887, 888, 322 P.2d 872 (1958). See also Schilling v. Schilling, 42 Wn.2d 105, 253 P.2d 952 (1953); Smith v. Smith, 45 Wn.2d 672, 277 P.2d 339 (1954); Hoyt v. Hoyt, 46 Wn.2d 373, 281 P.2d 856 (1955); Potter v. Potter, 46 Wn.2d 526, 282 P.2d 1052 (1955); and Applegate v. Applegate, 53 Wn.2d 635, 335 P.2d 595 (1959).

alone because this would establish the husband's fault, a factor she considered significant in relation to property division and alimony, proved unavailing.[28] Nor was a party who had been awarded a divorce permitted to show that it was awarded on the wrong grounds.[29] Perhaps the court itself is responsible for these repeated assignments of error. In *Saffer v. Saffer*[30] a husband who, with his wife, was granted a divorce *was* able to obtain an order directing the trial court to review the award to the wife. The reason was that the wife had complained for a divorce upon the basis of the husband's alleged "abnormal sexual conduct," an accusation of crime, which the court felt was not adequately established. While this fact pattern may not occur frequently, one is left wondering what other arguments might prove attractive to the court. Legally this problem may be something of a tempest in a teacup, but the frequency of appeal indicates that litigants are prone to take a serious view about which spouse is awarded the decree.

Cases decided during the period under review have also added to the fund of authority concerning defenses to a complaint for divorce. The new defense created by statute, insanity of the defendant as an exclusive ground of divorce, came into play in *Wolfe v. Wolfe*.[31] It was there held that cruelty could not be the basis for a divorce when "the defendant was under an adjudication of insanity during the two-year period alleged in the complaint as the time when her cruel and inhuman treatment rendered plaintiff's life burdensome."[32] However, in this case the mental condition had existed two years, which is the time period required by the statute to establish the chronic mania or dementia *as a ground for divorce*. Does this suggest that insanity of the defendant, existing at the time of the action and during the period when the allegedly wrongful conduct occurred, but of less than two years duration, is not available as a defense? The *Wolfe* case is obviously not a holding on this point.[33]

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[28] Patrick v. Patrick, 43 Wn.2d 139, 260 P.2d 878 (1953).
[29] Murphy v. Murphy, 44 Wn.2d 737, 270 P.2d 808 (1954).
[30] 42 Wn.2d 298, 254 P.2d 746 (1953).
[31] 42 Wn.2d 834, 258 P.2d 1211 (1953).
[32] An adjudication of insanity is not required. The statute provides only that the condition be "established by competent medical testimony." RCW 26.08.020(10).
[33] Perhaps it is clear that insanity is no defense unless it has existed two years, but it does not seem clear to the reviewer. The court alludes to the fact that insanity was a defense at common law. Is it still, independently of the statute, in testing the wrongful quality of the defendant's act? Cobb v. Cobb, 19 Wn.2d 697, 143 P.2d 856 (1943), the case which announced the rule "corrected" by the 1949 amendment, held only that a person presently insane could be sued for divorce for acts of cruelty committed *prior* to the time insanity commenced and which could not be attributed to the mental condition. If wrongful acts cannot be commited by an insane person, why the reliance on RCW 26.08.020(10) in the Wolfe case? Enough ambiguity seems present here, as

Recrimination as a defense had almost disappeared from Washington law at the time the new divorce law was enacted. The court had said, "[the] doctrine is that a person seeking a divorce must be innocent of any substantial wrongdoing to the other party *of the same nature* as that of which complaint is made. [Emphasis by the court]"[34] The virtually complete abolition of the defense may now have been accomplished. In an action by a wife who complained of cruelty, where the husband established that the wife had also abused him verbally and physically, the trial court denied a divorce. Reversing, the supreme court said the defense of recrimination had no application as the husband had employed excessive violence and thus "the acts cannot be held similar within the contemplation of this doctrine."[35] Nonetheless, it is possible that this defense, ejected through the front door, has unobtrusively re-entered through the rear under the new name of provocation. In the case last cited the husband argued unsuccessfully that his conduct was justified because provoked by the wife.

However, in *Short v. Short*[36] a wife's prayer for separate maintenance was denied because her conduct provoked the husband into leaving home, thus making the ground of abandonment unavailable to her. In a very similar case the trial court, having found "that both parties are to blame for the situation . . .," granted separate maintenance anyway. The supreme court, although reversing for other reasons, said: "The findings in this case . . . show that the appellant did not abandon the respondent, that he was not guilty of cruel treatment or personal indignities, and that her dissatisfaction was no more his fault than her own."[37]

Provocation assumes that conduct, otherwise wrongful, is not ground for relief when justified by preceding wrong of the plaintiff. Recrimination assumes that wrongful conduct, otherwise grounds, cannot be used to obtain relief when balanced against equally wrongful conduct of the plaintiff. The doctrines can be distinguished upon a cause-and-effect basis, but in substance and usefulness as a defense to divorce are they very far apart?

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well as in the report of the drafting committee, 23 WASH. L. REV. 320 (1948), the subsequent explanatory comment, Kaiser, *The Divorce Law of 1949*, 24 WASH L. REV. 123 (1949) at 124, and in the general policy question, to require further interpretation by the court.

[34] Hokamp v. Hokamp, 32 Wn.2d 593, 596, 203 P.2d 357, 359 (1949).

[35] Schmidt v. Schmidt, 51 Wn.2d 753, 757, 321 P.2d 895, 897 (1958).

[36] 154 Wash. Dec. 287, 340 P.2d 168 (1959).

[37] Manzer v. Manzer, 154 Wash. Dec. 801, 344 P.2d 212 (1959).

Unlike recrimination, the conditional forgiveness known as condonation has been successfully used during the past decade. A reconciliation occurring after the pleadings were completed, but before trial, enabled a wife to obtain a dismissal of the action despite the fact that the husband had cross-complained and protested the dismissal.[38] It is well settled that a breach of conjugal kindness, which need not be grounds for divorce in itself, revives the former basis for complaint.[39] The party asserting the defense has the burden of proof. A mere showing of continued cohabitation, which might establish condonation of a specific act, does not prove forgiveness of a continuing course of abusive treatment.[40] Another point relating to condonation was discussed by the court in *Saffer v. Saffer*.[41] The fact that a past wrong, in this case adultery by the wife, has been fully condoned and never revived does not preclude consideration of the act in determining fitness for an award of custody. There are still some annoying details to be resolved in relation to this defense,[42] but its general use seems clear and consistent.

THE DECREE OF DIVORCE AND THE ORDERS THEREIN

Concerning the matters about which parties seeking a divorce are most inclined to dispute; namely, the disposition of property and the provisions relating to the custody and support of children, the focal part of the divorce act is RCW 26.08.110. In this section the divorce must find both the grant of power to enter, modify, and enforce necessary orders and the standards or guides for the exercise of such authority. It is a crucial section, and the great majority of cases decided since the adoption of the act have concerned one or more of its provisions. Most of the language in the section is not new, but consists of fragments from several sections in the pre-1949 divorce statute. Unfortunately the patchwork was not skillfully accomplished. How much the deficiencies of the statute have contributed to the bulk of divorce

[38] McFerran v. McFerran, 47 Wn.2d 236, 287 P.2d 142 (1955).

[39] Rentel v. Rentel, 39 Wn.2d 729, 238 P.2d 389 (1951); Edwards v. Edwards, 47 Wn.2d 224, 287 P.2d 139 (1955).

[40] Murray v. Murray, 38 Wn.2d 269, 229 P.2d 309 (1951).

[41] 42 Wn.2d 298, 254 P.2d 746 (1953).

[42] A problem yet to be resolved deals with condonation after the pleading and a breach of conjugal kindness thereafter, all before the time of trial. Clearly the revived ground for divorce is available, but what about the ninety day waiting period and other procedural details? In the absence of a motion to dismiss it would seem pointless to insist that the action had been terminated and must be commenced again. However to proceed without additional notice to the opposing litigant, or without disclosure of the circumstances to the court and waiting out an additional ninety days after the breach of conjugal kindness, might be to invite a subsequent petition for vacation of the decree. It may be that a registered letter of notice, with a copy placed in the file, would provide the needed protection.

litigation is a matter of conjecture, but the fact of contribution is beyond dispute.

There are problems of obtaining, appealing or modifying, and enforcing these several types of awards which are common to the entire section. Hence a decision dealing with alimony may be useful as authority for a similar point in a property division, child custody or support problem. This fungibility has limits however, and it has seemed advisable to deal with each area individually. The task of cross-application is left to the reader.

ALIMONY

The common law had no alimony concept for the simple reason that it had no divorces. Equity, with its inherent power to award separate maintenance, had no problem with alimony because it simply ordered specific performance of the husband's established legal obligation to support his wife and family. Divorce powers are the product of legislation, and alimony is or is not available depending solely upon the words and the judicially interpreted legislative intent of the statute. In 1955 the court was asked to hold that the new divorce act makes no provision for an award of alimony and, as a consequence, that alimony was not available in Washington. This the court declined to do.[43] The power does exist and alimony may be ordered, although not in a default decree where no alimony has been prayed for in the complaint.[44]

The statute requires the divorce court to make disposition of the property of the parties, a phrase which now includes authorization to award alimony. The award is to be in light of the respective merits of the spouses, the condition in which they will be left by the divorce, the source of acquisition of the property, and the burdens imposed for the benefit of the children. The disposition "shall appear just and equitable" and may deal with separate as well as community assets. Struggling to give more precision to this general standard, the court has in-

[43] Loomis v. Loomis, 47 Wn.2d 468, 288 P.2d 235 (1955). The contention was that the power to award alimony, expressly mentioned in the pre-1949 statute dealing with orders in the interlocutory decree, had been repealed—which it was—and no new power had been granted. The court found alimony power in the provision enabling the court to make a disposition of the property of the parties, and by implication from the express authority to modify "such decree" in regard to alimony. Two judges dissented. See Brown, *Alimony in Washington: A Note to the Legislature,* 26 WASH. L. REV. 135 (1951).

[44] State *ex rel.* Adams v. Superior Court, 36 Wn.2d 868, 220 P.2d 1081 (1950). A dissenting minority of three judges argued that alimony is always a possible incident of divorce and that to award such relief, even though not requested in the complaint, would not deprive the defaulting husband of due process. For the same problem in connection with custody, see Sheldon v. Sheldon, 47 Wn.2d 699, 289 P.2d 335 (1955), which supports the majority opinion of the Adams case.

dicated that the trial judge must equate the need of the wife[45] against the ability of the husband to pay, exercising his informed discretion and recognizing—but not being controlled by—such additional factors as fault.[46] The husband must be left enough of his salary to live on.[47] The existence of a wide disparity in the earning ability of the spouses does not alone justify awarding alimony to the wife. However, need is a relative thing and a woman who before the divorce occupied a relatively affluent position in life should be continued in something comparable to the life to which she had become accustomed.[48] In recognition of the variable nature of the husband's ability to provide alimony, parties have attempted to accomplish flexibility by awards which are in part a fixed periodic amount and in part a percentage of the husband's income, in excess of a specified amount, as reported by him for federal income tax purposes. This device has received the approbation of the court.[49] Problems have arisen in this connection only because of a failure to specify whether such tax provisions as exemptions, deductions, spread-back privilege, and income-splitting with a new spouse were intended. These difficulties can be avoided by careful draftsmanship in preparing separation agreements and proposed orders for the court.

Careful preparation of documents could also assist materially in avoiding a recurrent conundrum—when is an award intended as alimony and when as a division of property?[50] There is no well defined standard which will resolve this problem when general language has been employed. There have been some hints offered during the past

[45] Wills v. Wills, 50 Wn.2d 439, 312 P.2d 661 (1957). It was held error to award a college trained wife, younger than the husband and in good health, $200 of the husband's $500 monthly income.

[46] Patrick v. Patrick, 43 Wn.2d 139, 260 P.2d 878 (1953).

[47] Hilsenberg v. Hilsenberg, 154 Wash. Dec. 790, 344 P.2d 214 (1959). A husband who earned about $17,000 annually could get along with approximately $4,500 when there was a substantial property award to him, and his wife and five children needed the $9,600 annual payment ordered for their support.

[48] Young v. Young, 47 Wn.2d 497, 288 P.2d 463 (1955). A majority of five judges limited the alimony to a three year period or until the wife should remarry. Two concurring judges set forth the concept of need as related to the former station in life. One judge dissented from the award of any alimony. This decision also discusses the case of Lockhart v. Lockhart, 145 Wash. 210, 259 Pac. 385 (1927), a case which establishes the general principle that a wife should not be given a "perpetual lien" on the husband's future income, the purpose of alimony being only to support the wife during a transitory period long enough to enable her to provide her own support. The Lockhart case, the rationale of which appears to be the basis for the majority opinion, has had a stormy history but has not been overruled.

[49] Prescott v. Prescott, 52 Wn.2d 769, 329 P.2d 200 (1958); Berry v. Berry, 50 Wn.2d 158, 310 P.2d 223 (1957).

[50] Whether an award is for alimony or is a division of property is an intensely significant issue. Tax consequences, modification, enforcement, and interstate recognition are illustrative of problems that involve the distinction.

decade which may be of some value. The Washington court felt that alimony was intended by the trial court's award of $7,500 to be paid in four equal installments to the wife, where both parties, each married previously, brought property with them to the second marriage and executed an antenuptial separate property agreement.[51] The decision was influenced, among other factors, by the absence of any language in the decree dealing with the property settlement already accomplished by the contract. If the court finds that the sum the wife is awarded is the amount previously loaned to the husband by the wife, it is possible to say the award is a property division.[52] The result in the preceding two illustrations may have been predictable. A more difficult case involved a property settlement agreement obligating the husband to place farm land in trust and to permit the trustee to pay the proceeds from the farm to the wife. The agreement provided that it was "further agreed . . . that the above provision shall be in lieu of a property settlement, allowance for alimony and support for the [wife] and . . . minor children. . . ." All other property was conveyed to the husband. The court suggested the following test:

> Generally, alimony has several distinct characteristics. It must have as its purpose the support and maintenance of the wife. . . . Usually, it is an allowance of periodical payments, but it may be in the form of a lump sum. Normally, alimony ceases upon the death of either of the parties. It is usually provided for by an order of the court incorporated in a decree of divorce. It is generally in the form of money, and payment of a specific sum is required.
>
> However, it appears that no one of these characteristics is conclusive in distinguishing alimony payments from property settlement payments. The use of the words "alimony" or "support and maintenance" are not always necessary.[53]

The husband, having suffered serious financial reverses and earning only $400 a month while the wife's trust income had reached $2,000 a month, petitioned for a modification. The court found the agreement to be a property division, not subject to modification. The fact that the husband was not required to pay a specific sum, having no obligation if the farm produced no income and an increasingly larger obligation as the farm continued to prosper, was apparently determinative.[54]

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[51] Platts v. Platts, 45 Wn.2d 853, 278 P.2d 679 (1954).
[52] Corrigeux v. Corrigeux, 37 Wn.2d 403, 224 P.2d 343 (1950).
[53] Valaer v. Valaer, 45 Wn.2d 565, 570, 571, 277 P.2d 326, 329 (1954).
[54] The alimony awards based in part on a percentage of the husband's taxable income, note 49 *supra*, can be distinguished. There is in them a minimum obligation in any event.

In a similar case, *Millheisler v. Millheisler*,[55] the court reached the same result.

Modification problems dealing with alimony have not been difficult nor frequent. There must be a showing that conditions have changed since the previous determination. One wife met this requirement by showing that the terms of a separate property agreement, incorporated into the decree, were unworkable.[56] Usually however, the change in circumstances will be directed toward the basic "need of the wife—ability of the husband to pay" formula and (assuming a husband who can pay) the wife prevails when she proves increased needs[57] and loses when she does not.[58] One opinion, modifying an order of the trial court reducing the total obligation of a husband for child support and alimony, had this warning dictum:

> The present modification order could be construed as, in effect, a cancellation of any alimony allowance. Under our decisions, this interpretation of the order would deprive the appellant of any right to modify or reinstate the alimony provisions *in the future,* even if need therefor could be clearly demonstrated.[59] [Emphasis by the court.]

The court does not cite the decisions upon which this statement is based. If such a holding has been announced during the period under review it has not been found, but assuming the accuracy of the observation the need to fight for the magical one dollar alimony becomes obvious.

Some of the foregoing decisions have discussed enforcement of alimony awards, but no new developments have been noted. Contempt citations of course are available,[60] as are normal judgment remedies as the installments accrue. All else that need be said on this topic appears in the discussion of enforcement of property division awards.

PROPERTY DIVISION

The power to divide the spouses' property upon divorce is derived from the same statutory words, "disposition of the property of the parties," as is alimony. The same is true of the statutory standards established to guide the trial court in its exercise of discretion. There is one important distinction: "Such decree as to alimony . . . may be modified, altered and revised. . . . Such decree, however, as to the . . .

[55] 43 Wn.2d 282, 261 P.2d 69 (1953).
[56] Heuchan v. Heuchan, 38 Wn.2d 207, 228 P.2d 470 (1951).
[57] Warning v. Warning, 40 Wn.2d 903, 247 P.2d 249 (1952).
[58] Gordon v. Gordon, 44 Wn.2d 222, 266 P.2d 786 (1954).
[59] Hanson v. Hanson, 47 Wn.2d 439, 446, 287 P.2d 879, 883 (1955).
[60] State *ex rel.* Adams v. Superior Court, 36 Wn.2d 868, 220 P.2d 1081 (1950).

division of property shall be final . . . subject only to the right to appeal."[61] [Emphasis added.] As noted in the preceding discussion of alimony awards, the award of alimony and child support is a factor directly affecting the manner in which the property division will be determined.

It is well established that the trial court may divide both separate and community property and should consider the total assets available when making its decree.[62] Normally the wife's interest should be recognized by an award of property rather than by simply providing for her support.[63] The trial judge is possessed of considerable discretion in this connection and his determination is said to stand unless abuse of discretion is detected.[64] The wishes of the litigants as expressed in a property settlement agreement are entitled to careful consideration and are often persuasive,[65] but such expressed desires do not compel the court to grant a corresponding decree.[66] Fault is a relevant factor.[67] In the absence of fault the court has indicated that an unequal distribution of community property is not appropriate.[68] However, this holding was quickly distinguished in a decision in which consideration of additional factors militated "against a mathematically equal distribution in terms of dollars and cents. . . ."[69]

Where mature parties brought separate property to the marriage, and are divorced after a brief marital relation during which community acquisitions were expended for costs of living, an award giving each spouse his or her own property is appropriate.[70] The significance of *source* of acquisition is further illuminated by a decision in which the bulk of property was acquired through the wife and was awarded to her, the husband being given enough to recognize the value of his services to the community and the value of improvements made by his efforts.[71] This factor also works in reverse. Even though the parties have been separated, the frugality of the wife may have been a contributing factor to the husband's success in acquiring wealth and is

[61] RCW 26.08.110.
[62] Schilling v. Schilling, 42 Wn.2d 105, 253 P.2d 952 (1953).
[63] Graham v. Graham, 38 Wn.2d 796, 232 P.2d 100 (1951).
[64] Akins v. Akins, 51 Wn.2d 887, 322 P.2d 872 (1958); Edwards v. Edwards, 47 Wn.2d 224, 287 P.2d 139 (1955).
[65] Short v. Short, 154 Wash. Dec. 287, 340 P.2d 168 (1959).
[66] Bernier v. Bernier, 44 Wn.2d 447, 267 P.2d 1066 (1954).
[67] Browning v. Browning, 46 Wn.2d 538, 283 P.2d 125 (1955).
[68] Wills v. Wills, 50 Wn.2d 439, 312 P.2d 661 (1957).
[69] Wolfishberg v. Wolfishberg, 51 Wn.2d 103, 107, 316 P.2d 114, 116 (1957).
[70] Toivonen v. Toivenen, 44 Wn.2d 473, 268 P.2d 456 (1954). It is worth noting that even in this case the trial court awarded the wife an additional $4,000 and attorney's fees.
[71] Lynch v. Lynch, 38 Wn.2d 437, 229 P.2d 885 (1951).

entitled to recognition in the division of such property.[72] However, the source of acquisition is but one factor and, as with fault, is not to be used to the exclusion of other considerations.[73]

It is important that the husband be given enough property, preferably the type enabling him to continue in the work for which he is fitted, to safeguard his own welfare.[74] In furtherance of the policy that a divorced wife should be required to become self-sustaining as rapidly as possible, the court has indicated that she should be given cash with which to start a business, even if the husband must encumber his portion of the award to make this possible.[75]

The statute requires the divorce court to make a disposition of the property, and an attempt to award the assets to the spouses as tenants in common has been held as not being in compliance.[76] Such a decree leaves the parties in the position they would occupy if no award were made at all, and the purpose of avoiding future litigation or a partition action would not be served.[77] However, an award of a home to the spouses as tenants in common was not questioned in *Nelson v. Nelson*,[78] where the wife and children were to occupy the premises. The court did indicate that the husband, required to pay a mortgage indebtedness encumbering the home, was to have a lien in the amount of his payments "when and if" the home was sold. Perhaps ultimate sale and division had been ordered in the *Nelson* case.[79] Orders directing a sale and division of the proceeds have been used where a physical distribution would be difficult.[80] In one such case, the wife protested that the order to sell an unfinished home was an abuse of discretion because fair value would not be obtained. She was at least partially rewarded for her effort. The appellate court ordered that an attempt be made to sell, but if such efforts proved impracticable the trial court was authorized to "issue such order as it deems necessary. . . ." [81] No mention was made in the preceding opinion of the case of *High v. High*,[82] which held

[72] Morse v. Morse, 42 Wn.2d 229, 254 P.2d 720 (1953).
[73] Merkel v. Merkel, 39 Wn.2d 102, 234 P.2d 857 (1951).
[74] Patrick v. Patrick, 43 Wn.2d 139, 260 P.2d 878 (1953); Lynch v. Lynch, *supra* note 71.
[75] Atkinson v. Atkinson, 38 Wn.2d 769, 231 P.2d 641 (1951).
[76] Bernier v. Bernier, 44 Wn.2d 447, 267 P.2d 1066 (1954).
[77] Shaffer v. Shaffer, 43 Wn.2d 629, 262 P.2d 763 (1953).
[78] 43 Wn.2d 278, 260 P.2d 886 (1953).
[79] An order directing sale after two years may have saved an award to spouses as tenants in common in Henson v. Henson, 47 Wn.2d 866, 289 P.2d 1034 (1955).
[80] Hokamp v. Hokamp, 32 Wn.2d 593, 203 P.2d 357 (1949).
[81] Murphy v. Murphy, 44 Wn.2d 737, 270 P.2d 808 (1954). The interesting question of whether this would authorize modification of a "final" award was not necessary to discuss. The court, noting the absence of assignment of error, declined to decide whether the trial court decree failed to make a final disposition.
[82] 41 Wn.2d 811, 252 P.2d 272 (1953).

it was an abuse of discretion for the trial court to order the sale of real properties which the spouses had purchased prior to marriage but while living in a meritricious relation, for its speculative worth. The parties were to be permitted to "hold their undivided half interests in these separate tracts until such time as a division or other disposition can be agreed upon or effectuated in a proper proceeding for partition," exactly the technique condemned in other opinions.

The court's approval in the *High* opinion of a California decision holding that a divorce court "cannot order the sale of property which the parties hold as tenants in common and require a division of the net proceeds as in a partition suit" may have been intended to apply only upon the facts of the case—property acquired during illegal, but good faith, cohabitation. If physical division is not practical and a division by sale is in fact not proper, the problem can still be solved by awarding the property to one spouse and ordering a sum to be paid to the other, if necessary by installments, with a lien to secure the performance.[83]

Another problem of some difficulty is whether the award may give an interest to anyone other than a spouse. It is clear that divorce is not a liquidation proceeding, like bankruptcy, in which creditors may be given a direct interest.[84] Language ordering payment of debts settles the obligation between the spouses without adding to or detracting from the rights of the creditor.[85] It is also well settled that property may be placed in trust to accomplish proper support objectives, including those which provide for payment of the proceeds for the benefit of children.[86] However, despite earlier cases which apparently approved or at least did not set aside awards directly to the children,[87] there is reason to believe that no such direct property interest can be created.[88]

Sometimes parties forget to place property before the court for division. If they have previously divided the property by property settlement contract, approved by the court, no question arises except the

[83] Potter v. Potter, 46 Wn.2d 526, 282 P.2d 1052 (1955).

[84] Arneson v. Arneson, 38 Wn.2d 99, 227 P.2d 1016 (1951). However a community creditor may apparently be brought in by a spouse for the purpose of attempting to quiet title in allegedly separate property. Finley v. Finley, 47 Wn.2d 307, 287 P.2d 475 (1955).

[85] See the dissenting opinions in Brantley v. Brantley, 154 Wash. Dec. 864, 344 P.2d 731 (1959); Decker v. Decker, 52 Wn.2d 456, 326 P.2d 332 (1958).

[86] Abel v. Abel, 47 Wn.2d 816, 289 P.2d 724 (1955); Valaer v. Valaer, 45 Wn.2d 565, 277 P.2d 326 (1954).

[87] Kern v. Kern, 28 Wn.2d 617, 183 P.2d 811 (1947); Cozard v. Cozard, 48 Wash. 124, 92 Pac. 935 (1907).

[88] Pick v. Pick, 154 Wash. Dec. 953, 345 P.2d 181 (1959).

problem of interpretation.[89] If nothing is done about the property, the parties will be left as tenants in common of the community property.[90] This interest will support a partition action, even in the probate of the estate of a deceased co-owner.[91] However if the court finds that one tenant in common has misled the other into a detrimental change of position with reference to the ownership, the relying party will be permitted to quiet title in himself.[92] To establish such an estoppel (the only solution readily available since adverse possession is difficult to establish against a co-owner) the claimant must do more than show his occupancy, improvements, and an increase in value. Compensation may be given for the improvements, taxes, assessments and similar items, but the quiet title request will be denied unless the misleading statements and a detrimental change of position can be shown.[93]

Insurance policies also constitute property and may be disposed of by the court.[94] If policies are forgotten, the problem discussed above appears again. In a case of first impression decided during the period under review, the court was required to determine the consequence of such an oversight. The policy on the husband's life, naming the wife as beneficiary, was under familiar Washington law a community acquisition. It follows that the parties were tenants in common after divorce, but in an interpleader of the named beneficiary and a second wife of the deceased insured, the court found that the husband had failed to exercise the power to dispose of his share of the undivided property and thus had "clearly indicated that he intended . . . his former wife, to be the recipient of his one-half of the proceeds."[95] In a case decided only a few months earlier, also a case of first impression, the court held against the wife, a named beneficiary.[96] The case was not one of a forgotten policy however. The husband had been expressly awarded the policy by the decree, which had incorporated a

[89] Sears v. Rusden, 39 Wn.2d 412, 235 P.2d 819 (1951). Conveyances between the parties prior to divorce would also be effective even if not expressly adopted by the court. However in such a case difficulty with title insurance might well be encountered.

[90] This was established years ago by the case of Ambrose v. Moore, 46 Wash. 463, 90 Pac. 588 (1907), a doctrine frequently reaffirmed.

[91] Olson v. Roberts, 42 Wn.2d 862, 259 P.2d 418 (1953).

[92] Witzel v. Tena, 48 Wn.2d 628, 295 P.2d 1115 (1956).

[93] Fritch v. Fritch, 53 Wn.2d 496, 335 P.2d 43 (1959).

[94] Silen v. Silen, 44 Wn.2d 884, 271 P.2d 674 (1954); Berol v. Berol, 37 Wn.2d 380, 223 P.2d 1055 (1950).

[95] Northwestern Life Ins. Co. v. Perrigo, 47 Wn.2d 291, 295, 287 P.2d 334, 336 (1955). The same reasoning was used in giving the former wife, a named beneficiary, the total proceeds of insurance on the deceased husband's life against the claim of the administrator of the deceased's estate for an equal share. Cowan v. Sullivan, 48 Wn.2d 680, 296 P.2d 317 (1956).

[96] United Benefit Life Ins. Co. v. Price, 46 Wn.2d 587, 283 P.2d 119 (1955).

property settlement agreement. The intent expressed in the contract, the court found, was to give the husband the wife's interest and accordingly was as effective to extinguish her claim as an express assignment would have been, despite the husband's failure to change the beneficiary designation.

Enforcement of Property Award

A property settlement agreement or any conveyance accompanying it, if not made part of an effective judgment, may subsequently be attacked by a party for fraud or coercion.[97] A property award of the court, whether or not incorporating an agreement of the parties, is a final judgment which may not be modified.[98] By statute the division may be appealed, although an acceptance of payments under the judgment waives the right of appeal with reference to the property award[99] and might waive the right of appeal in its entirety.[100] The vacation of a default decree of divorce awarding property is not a modification however.[101] On the other hand a trial court may not, upon remand of a divorce appealed only as to the custody award, make new orders with reference to the division of the property nor attempt to restrain the use of normal means of enforcing such prior judgment.[102] As with any normal judgment a property division, ordering the husband to pay the wife certain money, bears interest after its entry.[103]

At the beginning of the decade under review it seemed reasonably certain that a property award could not be enforced by a contempt order.[104] In retrospect, it would seem that the prior rule started to fall with *Robinson v. Robinson.*[105] Although the court again asserted that, because of the prohibition of imprisonment for debt in Article I, Section 17 of the state constitution, "such decrees, as they relate to the payment of money . . . cannot be enforced by contempt proceedings,"

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[97] Brown v. Brown, 46 Wn.2d 370, 281 P.2d 850 (1955).

[98] McLaughlin v. McLaughlin, 43 Wn.2d 111, 260 P.2d 875 (1953); Millheisler v. Millheisler, 43 Wn.2d 282, 261 P.2d 69 (1953).

[99] Potter v. Potter, 46 Wn.2d 526, 282 P.2d 1052 (1955).

[100] Murray v. Murray, 38 Wn.2d 269, 229 P.2d 309 (1951). At page 273, the court said: "The general rule in effect in many jurisdictions is that such action constitutes a waiver of the entire right to appeal the divorce decree. . . . Respondent here does not advance such a broad contention, . . . [W]ithout deciding the broad question of waiver as to the entire appeal, we agree with respondent that the assignment of error as to the property award has now become moot."

[101] High v. High, 41 Wn.2d 811, 252 P.2d 272 (1953).

[102] Johnson v. Johnson, 53 Wn.2d 107, 330 P.2d 1075 (1958).

[103] Berol v. Berol, 37 Wn.2d 380, 223 P.2d 1055 (1950).

[104] Corrigeaux v. Corrigeaux, 37 Wn.2d 403, 224 P.2d 343 (1950); State *ex rel.* Foster v. Superior Court, 193 Wash. 99, 74 P.2d 479 (1938).

[105] 37 Wn.2d 510, 225 P.2d 411 (1950).

it held that a writ of assistance (not a contempt citation) could be used to enforce an order of the court directing the former wife to deliver a document necessary for implementation of the property award. The theory of compelling obedience to an order of the court appeared again in *Decker v. Decker*,[106] this time to compel a husband to pay a debt which was secured by a mortgage upon certain real property awarded to the wife. It was held that contempt was available on the motion of the wife unless the husband could establish that: (1) he lacked the means to comply with the order; or, (2) the order had no reasonable relation to his duty to support the wife or children. A subsequent decision on similar facts has reaffirmed the reasoning employed in the *Decker* case.[107] Although both these decisions were dissented to by three judges, it would seem that contempt citations are now available to one who meets the indicated conditions. What remains is the task of clarifying the standards to be used in determining "the significant question . . . whether the provision that the court seeks to enforce by contempt proceedings, regardless of the name given it, bears a reasonable relationship to the husband's duty to support his wife and children."[108] One additional decision must be mentioned in this connection. In *Millheisler v. Millheisler*[109] the court found that a property settlement agreement was intended by the parties as a property award, not as an alimony or support provision, and was therefore not subject to modification. However, as a contract requiring the execution of documents by the husband, it could be enforced by a decree of specific performance.[110]

CUSTODY AND CHILD SUPPORT ORDERS

RCW 26.08.110 provides basic authority to "make provision for . . . the custody . . . of the minor children of such marriage." Additional power to provide for children born during the existence of a marriage

[106] 52 Wn.2d 456, 326 P.2d 332 (1958), noted in 34 WASH. L. REV. 192 (1959).

[107] Brantley v. Brantley, 154 Wash. Dec. 864, 344 P.2d 731 (1959). A related issue arose in Smith v. Smith, 53 Wn.2d 744, 337 P.2d 51 (1959), where an attorney attempted to use contempt proceedings to collect from the husband the fee awarded the wife in a divorce action. A writ of prohibition was granted. The husband had not been specifically *ordered* to pay the fee. The question of whether the contempt proceeding would be available to the attorney if there had been an order rather than only an award was discussed but left undecided.

[108] Brantley v. Brantley, *supra*, at p. 868. It should not be overlooked that the Robinson case, *supra* note 105, was a case involving an order to the wife, not directly related to any support obligation. Note that a contempt proceeding was not available.

[109] 43 Wn.2d 282, 261 P.2d 69 (1953).

[110] Would the same result be reached concerning a contractual promise to make periodic payments as a property division, or is this rule limited to cases where a money judgment would be an inadequate remedy? If the husband-obligor had remarried would a judgment be enforceable against the new community? If, for refusal to

of record later declared void is found in RCW 26.08.060. Other sections of the act provide for venue in proceedings to modify such orders,[111] the procedure to be followed,[112] and for the filing of certified copies of the records of the original divorce or annulment proceeding when required by the court hearing a petition for modification.[113] A number of problems have arisen in connection with these provisions since the adoption of the act.

Sheldon v. Sheldon[114] posed the problem of whether the court, in a default divorce in which the plaintiff husband had alleged the wife's fitness and requested that she be awarded custody, could find the wife not fit and grant custody to the husband. The wife alleged that an award in excess of the prayer for relief was a denial of due process. Respondent husband contended there is no property interest in the custody of children protected by the due process provisions of the state or federal constitutions. Although the trial court could question the mother's fitness, despite the pleadings, it was held error to grant relief beyond the prayer without giving the defendant notice and opportunity to appear.

A related, but distinguishable, issue arose in the case of *Hammond v. Hammond*.[115] There a wife took her children to Idaho where she obtained a divorce and was awarded custody. The husband-father did not appear nor did the wife obtain personal service in Idaho. The husband thereafter took possession of the children and the wife brought a writ of habeas corpus in Washington. The husband elected to attack collaterally the validity of the Idaho divorce, an issue which he lost, and the court ordered the children to be returned to the wife. What answer would the court have made had the husband contended that the Idaho decree deprived him of his custodial rights without according him due process? The United States Supreme Court, shortly

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pay under an order of specific performance or as the result of non-performance of an order similar to those in Decker and Brantley, a contempt citation is sought, can the husband defend by showing a remarriage and his lack of means to perform because of his new financial obligrtions? Fisch v. Marler, 1 Wn.2d 698, 97 P.2d 147 (1939), held that the remarried husband's earnings could be garnished for alimony and support obligations. Stafford v. Stafford, 10 Wn.2d 649, 117 P.2d 753 (1941), held that real property acquired by the husband and a new wife was not subject to execution for such ante-nuptial obligations. Where do obligations bearing a "reasonable relationship to the husband's duty to support," but not support orders, fit in this pattern?

[111] RCW 26.08.160

[112] RCW 26.08.170

[113] RCW 26.08.180. It may be noticed that the statutory sections cited in the preceding two sections expressly refer to the "original divorce or annulment action" while the present section refers only to the "original divorce action or proceedings." Presumably these are intended to have the same meaning in each section.

[114] 47 Wn.2d 699, 289 P.2d 335 (1955).

[115] 45 Wn.2d 855, 278 P.2d 387 (1954).

before the *Hammond* decision, held that Ohio was not compelled to give full faith and credit to a Wisconsin default divorce custody award to the father when the Wisconsin court did not have *in personam* jurisdiction of the wife.[116] In a case roughly the reverse of *Hammond,* the wife took the children and left the marital domicile, Idaho, where the husband later obtained an ex-parte default divorce awarding him custody. The Washington court apparently approved the conclusion of the trial court that "the order of the Idaho court . . . was not entitled to full faith and credit, for the reason that it did not have jurisdiction over the children at the time of the entry of the order."[117] The distinction in the two cases lies in recognizing the difference between jurisdiction resting upon the domicile of the plaintiff *and children* and the due process protection arguably owing to the non-appearing parent.

The requirements for venue in custody modifications were decided in *White v. White,*[118] in which a wife, awarded custody in a divorce granted in Spokane County but having moved to Franklin County, moved that the husband's subsequent petition to modify custody be transferred from Spokane to Franklin County. The basis for her request was that RCW 26.08.160 provided that modification petitions "may be brought in the county where said children are then residing, or in the county where the parent . . . who has the care, custody or control of said children is then residing." Her motion for change of venue was denied. The court pointed out that the 1949 act had changed the words "shall be," in the old divorce statute, to the permissive form "may be." Accordingly, venue may be in any of three possible counties: either the residence of the child or of the custodian, by RCW 26.08.160; or the county which entered the original decree, by virtue of its continuing jurisdiction.

The concept of continuing jurisdiction has proved useful to parties in several other cases. The court has renewed its position of earlier years that removal of the child from the state does not terminate the Washington court's jurisdiction, even when the original decree authorizes the removal by the parent given custody.[119] This does not mean that a further proceeding concerning custody may be initiated simply

[116] May v. Anderson, 345 U.S. 528 (1953). It must be recognized that the case does not say that Ohio *could* not, by comity, recognize the Wisconsin award. Would this not leave control, in the Hammond case, with the Washington court?

[117] *In re* Schreifels v. Schreifels, 47 Wn.2d 409, 412, 287 P.2d 1001, 1003 (1955). The Washington court held that it could make a custody determination under the husband's writ of habeas corpus and awarded custody to him on the merits of his claim.

[118] 51 Wn.2d 652, 321 P.2d 262 (1958).

[119] Sherwood v. Sherwood, 48 Wn.2d 128, 291 P.2d 674 (1955).

by affidavit and motion. The statute requires a petition and this requirement must be met.[120] A problem of due process is present here also, and there must be "such notice of the hearing upon the petition . . . as the court shall determine."[121] The decision of one judge that due process requirements were satisfied by notice to the attorney who had represented the defendant in the original divorce, the attorney having not withdrawn of record and the whereabouts of the defendant not being known, was sustained.[122]

The statute authorizing the award of custody, RCW 26.08.110, permits the order to be "modified, altered and revised by the court from time to time as circumstances may require," and further provides "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. . . ." Although not expressly mentioned in this section, the custody order is regarded as a "final" and appealable order. Determinations not appealed become *res judicata,* and in this regard the words "as circumstances require" have normally been taken to mean circumstances which have arisen since the last custody determination.[123] Perhaps the rigor of this rule has been somewhat relaxed by the decision in *Klettke v. Klettke,*[124] where the court stated:

> Thus a change in custody would seem justified under *either* of two conditions, when (a) there has been a material change in conditions or fitness of the parties, or (b) the welfare of the children would be promoted thereby . . . the requirement that a change of conditions be shown in order to modify custody provisions is simply another way of stating that a showing must be made that the welfare and the best interests of the children clearly require a change in custody. [Emphasis by the court.]

Conditions sometimes change with rapidity. Review of custody awards by appeal may involve considerable time. Prior to 1949 it had been established that when an appeal of a divorce was perfected, the superior court lost all jurisdiction and could not supersede the custody provision.[125] The contention that this rule concerning loss of control by the trial court pending appellate review was changed by the enactment of the above quoted provision of the 1949 act, has not proved entirely

[120] Schaefer v. Schaefer, 36 Wn.2d 514, 219 P.2d 114 (1950); State *ex rel.* Edwards v. Superior Court, 37 Wn.2d 8, 221 P.2d 518 (1950).
[121] RCW 26.08.170.
[122] Sweeny v. Sweeny, 43 Wn.2d 542, 262 P.2d 207 (1953).
[123] Brim v. Struthers, 44 Wn.2d 833, 271 P.2d 441 (1954).
[124] 48 Wn.2d 502, 505, 506, 294 P.2d 938, 940 (1956).
[125] Sewell v. Sewell, 28 Wn.2d 394, 184 P.2d 76 (1947).

successful. During pendency of the appeal the application for modification must be addressed to the Supreme Court.[126] However the trial court does have power to enforce and implement its orders during such period, and may retain some control by conditioning its award upon the continued existence of specified conditions during the appeal period.[127] A trial court may resort to the device of a temporary award or modification of custody, granting a continuance and fixing a rehearing for some future date.[128] It is possible for a trial court to clarify a prior custody provision without the formalities of a petition to modify,[129] so long as its reasons for doing so are appropriate,[130] and it is possible that this may be done pending appeal.[131] A writ of review, or certiorari, is not to be used in this connection as both modifications and clarifications are appealable orders.[132] If the time elapsed between the entry of the order appealed and the remand from the appellate court has been appreciable, it is appropriate for the trial court to reopen the matter for further proceedings.[133] Petitions to modify, alleging any facts which might support the prayer, are not to be dismissed on the pleadings,[134] and the petitioner who alleges prejudice and requests a change of judges, is entitled to such change as a matter of right.[135]

FACTORS INFLUENCING THE AWARD OF CUSTODY

The question of who shall have custody of minor children, with the accompanying problem of visitation privilege, has been the source of a considerable volume of litigation in the decade being reviewed. Of the 172 cases found in volumes 36 Wn.2d through 154 Wash. Dec., seventy-four or over 43% brought before the appellate court custody and visitation issues. This number does not include cases dealing solely with child support. Fifty-seven of these opinions were written in the years 1950 through 1956, averaging slightly over eight cases per year. Two of these custody problems became moot because of the

[126] Walkow v. Walkow, 36 Wn.2d 510, 219 P.2d 108 (1950). The supreme court is naturally hesitant to modify custody upon showings made by affidavits alone. Therefore it will, when necessary, remand the question to the superior court to determine facts and, within the scope of the remand, order modification.

[127] Cooper v. Cooper, 39 Wn.2d 28, 234 P.2d 492 (1951).

[128] Phillips v. Phillips, 52 Wn.2d 879, 329 P.2d 833 (1958).

[129] Starkey v. Starkey, 40 Wn.2d 307, 242 P.2d 1048 (1952).

[130] State *ex rel.* Hale v. Long, 36 Wn.2d 432, 218 P.2d 884 (1950).

[131] Paulson v. Paulson, 37 Wn.2d 555, 225 P.2d 206 (1950). The question of clarification during the pendency of appeal was discussed by the court, but under the assignments of error it was not necessary to decide the issue.

[132] Sutter v. Sutter, 51 Wn.2d 354, 318 P.2d 324 (1957).

[133] Sweeny v. Sweeny, 52 Wn.2d 337, 234 P.2d 1096 (1958).

[134] Joslin v. Joslin, 45 Wn.2d 357, 274 P.2d 847 (1954).

[135] State *ex rel.* Mauerman v. Superior Court, 44 Wn.2d 828, 271 P.2d 435 (1954).

disposition of the divorce upon appeal, and six arose on special writs in the supreme court. The remaining forty-nine cases placed the custody determination of the trial judge before the supreme court for review. In twenty-four instances, less than 50%, the trial judge was affirmed while in twenty-five cases the supreme court remanded, modified, or reversed. This pattern changed abruptly in the period 1957 through 1959. During this latter period seventeen appeals were taken from custody determinations, an average of slightly over six cases per year, and in only two instances was the trial court's determination reversed. In all the remaining cases, save one which arose on special writ, the appellate court affirmed.

A possible explanation for this phenomenon may be found in the nature of the tests used to determine the award of custody and visitation. A summary of principles is given in *Chatwood v. Chatwood*:[136] each case on its own facts; welfare of the child paramount, with parental interests being subsidiary; mother preference, coupled with age and sex of the child; acceptance of the trial court's findings as accurate unless the record clearly preponderates against such finding; and the need to give the trial court discretion because of his better opportunity to evaluate credibility of witnesses and testimony. These tests are of course general and nothing is contained in RCW 26.08.110 which provides specific guidance. Under these circumstances any appellate indication of liberality in reversing the decision of the trial court will be an invitation to the losing party to appeal. The period under review commenced with statements such as the one found in *Lundin v. Lundin*:[137] "When such discretion is exercised by the court, it should not be disturbed by this court unless it clearly appears that there has been an abuse thereof." Within a short time however, the court was talking less in terms of abuse of discretion and more about preponderance of evidence,[138] and by 1956 the language of the court was: "Under the facts in the instant case, and considering the circumstances which these facts seem to present to us, we reach a different conclusion from that of the trial court. It is our best judgment that the case should be remanded. . . ." [139]

As indicated above the reversal in policy concerning review came in

[136] 44 Wn.2d 233, 239, 266 P.2d 782, 785 (1954).
[137] 42 Wn.2d 186, 187, 254 P.2d 460, 461 (1953).
[138] Smith v. Smith, 45 Wn.2d 672, 277 P.2d 339 (1954); *In re* Walker, 43 Wn.2d 710, 263 P.2d 956 (1953).
[139] Nedrow v. Nedrow, 48 Wn.2d 243, 292 P.2d 872 (1956). See also, Clarke v. Clarke, 49 Wn.2d 509, 304 P.2d 673 (1956).

1957, apparently with the case of *Patterson v. Patterson*,[140] where the court returned to its former policy by quoting the following passage from an earlier case:

> Great weight should be given to the decision of the trial court in custody matters because of the great advantage the trial court enjoys over us in matters of trial atmosphere and opportunity to observe witnesses personally, and to gauge first hand their candor and truthfulness. . . . Generally speaking, the crux of the latter principle, boldly stated, is that the trial court is the forum where divorced parents, competing for custody of their children, should expect to win their law suits. In other words, on appeal, we are reluctant to disturb custody disposition made by a trial court, and we will do so only upon a showing of manifest abuse of discretion by the trial court.

That the court meant what it said seems indicated by the paucity of reversals from that date. Continuation of this policy by the court would seem an almost certain way to curb the number of appeals in the custody area.

If it is granted that the trial court is now the forum where custody must be won, it becomes essential to notice the factors which have influenced awards.

It has been decided that RCW 26.08.110 and .160 do not give a divorce court jurisdiction to determine custody of illegitimate children,[141] although in another case a husband was awarded custody of his wife's children by a prior marriage.[142] Racial characteristics have been considered.[143] Emotional instability[144] and ill health[145] are factors of importance but the condition must be shown to have relation to the welfare of the child.[146] Voluntary surrender of the child, by the parent awarded custody, may be regarded as an indication of lack of ability to meet the problems of custody[147] or as a lack of concern for the child's welfare.[148] Lack of interest in the child is not necessarily to be determined, however, from a father's failure to make gifts or contribute to the child's support when he has not been ordered to do so.[149]

[140] 51 Wn.2d 162, 164, 316 P.2d 902, 903 (1957).
[141] Palmer v. Palmer, 42 Wn.2d 715, 258 P.2d 475 (1953).
[142] Eickerman v. Eickerman, 42 Wn.2d 165, 253 P.2d 962 (1953). The question of jurisdiction was not raised in the case.
[143] Ward v. Ward, 36 Wn.2d 143, 216 P.2d 755 (1950).
[144] Atkinson v. Atkinson, 38 Wn.2d 769, 231 P.2d 641 (1951); Cooper v. Cooper, 39 Wn.2d 28, 234 P.2d 492 (1951); Johnson v. Johnson, 50 Wn.2d 56, 308 P.2d 967 (1957).
[145] Siewert v. Livermore, 52 Wn.2d 375, 325 P.2d 293 (1958).
[146] Guiles v. Guiles, 41 Wn.2d 377, 249 P.2d 368 (1952).
[147] Cooper v. Cooper, 39 Wn.2d 786, 238 P.2d 1204 (1951).
[148] Habick v. Habick, 44 Wn.2d 195, 266 P.2d 346 (1954).
[149] Malfait v. Malfait, 154 Wash. Dec. 503, 341 P.2d 154 (1959).

A lack of finances is normally not a compelling reason to modify a prior custody award and a mother is not to be deprived of custody only because she must work.[150] In appraising the significance of these and similar factors, the trial court must use its discretion and not feel restricted by a prior decision of the supreme court which relates to the circumstances of the case of an earlier date.[151]

There is an understandable reluctance upon the part of the court to approve awards of divided custody either in the sense of giving one person legal custody and another the physical care,[152] although such has been approved,[153] or in the sense of alternating the custody between the parents,[154] although the latter arrangements have also been approved.[155] In one case, *Reynolds v. Reynolds*,[156] which involved a wife who was trying to alienate the minor children's affection for the father, the court resorted to alternating periods of custody because the "welfare of the child will be served and respondent will have the opportunity to combat any efforts of hostile parties to alienate the affections of his children from him." As a dissenting opinion points out, this hardly seems to keep the test of the child's welfare paramount. In a case involving a wife who refused to cooperate with the husband in his exercise of visitation privileges, and where the trial court granted the husband's petition to modify the previous award and give him custody, the supreme court, with one judge dissenting, changed the order and established joint custody.[157] Another type of division has occurred in cases in which the welfare of the minor children was thought best served by giving custody of some of the children to one party and custody of other children to another party.[158]

Removal of minor children from the state, or the announced intention of removing them, has been a fairly frequent factor in custody disputes. The initial award may prohibit removal. If it does not the party having custody is not required to remain within the jurisdiction even though the removal will effectively frustrate the visitation privilege of the other parent.[159] The determination to grant or deny per-

[150] Siewert v. Livermore, 52 Wn.2d 375, 325 P.2d 293 (1958).
[151] Sweeny v. Sweeny, 48 Wn.2d 872, 297 P.2d 610 (1956).
[152] Wells v. Wells, 43 Wn.2d 531, 261 P.2d 971 (1953).
[153] Ward v. Ward, 36 Wn.2d 143, 216 P.2d 755 (1950).
[154] Henson v. Henson, 47 Wn.2d 866, 289 P.2d 1034 (1955); Allen v. Allen 38 Wn.2d 128, 228 P.2d 151 (1951).
[155] Brim v. Struthers, 44 Wn.2d 833, 271 P.2d 441 (1954).
[156] 45 Wn.2d 394, 275 P.2d 421 (1954).
[157] Wheeler v. Wheeler, 37 Wn.2d 159, 222 P.2d 400 (1950).
[158] Merkel v. Merkel, 39 Wn.2d 102, 234 P.2d 857 (1951); Munroe v. Munroe, 49 Wn.2d 453, 302 P.2d 961 (1956).
[159] Nedrow v. Nedrow, 48 Wn.2d 243, 292 P.2d 872 (1956); Clarke v. Clarke, 49 Wn.2d 509, 304 P.2d 673 (1956).

mission to remove a child from the state is based upon the usual test of the child's best interests.[160] Even the contemptuous act of removing a child in open violation of the court's order does not, of itself, justify a modification of custody without consideration of all other factors.[161] This result is simply a variation of the principle that custody awards should not be employed to punish an erring parent.[162]

Children of an "age of discretion" may express their wishes in regard to the custody arrangement.[163] It is probably not error for a trial judge to refuse to consult the child[164] or, if error, probably not prejudicial.[165] If the children are consulted, their wishes are not controlling and in one case, *Thompson v. Thompson*,[166] the court affirmed an award which was vigorously opposed by the children. It seems established practice for the children to be consulted in the judge's chambers. No case has been found indicating the result of opposition to such interrogation, but counsel who consents may not later assign error based upon the interview.[167] Inasmuch as the impressions received by the judge during the interview may not appear in the record on appeal, it may be difficult for the appellate court to review such custody awards. In this connection the court has said: "We are in no position to say that the trial judge abused his discretion. . . . We must, therefore, affirm the order. . . ."[168]

The most tenacious concept in custody cases, other than the welfare of the child, is that the child's mother has a better claim to custody than does the father,[169] especially when the children are of "tender years." Undoubtedly this factor is persuasive, but as the court has pointed out in repeated instances this claimed preferential status is itself based on nothing more than the consideration of the welfare of the child, and has no controlling effect.[170] A companion concept is that it

[160] Wells v. Wells, 43 Wn.2d 531, 261 P.2d 971 (1953).
[161] Sweeny v. Sweeny, 43 Wn.2d 542, 262 P.2d 207 (1953).
[162] Pearce v. Pearce, 37 Wn.2d 918, 226 P.2d 895 (1951).
[163] Habich v. Habich, 44 Wn.2d 195, 266 P.2d 346 (1954); Henson v. Henson, 47 Wn.2d 866, 289 P.2d 1034 (1955).
[164] Susnar v. Susnar, 45 Wn.2d 62, 273 P.2d 237 (1954).
[165] Stratton v. Stratton, 53 Wn.2d 558, 335 P.2d 39 (1959).
[166] 45 Wn.2d 731, 277 P.2d 734 (1954).
[167] Kain v. Kain, 51 Wn.2d 387, 318 P.2d 955 (1957).
[168] Kain v. Kain, *supra*, p. 389. See also, Nelson v. Nelson, 43 Wn.2d 278, 260 P.2d 866 (1953). It would seem advisable, if counsel agrees to an interview of the children, to insure that the results or impressions of the interview will appear as a part of the record.
[169] Guiles v. Guiles, 41 Wn.2d 377, 249 P.2d 368 (1952).
[170] Habich v. Habich, 44 Wn.2d 195, 266 P.2d 346 (1954); Chatwood v. Chatwood, 44 Wn.2d 233, 266 P.2d 782 (1954); Christian v. Christian, 45 Wn.2d 387, 275 P.2d 422 (1954); Patterson v. Patterson, 51 Wn.2d 162, 316 P.2d 902 (1957); Siewert v. Livermore, 52 Wn.2d 375, 325 P.2d 293 (1958); Johnson v. Johnson, 53 Wn.2d 107, 330 P.2d 1075 (1958); Applegate v. Applegate, 53 Wn.2d 635, 335 P.2d 595 (1959).

is error for a trial court to award custody to anyone but a parent unless the parent has been found not fit. Cases have been remanded for failure to make findings relating to fitness,[171] especially where the record fails to make clear what governed the custody award.[172] However where recitals in the record show the basis for the award a formal finding is not required, at least not when the appellant has failed to object and to move to vacate the judgment of the trial court.[173] In any event it is now quite clear that a finding of unfitness is not essential to a determination to award custody to one other than a parent.[174] Explicit findings of fact are desirable, especially in light of the requirement of showing a change in circumstances since the last custody determination.[175] In connection with the rule last mentioned it should be noticed that even though a change of circumstances may be required for a modification and factors previously considered are res judicata, such prior events or facts may always be considered in a new determination regarding fitness.[176]

One additional factor has played a significant role in custody determination; proof of adultery.[177] At times the decisions seem to indicate that proof of adultery is in itself an adequate showing of unfitness to have custody, and in several instances an award to a mother, reversed upon appeal, seems to have been governed by this consideration.[178] In other cases, although regarded as a "weighty factor," adultery has been considered simply as evidence bearing upon the question of fitness and not *per se* a bar to an award of custody.[179]

Custody determinations are difficult and often unsatisfactory of necessity. The question has naturally arisen whether the statute should

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[171] Hansen v. Hansen, 43 Wn.2d 520, 262 P.2d 184 (1953).

[172] Pearce v. Pearce, 37 Wn.2d 918, 226 P.2d 895 (1951); Poffenroth v. Poffenroth, 49 Wn.2d 235, 299 P.2d 207 (1956).

[173] Malfait v. Malfait, 154 Wash. Dec. 503, 341 P.2d 154 (1959).

[174] Chatwood v. Chatwood, 44 Wn.2d 233, P.2d 782 (1954); Henson v. Henson, 47 Wn.2d 866, 289 P.2d 1034 (1955); Applegate v. Applegate, 53 Wn.2d 635, 335 P.2d 595 (1959); Stratton v. Stratton, 53 Wn.2d 558, 335 P.2d 39 (1959).

[175] Brim v. Struthers, 44 Wn.2d 833, 271 P.2d 441 (1954); Susnar v. Susnar, 45 Wn.2d 62, 273 P.2d 237 (1954).

[176] Gibson v. Olnhausen, 43 Wn.2d 803, 263 P.2d 954 (1953); Brim v. Struthers, *supra*.

[177] Saffer v. Saffer, 42 Wn.2d 298, 254 P.2d 746 (1953).

[178] Merkel v. Merkel, 39 Wn.2d 102, 234 P.2d 857 (1951); Schilling v. Schilling, 42 Wn.2d 105, 253 P.2d 952 (1953); Christian v. Christian, 45 Wn.2d 387, 275 P.2d 422 (1954). See also, *In re* Schreifels v. Schreifels, 47 Wn.2d 409, 287 P.2d 1001 (1955).

[179] Bigelow v. Bigelow, 39 Wn.2d 824, 239 P.2d 317 (1951); Revier v. Revier, 48 Wn.2d 231, 292 P.2d 861 (1956); Nedrow v. Nedrow, 48 Wn.2d 243, 292 P.2d 872 (1956); Annest v. Annest, 49 Wn.2d 62, 298 P.2d 483 (1956); Poffenroth v. Poffenroth, 49 Wn.2d 235, 299 P.2d 207 (1956); Westlake v. Westlake, 52 Wn.2d 77, 323 P.2d 8 (1958).

provide some other procedure for making these decisions. The supreme court has permitted itself to speculate in this connection:

> The disposition of child-custody matters involves some imponderables. Among other things, human knowledge, and methods or procedures, available for analyzing and disposing of the problem of what will be most conducive to the best interest and welfare of children, have not been reduced to an exact science, and may never be, considering the nature of the problem and the variety of known and unknown factors bearing upon it. In this connection, just in passing, *it may be worthwhile* to note that a strictly *adversary proceeding,* with the contending parties, their relatives, friends, and supporters often testifying in a diametrically opposite manner (particularly as to matters of opinion), may *not be too conducive to reaching the best and most ideal results in custody cases.*[180] [Emphasis by the court.]

What the court had in mind seems reasonably clear: should there be wider use of experts—juvenile authorities, social workers, psychiatrists and similar persons? This possibility has not escaped the attention of lawyers and trial judges. In one case the child had been found to be a dependent child before the divorce was started and the supreme court was content to permit the divorce judge to defer to the juvenile authorities concerning custody.[181] However, a child may not, in a divorce proceeding, be found dependent and placed under supervision of the juvenile court.[182] The divorce court must retain jurisdiction and make the custody determination. The hearing may be continued to a later date however, with an intervening trial period of custody,[183] and during the period of temporary custody the child may be placed in a home for psychiatric observation and care, with the final determination to be influenced by the results.[184] Such studies, whether by medical experts, probation officers, or home studies by a welfare department are not to be condoned if presented as "out-of-court" reports.[185] "While we appreciate the value and necessity of such reports under certain conditions and circumstances, they have no place in adversary proceedings, except by agreement of the parties."[186] It is somewhat surprising to discover, at least upon the basis of reported cases, that no attempt has been made to use the broader powers of the family court in this regard.[187]

[180] Chatwood v. Chatwood, 44 Wn.2d 233, 238, 266 P.2d 782, 785 (1954).
[181] *In re* Walker, 43 Wn.2d 710, 263 P.2d 956 (1953).
[182] Olson v. Olson, 46 Wn.2d 246, 280 P.2d 249, (1955).
[183] Potter v. Potter, 46 Wn.2d 526, 282 P.2d 1052 (1955).
[184] Munroe v. Munroe, 47 Wn.2d 391, 287 P.2d 482 (1955).
[185] Lorang v. Lorang, 42 Wn.2d 539, 256 P.2d 481 (1953).
[186] Lawrence v. Hosfield, 51 Wn.2d 157, 159, 316 P.2d 1102, 1103 (1957).
[187] RCW 26.12.010 *et seq.*

It has long been recognized that custody need not be awarded to either parent and a number of the cases cited above concern awards to third parties.[188] Such a third party, having been awarded custody, has standing to contest a petition to modify the award.[189]

One additional complication regarding custody has recently arisen. The opinion in *In re Candell*,[190] a construction of RCW 26.32.040 which is a part of the adoption act, makes it clear that the consent of a parent who is *not expressly* awarded custody, some visitation privilege, or ordered to pay support, is not required in a subsequent adoption of the child. The decision arose as the aftermath of a Colorado default divorce which was silent as to the husband's future relation to the child. It would appear mandatory for counsel hereafter to consider this development when working out custody arrangements. It may also be desirable for attorneys to review the position of former clients who occupy the position of the husband in the *Candell* case. Perhaps a modification, giving the petitioner any right, privilege, or obligation regarding the child, will remove him from the "deprived" category.

The enforcement of custody and visitation orders, considered apart from child support problems, has not caused many appeals. Contempt citations may be used to enforce restraining orders[191] and to test the limits of the custody award.[192] Two interesting cases have considered the problem of whether a wife, awarded custody on condition that she desist from improper associations with certain persons, may be held in contempt for violation of the order.[193] The contempt citation was held, expressly in one case and by implication in the other, to be in excess of the trial court's statutory authority and not supportable as an exercise of inherent equitable power. The dearth of litigation in this regard undoubtedly stems from the availability of the petition to modify.

Child Support

By statute[194] the property of a husband and wife is chargeable for

[188] Ward v. Ward, 36 Wn.2d 143, 216 P.2d 755 (1950); Merkel v. Merkel, 39 Wn.2d 102, 234 P.2d 857 (1951); Saffer v. Saffer, 42 Wn.2d 298, 254 P.2d 746 (1953); Lundin v. Lundin, 42 Wn.2d 186, 254 P.2d 460 (1953); Hansen v. Hansen, 43 Wn.2d 520, 262 P.2d 184 (1953); Christian v. Christian, 45 Wn.2d 387, 275 P.2d 422 (1954).

[189] Rawe v. Rawe, 49 Wn.2d 672, 306 P.2d 200 (1957).

[190] 154 Wash. Dec. 279, 340 P.2d 279 (1959).

[191] Cogswell v. Cogswell, 50 Wn.2d 597, 313 P.2d 364 (1957).

[192] McArdle v. McArdle, 46 Wn.2d 268, 280 P.2d 675 (1955).

[193] Poffenroth v. Poffenroth, 49 Wn.2d 235, 299 P.2d 207 (1956); Pearce v. Pearce, 37 Wn.2d 918, 226 P.2d 895 (1951).

[194] RCW 26.16.205.

family expenses and the parties may be sued jointly or separately in relation to such obligations. The divorce act authorizes the court to "make provision for . . . support and education of the minor children. . . . " Such orders may be modified as circumstances require. Failure of the divorce court to enter an order concerning support, or its inability to do so for lack of *in personam* jurisdiction, not only leaves the parties jointly and separately liable to third persons who furnish support but also leaves open the question of *inter sese* contribution.[195] Normally an order is entered by the trial court and appeals take the form of disputes about fairness, need, ability, and abuse of discretion.[196] A reading of the opinions handed down during the past decade strongly suggests that not enough care is being exercised in drafting agreements for clients and proposed orders for the court.

It is apparent that an order cannot be reviewed unless the record gives the appellate court necessary information.[197] Several cases have appeared involving orders to pay a periodic, unsegregated sum for the support of several persons. If these parties are children who will attain majority[198] upon successive dates, or if the obligor is relieved from his duty to support one or more of the group for any reason, a question of segregation inevitably arises. The first case of this nature arising since 1949, *State ex rel. Kibbe v. Rummel,*[199] involved a husband who reduced his monthly payments by half when his daughter married and discontinued support entirely when the other child, a boy, reached age eighteen. The court sustained an order of contempt, saying that the husband's proper course of action would have been a petition to modify and that he had no prerogative to scale down the payments of his own accord. A second husband, under order to pay $80 per month for the support of three children, reduced his payment by a third during periods that one child—with the custodial wife's consent but without a formal modification—lived with the father, another third when a daughter married, and paid only the remaining one-third for

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[195] Scott v. Holcomb, 49 Wn.2d 387, 301 P.2d 1068 (1956). A husband abandoned his wife in New York taking four of five children with him. Years later the wife obtained a New York judgment against the husband for her expenses in rearing the one child. Upon her attempt to enforce the judgment in Washington, the husband was able to set-off his expenses in rearing the other children against the judgment of the wife.

[196] Lynch v. Lynch, 38 Wn.2d 437, 229 P.2d 885 (1951).

[197] Nelson v. Nelson, 43 Wn.2d 278, 260 P.2d 886 (1953).

[198] Support duty terminates automatically when the child reaches the age of majority as the divorce statute authorizes orders only in relation to minors. This was held true even when the divorce order provided support for an incompetent son. Van Tinker v. Van Tinker, 38 Wn.2d 390, 229 P.2d 333 (1951).

[199] 36 Wn.2d 244, 217 P.2d 603 (1950).

the child still in the wife's care. The wife sued to recover accrued arrearages, alleging that she as trustee of the ordered support money for the children could not agree to a reduction or waive the right to payment. Perhaps so, the court indicated, but the duty to support continues only as long as dependency exists and dependency may terminate by attainment of majority, emancipation, marriage, or even the acquisition of support from another source. The husband is entitled to show such termination and the question then is, was there an abuse of trial court discretion in finding that the original order was capable of such out-of-court segregation? Finding no abuse, the court affirmed the lower court's judgment denying the wife recovery.[200] A third husband, in the case of *Koon v. Koon*,[201] this time under an order to pay a set amount for each child, elected not to make payments to the wife during periods when the boys attended schools where their total support was paid by the husband, or lived with him with the wife's consent, or were in the military service. The wife sued for arrearages. This case presented no problem of construction regarding segregation of lump payments but rather whether the termination of dependency, if proved, enabled the husband to discontinue the payments. Possibly the majority opinion says that the husband failed to prove termination of dependency, the wife having always remained prepared and willing to care for the children and actually having cared for the one boy in military service who was permitted to live at home. Again, the holding may be that the duty to pay continues unabated until relief is obtained by modification of the order. Judge Finley, in a concurring opinion, indicates his belief that two conflicting lines of authority exist. One group (of which *Dittmar* is the most recent example) permits flexibility in determining if the duty to pay ceased by reason of cessation of dependency; the other (of which the *Kibbe* case is typical) denies such flexibility. Judge Finley would prefer the former,[202] but believes the court has chosen the latter. The

[200] Ditmar v. Ditmar, 48 Wn.2d 373, 293 P.2d 759 (1956).

[201] 50 Wn.2d 577, 313 P.2d 369 (1957).

[202] If, in a case involving unsegregated payment for several persons, there is to be a segregation, who is to decide upon the amount of the reduction? In a fairly old case, Evans v. Evans, 116 Wash. 460, 199 Pac. 764 (1921), a husband was ordered to pay lump periodic sums as child support and as alimony. He terminated payments upon maturity of the daughter. The wife's action for arrearages was denied. She was held to have the burden of segregating and, failing to do so, lost all claim against the husband. The Kibbe case, supra note 199, distinguishes Evans by saying the wife was a principal party in interest while in Kibbe she was seeking to recover only for the benefit of the son, there being no alimony in the unsegregated award. One solution is that used by the wife in Wages v. Wages, 39 Wn.2d 74, 234 P.2d 497 (1951), who, under facts much like the Evans matter, brought a show cause order to have the hus-

issue of whether or not the wife, having custody, can waive the children's right to support payments, a problem alluded to in *Dittmar* but not part of the holding, had already been resolved against the husband in prior decisions[203] and the court's dictum in *Dittmar* indicates approval of the rule.

Wheeler v. Wheeler, the case last cited, also dealt with the question of whether interruption of the husband's visitation privilege, granted him by the divorce decree, effects his duty to pay support. The answer, no, has been repeated several times.[204] The reason for this is explained in *Corson v. Corson*[205] where the trial court, in a modification proceeding initiated by the husband, suspended support of the obligation until such time as the wife would again make visitation by the husband possible by returning the child to Washington from Texas. This was error, said the court on appeal, because support orders must be based upon the child's need and the parent's ability to support, not upon the availability or convenience of continued visitation.

When the obligor experiences difficulties with support payments, his remedy is obviously a petition for modification. There must be a showing of a change in circumstances since the last support determination (a task facilitated by findings and conclusions which indicate with some clarity what the circumstances were at that time) such as a change in earnings[206] or in the incurring of greater obligations.[207] It is well settled that support obligations which have accrued may not be modified retroactively.[208] Although the court's decision not to permit a wife to enforce arrearages by use of a contempt citation has been held not to be a retroactive modification because she could still attempt

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band held in contempt, permitting the court to make the segregation. Better and safer yet would be a regular petition for modification at or before the date the child support obligation terminates. Best of all would be a properly drawn order in the beginning.

[203] Wheeler v. Wheeler, 37 Wn.2d 159, 222 P.2d 400 (1950); Herzog v. Herzog, 23 Wn.2d 382, 161 P.2d 142 (1945).

[204] Kain v. Kain, 51 Wn.2d 387, 318 P.2d 955 (1957), where the wife could have permitted the visits but refused to do so; and, Gaidos v. Gaidos, 48 Wn.2d 276, 293 P.2d 388 (1956), where removal of the child to West Virginia made visitation impracticable.

[205] 46 Wn.2d 611, 283 P.2d 673 (1955). But, *cf:* Sanges v. Sanges, 44 Wn.2d 35, 265 P.2d 278 (1953), where a modification relieving the husband from future support was affirmed, based upon the wife's action in removing the child to another state in open violation of an order not to do so. The court said it was not shown that the modification would adversely effect the child.

[206] Bigelow v. Bigelow, 39 Wn.2d 824, 239 P.2d 317 (1951).

[207] Hanson v. Hanson, 47 Wn.2d 439, 287 P.2d 879 (1955). The new financial burdens, if not unavoidable, must be for appropriate matters. In the cited case the husband-obligor had remarried and was legally obligated to support his new wife and "socially, if not legally," responsible for the support of four stepchildren.

[208] Kain v. Kain, 51 Wn.2d 387, 318 P.2d 955 (1957); Sanges v. Sanges, 44 Wn..2d 35, 265 P.2d 278 (1953); Wheeler v. Wheeler, 37 Wn.2d 159, 222 P.2d 400 (1950).

collection by other means,[209] the same is not true of an order enjoining the use of a writ of execution.[210] Past due installments do not automatically become judgment liens,[211] but they do become judgments and the inherent right to enforce by usual means may not be denied. On the other hand, the right to enforce may ultimately be barred by operation of the statute of limitations.[212]

To obtain the judgment or order for child support and protect it from modification is one problem; to enforce the obligation is another. As just discussed it is possible, at the discretion of the court, to use a contempt proceeding and, as a matter of right, to execute upon accrued judgments. It is also possible to obtain a lien against specific assets as security for the payments to fall due. Here, however, is another area in which caution must be exercised in drafting the agreement to be adopted by the court or the proposed order. In *Goodsell v. Goodsell*[213] the court adopted an agreement providing for occupancy of the family home by the wife until the children, whose custody she was awarded, should become adults. At that time the house was to be sold and the proceeds divided between the spouses. The agreement, and thus the order, also provided that the husband's interest was subject to a lien for the support payments. When the husband defaulted in payment, the wife asserted the lien and had the premises sold. Then came the surprise. The husband was successful in having the sale set aside for, by terms of the agreement as construed by the court, the lien could not be exercised until *after* the children had attained majority. Such a bizzare result might be dismissed as an accident, but much the same result was obtained with reference to an attempted garnishment of the cash surrender value of an insurance policy on the life of the obligor husband.[214] The agreement, again adopted by the divorce court, ordered the husband to name the wife, and in certain contingencies the children, as beneficiaries and not to borrow against or draw upon the policy. The garnishment proceeding was ordered dismissed because a cash surrender value, not being a present debt unless the

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[209] Corson v. Corson, 46 Wn.2d 611, 283 P.2d 673 (1955).
[210] Starkey v. Starkey, 40 Wn.2d 307, 242 P.2d 1048 (1952).
[211] Swanson v. Graham, 27 Wn.2d 590, 179 P.2d 288 (1947).
[212] Wheeler v. Wheeler, 37 Wn.2d 159, 222 P.2d 400 (1950).
[213] 38 Wn.2d 135, 228 P.2d 155 (1951).
[214] Pick v. Pick, 154 Wash. Dec. 953, 345 P.2d 181 (1959). Two judges dissented without opinion, and a third dissented for the reason that the court, having continuing jurisdiction over the insurance policies in a proper enforcement proceeding ancillary to the divorce, could make the cash surrender value available. For another case dealing with a support order directing the father to provide insurance protection for a minor son, see Silen v. Silen, 44 Wn.2d 884, 271 P.2d 674 (1954).

holder elects to surrender, is not subject to garnishment. Assuming that the court otherwise could compel the husband to exercise this election or could surrender the policy for him, which power the court questions, it may not do so in this case because of the support order's prohibition of termination or impairment of the insurance protection.

One additional device available to secure payments for support appears in *Rentel v. Rentel.*[215] In that case the court ordered certain property to be placed in trust for the purpose of sale, the proceeds to be deposited in a bank under arrangements for periodic disbursements to the wife.

DECREES OF NULLITY

The term annulment is generally employed to denote two entirely different situations: voidable marriages which, prior to adoption of the divorce act of 1949 and more particularly before *Saville v. Saville,*[216] could be annulled *ab initio* at any time during the life of the parties but not after the death of either;[217] and void marriages which may be declared null at any time.[218] Since the decision in *Saville* it appears reasonably safe to conclude that annulment for a voidable marriage is no longer an available remedy.[219] The 1949 divorce act authorizes a decree of nullity[220] and provides that children conceived or born during the existence of a marriage of record subsequently declared void are legitimate children.[221]

Only one case has dealt with the new provisions for void marriages, but it is a case for major significance. In *Jones v. Jones*[222] the court not only approved suit money, attorney fees, and temporary alimony awards, which it could do in any event by a prior decision,[223] but also made an award of permanent alimony to the wife. In so doing the court

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[215] 39 Wn.2d 729, 238 P.2d 389 (1951).
[216] 44 Wn.2d 793, 271 P.2d 432 (1954).
[217] *In re* Romano's Estate, 40 Wn.2d 796, 246 P.2d 501 (1952).
[218] Not every person may assert the circumstances which demonstrate the nullity of a marriage, however. In the case of *In re* Englund's Estate, 45 Wn.2d 708, 277 P.2d 717 (1954), the deceased had married a woman whose prior Idaho divorce was void for lack of jurisdiction. The sister of the deceased, having no standing to collateraliy attack the Idaho divorce, was unable to assert the nullity of the subsequent marriage for the purpose of having the "wife" removed as administratrix of the deceased's estate.
[219] The Saville case expressly rejected this broad conclusion, saying only that where the relief was sought upon grounds which would support a complaint for divorce, that divorce must be used to the exclusion of annulment. Despite a contrary suggestion by the court, it would appear that there are no grounds for annulment which would not be grounds for a divorce.
[220] RCW 26.08.050.
[221] RCW 26.08.060.
[222] 48 Wn.2d 862, 296 P.2d 1010 (1956).
[223] Davis v. Davis, 12 Wn.2d 499, 122 P.2d 497 (1942).

has indicated that RCW 26.08.110 is as generally applicable to actions for a decree of nullity as for divorce.

SEPARATE MAINTENANCE

The superior court, having the inherent powers of an equity court, was able to award separate maintenance without statutory authorization and frequently did so prior to 1949.[224] Indeed there is still no statutory provision authorizing the commencement of an action for separate maintenance. The statute[225] enacted in 1949 provides only that: "If the court determines after trial that no divorce or annulment shall be granted, it may enter a decree of separate maintenance. . . ." It has been suggested that this statute was "designed to permit the court to award separate maintenance in cases where only a divorce or annulment was sought in the pleadings. Heretofore the court was without the power to do this."[226] Since a decree of separate maintenance does not terminate the marital status, there is no requirement that the plaintiff establish the same jurisdictional base of domicile that would be required in actions for divorce.[227] It may have been the intended purpose of the legislation to authorize entry of separate maintenance even though the relief is not requested. The court has not been required to determine whether such unsought relief may be awarded.[228] It has been held that a wife may be granted separate maintenance upon the amendment of her pleading although she, as defendant in a divorce action, had initially sought no relief.[229]

Whatever rule is ultimately announced regarding the pleading requirement, it is clear that there are many cases in which divorce actions will not support a decree of separate maintenance because of the different grounds in the two remedies. Two recent decisions have held that separate maintenance may be granted *only* when the wife establishes

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[224] Illustrative cases are: McGarry v. McGarry, 181 Wash. 689, 44 P.2d 816 (1935); Schonborn v. Schonborn, 27 Wash. 421, 67 Pac. 987 (1902); Kimble v. Kimble, 17 Wash. 75, 49 Pac. 216 (1897).

[225] RCW 26.08.120.

[226] See the dissenting opinion in Stibbs v. Stibbs, 38 Wn.2d 565, 231 P.2d 310 (1951). The quoted statement is a dictum.

[227] State *ex rel.* Lloyd v. Superior Court, 55 Wash. 347, 104 Pac. 771 (1909); Herr v. Herr, 35 Wn. 2d 164, 211 P.2d 710 (1949).

[228] The case of State *ex rel.* Adams v. Superior Court, 36 Wn.2d 868, 220 P.2d 1081 (1950), and Sheldon v. Sheldon, 47 Wn.2d 699, 289 P.2d 335 (1955), should be noted in this connection. The cases held, respectively, that an award of alimony and an award of custody in a default divorce, neither being prayed for in the complaint, were violative of due process requirements.

[229] Metcalf v. Metcalf, 50 Wn.2d 167, 310 P.2d 254 (1957). The court expressly passed the question of whether such a decree could be entered without the request in an amended pleading.

both abandonment and non-support.[230] These decisions appear consistent with earlier cases requiring an abandonment,[231] but inconsistent in requiring a showing of the additional factor of non-support.[232] The present rule may be the product of a conscious judicial policy to limit the use of separate maintenance. The court has demonstrated that where divorce is requested by one spouse and separate maintenance by the other, divorce is the appropriate remedy.[233]

The function of the decree is to provide support during the continued separation, not to make a permanent disposition of assets. *Cohn v. Cohn*,[234] a case decided before the enactment of the new law, held that a property division could not be made in separate maintenance action. The statute[235] states that the court may "set aside property for the benefit of the wife and children." By a footnote the court has implied that the rule in the *Cohn* case has been changed,[236] although this issue was not necessary to resolve in the case being decided.

Attorney's fees and costs in actions to modify decrees of separate maintenance are provided by statute,[237] but fees and costs *pendente lite* are not. The court has held that the latter right exists independently of statute although the award is to be controlled by analogy to RCW 26.08.090 and cases interpreting that section.[238]

SUIT COSTS AND ATTORNEY'S FEES

The allowance of suit costs and attorney's fees is governed by statute for the initial trial and appeal[239] and in actions seeking modification of orders.[240] Contingent fee arrangements are not permissable in divorce litigation.[241] The purpose of the allowance is to permit effective preparation and presentation of the case and an action may be stayed until the plaintiff husband provides money necessary for the wife's

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[230] Manzer v. Manzer, 154 Wash. Dec. 801, 344 P.2d 212 (1959); Roberts v. Roberts, 51 Wn.2d 499, 319 P.2d 545 (1957).

[231] Anderson v. Anderson, 42 Wn.2d 370, 255 P.2d 373 (1953).

[232] Best v. Best, 48 Wn. 2d 252, 292 P.2d 1061 (1956). A pre-1949 decision, Morden v. Morden, 119 Wash. 176, 205 Pac. 377 (1922), is clearly in conflict with the recent cases.

[233] Fallin v. Fallin, 154 Wash. Dec. 445, 340 P.2d 791 (1959); Short v. Short, 154 Wash. Dec. 287, 340 P.2d 168 (1959).

[234] 4 Wn.2d 322, 103 P.2d 366 (1940).

[235] RCW 26.08.120.

[236] Jensen v. Jensen, 154 Wash. Dec. 588, 341 P.2d 882 (1959). The trial court ordered the husband to pay one-half of his earnings to the wife and in no event less than $400 per month. This was held to be an order for support, not an attempt to divide the property.

[237] RCW 26.08.190.

[238] Stibbs v. Stibbs, 38 Wn.2d 565, 231 P.2d 310 (1951).

[239] RCW 26.08.090.

[240] RCW 26.08.190.

[241] *In re* Smith, 42 Wn.2d 188, 254 P.2d 464 (1953).

appearance.[242] In petitions to modify or on appeals the court may award fees to either party.[243] The awards are in the discretion of the court, [244] with the major requirement being that the wife establish a need for the funds. [245] Need may be established where the husband controls all available assets, even though the wife's share will eventually be substantial.[246] The amount awarded for costs and fees will be influenced by the other orders concerning property division, support and alimony[247] as well as by the usual factors of time, difficulty of the questions presented, the amount of the property involved, and results obtained.[248]

Despite the 1949 addition to RCW 26.08.090 authorizing the supreme court to award fees and costs upon appeal, it has been held that the superior court may also make such awards.[249] The supreme court may make the award, but the request is to be made as part of the appeal, not by subsequent separate motion.[250]

It had been decided prior to 1949 that an attorney may enforce an order to pay attorney's fees by execution,[251] and the court recently left open the possibility that the attorney may be able to use a contempt citation for the same purpose.[252]

CONCLUSION

To attempt a brief summary of the decisions under the new divorce act could only be misleading. Both the statutes and opinions emphasize the significance of flexibility and discretion in meeting the constantly varying factual patterns arising in family disputes. Under such circumstances one becomes chary of general rules. Nonetheless a few basic observations may be appropriate.

The major development has been the emphasis of divorce as the

[242] State *ex rel.* Pearce v. Superior Court, 34 Wn.2d 768, 209 P.2d 906 (1949).
[243] Gibson v. Von Olnhausen, 43 Wn.2d 803, 263 P.2d 954 (1953).
[244] Malfait v. Malfait, 154 Wash. Dec. 503, 341 P.2d 154 (1959); Roberts v. Roberts, 51 Wn. 2d 499, 319 P.2d 545 (1957); Schmidt v. Schmidt, 51 Wn.2d 753, 321 P.2d 895 (1958); Platts v. Platts, 45 Wn.2d 853, 278 P.2d 679 (1954); Smith v. Smith, 45 Wn.2d 672, 277 P.2d 339 (1954).
[245] Akins v. Akins, 51 Wn.2d 887, 322 P.2d 872 (1958); Blakey v. Blakey, 51 Wn.2d 404, 318 P.2d 958 (1957); Kain v. Kain, 51 Wn.2d 387, 318 P.2d 955 (1957); Koon v. Koon, 50 Wn.2d 577, 313 P.2d 369 (1957); Lynch v. Lynch, 38 Wn.2d 437, 229 P.2d 885 (1951).
[246] Stringfellow v. Stringfellow, 53 Wn.2d 359, 333 P.2d 936 (1959).
[247] Johnson v. Johnson, 53 Wn.2d 107, 330 P.2d 1075 (1958); Wills v. Wills, 50 Wn.2d 439, 312 P.2d 661 (1957).
[248] Abel v. Abel, 47 Wn.2d 816, 289 P.2d 724 (1955).
[249] Hilsenberg v. Hilsenberg, 154 Wash. Dec. 790, 344 P.2d 214 (1959); State *ex rel.* Akinson v. Church, 37 Wn.2d 814, 226 P.2d 861 (1951).
[250] Best v. Best, 49 Wn.2d 128, 298 P.2d 855 (1956).
[251] Yoder v. Yoder, 105 Wash. 491, 178 Pac. 474 (1919).
[252] Smith v. Smith, 53 Wn.2d 744, 337 P.2d 51 (1959).

preferred remedy for marital problems, a policy implemented by the exclusion of annulment and the severe limitation of separate maintenance. The decree of nullity remains, however, and has actually been made more attractive by the provisions legitimizing children and making available full ancillary relief.

Proof of the subjective effect of cruelty has become the principal problem in connection with grounds for divorce, although some questions in relation to "legal age" and five-year separation require clarification. There are also open problems concerning the defenses of insanity and condonation. Provocation as a defense is not new, but may be assuming new importance.

The distinction between alimony and property division remains very confusing, but with the development of a line of cases permitting contempt enforcement of property awards the distinction has become somewhat less crucial. The court has invited parties to exert more control in this regard by skillful use of property settlement agreements.

Problems of custody, visitation, and child support are the matters most litigated. The recently demonstrated determination of the appellate court to support the trial court's use of discretion in this area will undoubtedly reduce the volume of appeals in the future. Welfare of the child has emerged as the only test of real significance in custody determinations, and the proper methods of using expert evidence and interrogation of the child in this connection have been well illustrated.

Fault and the desire to punish erring spouses have become factors of receding importance. The court has indicated that the power to award costs and fees is to be exercised for the sole purpose of enabling parties to have a full and fair hearing. There has been consistent insistence upon due process, demonstrated especially by the court's refusal to permit resolution of issues not expressly raised in pleadings upon which defaulting defendants may have relied. The trend has been away from summary dispositions or rigid, doctrinal treatment.

Trends toward flexibility increase the complexity of the lawyer's work, and emphasis of discretion makes prediction of results difficult. However, it is exactly these features which are most essential in domestic relation cases. The cases have established major policies under the act and have made it usable. It is the lawyer's responsibility to use it well.