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I. Introduction

For nearly two centuries American law required that one spouse prove that the other was guilty of wrongful conduct before a divorce would be granted. The spouse seeking the divorce usually had to prove not only the other's fault, but his own blamelessness as well. Although in the era following World War II there has been a strong trend away from this concept of fault, Pennsylvania remains an outstanding exception. This article briefly reviews the history of divorce law in America, citing the Pennsylvania statutes as an example of the approach that predominated through the middle of the twentieth century. Pennsylvania's present divorce laws are contrasted with the more liberal "no-fault" approach taken by the vast majority of the states.

II. The Evolution of Divorce Law in the United States

Divorce in Pennsylvania, as elsewhere in the United States, is strictly statutory, and the power to regulate marriage and divorce is reserved to the states as part of their police power. The states' monopoly with respect to termination of marriages and their virtually absolute power to prescribe the means whereby a divorce may be granted have been consistently upheld.[1]

The state is an "unnamed third party" in divorce actions because of its overriding interest in promoting the public welfare by encouraging

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1. *See* Boddie v. Connecticut, 401 U.S. 371 (1971).

family stability. Early attacks upon the constitutionality of divorce laws focused upon the contractual aspects of marriage—the rights of parties to a contract in general and the constitutional prohibition against impairment of contracts. These arguments were uniformly rejected on the theory that the contractual aspects of marriage are peripheral considerations and that marriage is actually a status, relationship, or institution in which the state has important interests. An example of this interpretation can be found in *Maynard v. Hill,*[2] in which the United States Supreme Court upheld a divorce enacted by the legislative assembly of the territory of Washington as a valid exercise of legislative power. The actual issue before the Court was title to a territorial land grant made to the husband subsequent to the legislative divorce. Determinative of the issue of title was the validity of the divorce, which the husband had obtained by legislative act, without notice to the wife, after he had deserted her some years previously. The wife's heirs argued unsuccessfully that the divorce act constituted a law impairing the marriage contract of the parties.

At present, by mandate of the Pennsylvania Constitution, only the courts are empowered to terminate marriages,[3] and this power is strictly limited by the legislature to certain enumerated grounds and other requirements.[4] The source of legislative power with regard to termination of marriages is found in the British legal tradition, which the colonial legislatures and assemblies continued with some essential adaptations. The legislative power to terminate marriages developed of necessity to fill a void resulting from the limitations of the English ecclesiastical courts. Although marriage and divorce were within the purview of the Church and, therefore, within the exclusive jurisdiction of the ecclesiastical courts, the latter applied only canon law and could not terminate marriages. The ecclesiastical courts could grant a divorce *a mensa et thoro,* divorce from bed and board amounting to a judicially-approved separation. A marriage could also be annulled if it was void as a result of pre-existing disabilities, but in such case the marriage was set aside or "avoided," not terminated. Only Parliament could, and did, grant divorces *a vinculo matrimonii,* absolute divorces terminating existing marriages.

As a consequence of the parliamentary tradition, the early colonists apparently viewed divorce as a natural subject for the exercise of legislative power. The colonial assemblies assumed jurisdiction over divorce and annulment of marriage, but there was one important difference between the colonial assemblies, or the early state legislatures, and

2. Maynard v. Hill, 125 U.S. 190 (1888). In *Maynard*, the Supreme Court sets forth a thorough discussion of legislative divorces in the United States.

3. *See* PA. CONST. art. 3, § 32 (1967) (prohibits special laws). *See* note 7 *infra.*

4. The divorce laws of Pennsylvania are codified at PA. STAT. ANN. tit. 23, §§ 1-98 (Purdon 1955). Specific grounds for divorce are set forth in PA. STAT. ANN. tit. 23, § 10 (Purdon 1955).

Parliament. Parliament functioned as a judicial tribunal as well as a legislature. It became necessary for the early Pennsylvania legislatures to perform some of the functions of a court, such as investigation and fact finding with regard to petitions for divorce.

In England, divorces continued to be granted by private act of Parliament until 1857, when the Matrimonial Causes Act was enacted.[5] There were a number of divorces granted, or, more precisely, enacted by the Pennsylvania legislature on a variety of grounds. Frequently the grounds were not specified in the legislative act and the terms divorce and annulment were often used interchangeably. It is apparent that there remained some difficulty with regard to the concept of terminating a marriage while acknowledging its validity. The ingrained belief that a marriage could not be terminated unless it was somehow defective is reflected in the use of annulment language in the divorce acts.[6]

The legislature's power to enact divorces was curtailed by the constitution of 1838, which vested power in the courts to terminate marriages in enumerated cases. Article I, section 14 of the Constitution of Pennsylvania, as amended in 1838, provided that "the legislature shall not have power to enact laws annulling the contract of marriage in any case where, by law, the courts of this Commonwealth are, or may hereafter be empowered to decree a divorce."[7]

After 1838 the legislature, as well as the courts, assumed by implication that while the legislature could no longer enact divorces on the enumerated grounds, in other cases legislative action was proper. The result was overlapping jurisdiction in divorce cases, which a number of litigants interpreted as providing them with a choice of forum.

In *Jones v. Jones,*[8] an action in ejectment, ownership of real estate turned upon the validity of an act of assembly terminating the marriage between the parties. The evidence before the supreme court revealed that several years prior to the petition for a legislative divorce, the plaintiff-wife had instituted divorce proceedings in the appropriate court on grounds of indignities and cruel treatment, but because she was unable to meet her burden of proof, a verdict had been rendered for the defendant-husband. The supreme court ruled that the denial of a divorce by the proper court did not necessarily preclude a petition to the legislature for a divorce asserting grounds other than those specifically placed within the jurisdiction of the court.[9]

5. Matrimonial Causes Act, 1857, 20 & 21 Vict., c. 85.

6. *See* PA. STAT. ANN. tit. 23, §§ 10(1)(b) and (g) (Purdon 1955), which establishes bigamy and fraud as grounds for divorce. Both of these grounds constitute a basis for annulment pursuant to PA. STAT. ANN. tit. 23, § 12 (Purdon 1955).

7. PA. CONST. art. 1, § 14 (1938)(amended 1874 and 1967). The Pennsylvania Constitution no longer contains such an express prohibition. The quoted provision was deleted and a provision prohibiting enactment of special laws was adopted in 1967. *See* PA. CONST. art. 3, § 32.

8. 12 Pa. 350 (1849).

9. *Id.* at 357.

The law enacted by the legislature to divorce the parties in *Cronise v. Cronise*[10] survived attack in the courts because plaintiff had sought and obtained a divorce that did not fall within one of the enumerated grounds reserved to the courts. The supreme court found, as had the legislature, that plaintiff-wife was sufficiently deserving of the relief that a divorce would afford her even though she would have been denied a divorce had she instituted her proceedings in the courts rather than in the legislature.

Legislative divorces continued to be available on a limited basis until they were prohibited by the constitution of 1874.[11] The abolition of divorce by legislative enactment was almost universally viewed as a reform that would avoid many abuses that had previously occurred. One such abuse was highlighted by the *Cronise* case: defendant-husband, who had successfully opposed the divorce action in the courts, had stated that he would have defended in the legislature as well had he been notified of the proceedings. The Pennsylvania Supreme Court held that notice was not necessary because the legislative divorce was a law and not a decree.[12]

III. Pennsylvania Divorce Law—From Pre-Revolution to the Present

The legal principles that govern the Pennsylvania divorce statutes today were first enunciated in 1785.[13] Pennsylvania divorce law is derived almost entirely from the law of eighteenth century Scotland. For example, the penal provision prohibiting the marriage of a defendant in a successful action for divorce on grounds of adultery to a named co-respondent during the life of the injured spouse is assumed to have been derived from the Scottish oath of calumny.[14]

The first divorce code enacted in Pennsylvania, the Act of 1785,[15] provided for divorce from the bonds of matrimony on the grounds of impotency, bigamy, adultery, desertion, or marriage on false rumor of death. A bed and board divorce could be obtained by a wife on the additional grounds of abandonment, cruel and barbarous treatment, or indignities to the person. This divorce law was recodified by the Act of 1815,[16] which reduced the desertion period to two years and added cruel and barbarous treatment and indignities as grounds for divorce from bed and board for a husband as well as a wife. The present divorce law[17] made relatively little change in the substance of the Act of 1815, which was only a slight modification of the Act of 1785.

10. 54 Pa. 255 (1867).
11. PA. CONST. art. 3, § 7 (1874) (amended and renumbered as art. 3, § 32 (1967)).
12. Cronise v. Cronise, 54 Pa. 255, 262 (1867).
13. An Act Concerning Divorces and Alimony, c. 1187, 12 Pa. Stat. 94 (1785).
14. *See* Garrat v. Garrat, 4 Yeates 243 (Pa. 1805).
15. *See* note 13 *supra*.
16. Act of March 13, 1815, P.L. 150 No. —.
17. PA. STAT. ANN. tit. 23, §§ 1-98 (Purdon 1955).

The only successful attempt to reform the divorce laws, albeit a minor one, culminated in an amendment to the divorce law in 1972. The amendment provides that if the defendant is insane or has a serious mental disorder that results in confinement in a mental institution and there is no reasonable, foreseeable prospect of his or her being discharged from in-patient care, a divorce can be granted.[18] This represents a change from the prior law that insanity was not a ground for divorce and that when an action was brought against a hopelessly insane person it had to be based upon some statutory ground that arose before the defendant became insane.[19]

Pennsylvania is one of only three states that still require, except in case of hopeless mental illness, that one party prove the other to have been at fault in the marriage.[20] All of the other states permit a divorce on the grounds of incompatibility of the parties. Incompatibility is clearly not a ground for divorce in Pennsylvania. Domestic infelicity, intemperance, inconvenience or mistreatment as a result of ill health, domestic differences, trivial altercations, incompatibility of temperament, petty irritations, frequent refusal of intercourse or failure to perform household duties have been held not to be indignities and are not otherwise grounds for divorce in Pennsylvania.[21] Judge Spaeth has succinctly explained the requirement of fault that is basic to Pennsylvania divorce law:

> [T]he right to obtain a divorce in Pennsylvania is defined in punitive terms, which apply to both parties: one who commits any of certain enumerated wrongs may be punished by being divorced from his or her spouse; the punishment may be exacted, however, only by one who is innocent.[22]

If both parties are nearly equally at fault, so that neither can clearly be said to be the innocent and injured spouse, Pennsylvania will grant the divorce to neither.[23]

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18. PA. STAT. ANN. tit. 23, § 10 (Purdon 1976). The requirements under the new provision are strict, however, and few plaintiffs will be able to obtain a divorce on this ground. The defendant must have been confined in a mental institution for at least three years prior to the filing of the complaint in divorce and there must be "no reasonably foreseeable prospect of the defendant spouse's being discharged from inpatient care during the next three years subsequent to the filing of the complaint." These facts must be certified by the superintendent of the institution and supported by a statement of the treating physician. Experience has indicated that few physicians are willing to predict the future of a mentally ill individual.

19. Boyer v. Boyer, 163 Pa. Super. Ct. 520, 63 A.2d 187 (1940).

20. The other two states are Illinois and South Dakota.

21. *See* Matobcik v. Matobcik, 173 Pa. Super. Ct. 267, 98 A.2d 238 (1953); Cowher v. Cowher, 172 Pa. Super. Ct. 989, 1 A.2d 304 (1952); Stewart v. Stewart, 171 Pa. Super. Ct. 218, 90 A.2d 402 (1952); Kranch v. Kranch, 170 Pa. Super. Ct. 169, 84 A.2d 230 (1951). *See also* Teitelbaum, *The Pennsylvania Divorce Law,* PA. STAT. ANN. tit. 23, p. 343 (introduction to the Title 23) noting that "[u]nhappiness, incompatibility, lack of harmony and other such matters which indicate misalliances are not sufficient for divorce."

22. Steinke v. Steinke, 238 Pa. Super. Ct. 74, 92, 357 A. 2d 674, 683 (1975) (Spaeth, J., concurring in result).

23. *See, e.g.,* Hepworth v. Hepworth, 129 Pa. Super. Ct. 360, 195 A. 924 (1937).

Today nearly all divorce actions in Pennsylvania are brought on the grounds of indignities. Indignities represent a catch-all that not only includes actions on the part of the guilty spouse such as "vulgarity, unmerited reproach, studied neglect, ridicule and abusive language,"[24] but can include other grounds for divorce, such as adultery, or cruel and barbarous treatment.[25] The party bringing the divorce action will rarely limit himself to one of these other statutory grounds because they can be incorported within a case of indignities, whereupon the party can bring in evidence of other mistreatment by the spouse in addition to evidence supporting the more specific ground.

The courts have been strict in their interpretation of what constitutes indignities. A party seeking a divorce on this ground must show that he has been subjected to a course of behavior that is humiliating and degrading, making his life intolerable and burdensome. A single act is not sufficient; there must be a continuous course of mistreatment.[26] The cited actions must have manifested the spirit of malevolence, hate and estrangement that is central to a charge of indignities.[27]

In recent years, the courts have found themselves caught between Scylla and Charybdis when interpreting the present Pennsylvania divorce code. On the one hand they are faced with strict precedential interpretations requiring the degree of hatred and estrangement discussed above. On the other hand, they are often faced with records that they feel require that plaintiff be granted a divorce if at all possible.

A classic example of this dilemma is found in *Steinke v. Steinke.*[28] Shortly after the Steinkes were married, the husband informed his wife that he never wanted to grow up. He started wearing diapers and rubber pants. Nine months after the parties were married, a daughter was born and the husband stopped wearing diapers, but he then expressed a desire to dress as a woman. With the help of hormone pills he began to assume the identity and appearance of a woman, at work and in public as well as at home. He applied for an operation to transform his sex, but after a period of time was advised by the physician that he was not a proper candidate. He soon stopped the treatments and, feeling himself cured, resumed living as a man. At about the same time, his wife filed a complaint in divorce alleging indignities. The lower court refused to grant the divorce because the husband's conduct stemmed from a psychiatric disorder, and mental illness has always been a valid defense to any

24. Patton v. Patton, 183 Pa. Super. Ct. 468, 132 A.2d 915 (1957).

25. *See* Foley v. Foley, 188 Pa. Super. Ct. 292, 146 A.2d 328 (1959) (adultery, among other acts, as indignities); Robinson v. Robinson, 183 Pa. Super. Ct. 574, 133 A.2d 259 (1957) (cruel and barbarous treatment).

26. Commonwealth *ex rel.* Whitney v. Whitney, 160 Pa. Super. Ct. 224, 228, 50 A.2d 732, 734 (1947).

27. Barr v. Barr, 232 Pa. Super. Ct. 9, 331 A.2d 774 (1974); Sells v. Sells, 228 Pa. Super. Ct. 331, 323 A.2d 20 (1974).

28. 238 Pa. Super. Ct. 74, 357 A.2d 674 (1975).

accusation of indignities. The superior court, on the horns of a dilemma, reversed, holding that the husband's predilection was "the indulgence of a private fantasy" rather than a product of mental illness.[29]

Judge Spaeth stated in a thoughtful concurring opinion[30] that the majority had reached a humane result, but that it could not be squared with the present state of the law. Judge Spaeth noted that the lower court had found that despite the defendant's bizarre behavior the record did not show "a spirit of malevolence [or] hate." During the course of his transvestitism the husband had told his wife that he loved her and his daughter very much and he had worked hard to provide them with what he could afford. Judge Spaeth resolved the dilemma by concluding, contrary to the lower court and the majority, that "hate and estrangement" need not be proved to support a charge of indignities.

Judge Spaeth also discussed at length whether the defendant could be held responsible for his conduct or whether mental illness was a defense to the indignities alleged. Noting that the standard should be "whether, under all these circumstances, including [the defendant's] mental derangement as and if the jury sees it, it would be just to hold [the defendant] accountable,"[31] Judge Spaeth felt that despite any mental derangement on the part of the defendant, the divorce should be granted:

> Taking into account all of the circumstances, [the defendant] will not be unjustly treated if held accountable for his conduct. True, he has suffered from a mental derangement, and this weighs against holding him accountable. This circumstance, however, is more than balanced by the others. Because of [the defendant's] conduct, the marital relationship has been destroyed; a divorce will recognize this destruction. In thus freeing the parties from the bonds of a stifling relationship, [the defendant] will not be treated with undue severity; *he is and has been physically and financially independent.*[32]

It is interesting to note that the final thought of Judge Spaeth was that the defendant, if divorced, will not be left destitute since he was the wage earner. Actually, under the present divorce code there is no room for such a consideration. If the party is at fault, the divorce will be granted and alimony will be denied regardless of the number of years the parties have been married and even if the defendant will become a ward of the state.

Financial exigencies pose a serious problem under Pennsylvania's fault divorce law. A judge may wish to grant the divorce to the plaintiff so that he can begin a new life and end a hopeless, destroyed marriage. At the same time, the judge realizes that if he grants a divorce the plaintiff cannot be required to support his ex-spouse who, though at fault, may be

29. *Id.* at 82, 357 A.2d at 678.
30. *Id.* at 83, 357 A.2d at 678.
31. *Id.* at 99-100, 357 A.2d at 687, *quoting* Commonwealth v. Simms, 228 Pa. Super. Ct. 85, 111, 324 A.2d 365, 385 (1974).
32. *Id.* at 102, 357 A.2d at 688-89 (emphasis added).

left destitute. The judge is not always allowed the comfort of knowing that the party seeking the divorce is the one who is financially dependent upon the other spouse, as was the case in *Steinke.*[33]

Practically speaking, this problem is often solved by the defendant's contesting the divorce until plaintiff agrees to enter into a favorable property settlement agreement. The result is that the vast majority of divorces in Pennsylvania are uncontested, the parties having reached a property settlement agreement prior to the hearing. One may not infer that these uncontested divorces are collusive. The plaintiff is still required to set forth a cause of action, but is not required to answer for his conduct in the uncontested hearing, something he would have to do in a contested divorce with resultant uncertainty as to the outcome.

The property settlement agreement that results from these negotiations is often not satisfactory. For example, a husband agrees to pay his wife a certain amount per month so long as she lives or until she remarries, a typical provision in a marital property settlement. The husband is under no order of court requiring him to make the payment. What exists is simply a contract between the parties. If the husband defaults, the wife must institute an action, either at law or in equity, to obtain the money due. The unsatisfactory result that such a contract action can have is evidenced by *Commonwealth ex rel. Jones v. Jones,*[34] in which a husband had entered into an agreement, but then put all his assets beyond the reach of creditors. The wife obtained valid judgments against the husband for the amount due under the terms of the agreement, but there was no way that she could enforce them.

The supreme court dealt with this problem of unenforceable marital property settlements in *Commonwealth ex rel. Silvestri v. Slatkowski.*[35] The court held that the wife had a right to proceed with an action in equity to compel specific performance of a property settlement agreement. The court specifically noted, however, that it was not deciding whether the husband could be held in contempt if he failed to perform the agreement. The most useful resource in enforcing the duty of support, wage attachment, which is permitted under the Pennsylvania Civil Procedural Support Law,[36] is specifically not available to the wife under these circumstances. The duty of support that arises out of an agreement upon divorce is merely contractual, not statutory.

Because of the problems just discussed, those interested in divorce reform are presently urging significant amendment of the Pennsylvania divorce law. Senate Bills 342 and 404, which are introduced in the 1977 session of the Pennsylvania legislature,[37] were in large part the result of

33. Steinke v. Steinke, 238 Pa. Super. Ct. 74, 357 A.2d 674 (1975).
34. 216 Pa. Super. Ct. 1, 260 A.2d 809 (1969).
35. 423 Pa. 498, 224 A.2d 212 (1966).
36. PA. STAT. ANN. tit. 62, § 2043.39 (Purdon 1968).
37. Pa. S.B. 342, 161st Sess. (1977); Pa. S.B. 404, 161st Sess. (1977).

drafting done by the Family Law Section of the Pennsylvania Bar Association. The bills provide that, in addition to all the present grounds for divorce in Pennsylvania, a divorce could be obtained if a husband and wife have lived separate and apart in different habitations for at least one year and the court, after a hearing, determines that there is no reasonable prospect of reconciliation. The bills further provide that if there are any minor children of the marriage or the defendant denies the allegation that there is no reasonable prospect of reconciliation, the court may order counseling for a period not to exceed three months to enable the parties to effect a reconciliation. If, at the expiration of that period, the parties have not reconciled, the court shall determine that there is no reasonable prospect of reconciliation. The only defenses to this ground for divorce are that the parties have not lived separate and apart for at least twenty-four months or that there is reasonable prospect of reconciliation.

The other significant change in the present Pennsylvania divorce law that the bills would effect would be the allowance of permanent alimony. To determine the nature and amount of alimony, if any, the court would be required to consider all relevant factors, including the earnings and earning abilities of the parties, the ages of the parties, the duration of the marriage and the relative assets, liabilities and needs of the parties. The fault of the parties is not to be considered.

Advocates of divorce reform in Pennsylvania, such as Professor Henry H. Foster of the New York University School of Law, have also urged reforms affecting distribution of marital property upon divorce. The amended version of Senate Bill 404 provides for equitable division of all marital property. At present, however, Pennsylvania is one of a handful of states that follow the pure common-law property system permitting division of only the jointly-owned property upon divorce.[38] The majority of American jurisdictions either have community property law (9 states) or grant the divorce court discretion to make an equitable distribution of both separate and jointly-held property (37 states). These latter states vary as to what is deemed to be marital property or subject to division. The major difference is whether or not separate property owned before marriage is included within the property subject to distribution by the divorce court.

An excellent example of a modern and equitable approach to distribution is found in the Delaware Divorce and Annulment Law, which grants the court in a proceeding for divorce or annulment the power to distribute virtually all property acquired by either party during the mar-

38. Remarks of Professor Henry H. Foster, *Matrimonial Law: State of Disunion, 1976*, before the Family Law Section of Pennsylvania Bar Association, July 9, 1976. The only other pure common law states are Florida, Georgia, Mississippi, New York, Rhode Island, South Carolina, Virginia and West Virginia. In Alabama, North Carolina and Ohio, a court may order alimony paid out of the spouse's separate property. In Maryland, only personalty is subject to equitable distribution upon divorce.

riage.[39] It can distribute the property regardless of whether title was held individually or in some form of co-ownership such as joint tenancy, tenancy in common or tenancy by the entireties. The presumption that property acquired during marriage is marital property is overcome only by showing that it was obtained in exchange for property held prior to marriage, was excluded by a valid agreement of the parties, or represented an increase in the value of property acquired prior to marriage. Having determined that it is marital property, the court must then consider factors similar to those proposed in the divorce bill drafted by the Pennsylvania Bar Association: the length of the marriage, the relative financial status of the parties, the contribution of the parties to the acquisition and preservation of the marital property, and whether the property itself was acquired by gift or devise.[40]

The Delaware Divorce and Annulment Law also gives the courts power to ensure that any alimony award will be enforceable and that the party receiving the award will not be left destitute if the payor dies.[41] The court has the right to impose a lien or charge upon marital property distributed to the payor as security for payment. Furthermore, the court can direct the continued maintenance of existing life insurance policies insuring the life of either party and forbid changes in the designation of beneficiaries. All of these powers allow the court to make an equitable distribution of property and avoid the injustice that can arise if one party who contributed to the acquisition of assets is ignorant of the fact that they were titled in the sole name of the other spouse. At the same time, the Delaware law does not automatically require that the court award one-half of the joint assets to each spouse if the court believes that one made a more significant contribution to the acquisition of those assets than did the other.

IV. National Trends in Divorce

The fault concept in Pennsylvania follows the trend of nineteenth century and early twentieth century divorce law in the United States. As discussed above, this concept has now been abandoned by all but three states. For the past three decades there has been a strong trend away from the traditional notion that one spouse must be guilty of some injury to the other before a divorce may be granted. When the states began to adopt so-called "no fault" statutes, they set different standards upon which a divorce could be granted.

California, for example, declares that a divorce may be granted if there are "irreconcilable differences which have caused the irremediable

39. DEL. CODE ANN. tit. 13, § 1513 (Supp. 1976).
40. *Id.* § 1513(a); Pa. S.B. 342, 161st Sess. (1977); Pa. S.B. 404, 161st Sess. (1977).
41. DEL. CODE ANN. tit. 13, § 1513 (Supp. 1976).

breakdown of the marriage."[42] Other states allow a decree of dissolution when "the marriage is irretreviably broken,"[43] or "when there has been a breakdown of the marriage relationship to the extent that the legitimate objects of marriage have been destroyed and there remains no reasonable likelihood that the marriage can be preserved."[44] Nevada and New Mexico allow divorces for mere "incompatability,"[45] and Alabama similarly permits divorce if there is "a complete incompatibility of temperament."[46]

It is apparent that all these "no-fault" statutes say, in effect, that if the court determines that the marriage relationship between the parties is over, then a divorce should be decreed. The concept underlying these statutes is that a unilateral decision by one spouse that the marriage is over would so destroy the marriage relationship as to justify divorce.

Another group of states takes a different approach to divorce without fault. These states recognize that a marriage has no reason for further existence when the parties have lived separate and apart for a prescribed period without cohabitation. The time period varies from six months in Montana and Vermont to five years in Idaho and Rhode Island.[47] It should be noted that living apart for the prescribed period is the sole basis upon which the marriage is dissolved—there is no requirement that the separation be consensual.

Some state legislatures have felt that with the passage of no-fault provisions there is no purpose in retaining fault grounds. Other states take the view that there is justification for retaining the fault provisions since some parties will not wish to wait the time required by the statute to dissolve the marriage on the basis of living separate and apart.

The most common fault ground among all states is adultery, which thirty-two states have retained.[48] Twenty-eight states still permit divorce

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42. CAL. CIV. CODE § 4508 (West 1970). Similar grounds for divorce are available in Idaho, Maine, New Hampshire, North Dakota, Oregon and Rhode Island.

43. Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Indiana, Kentucky, Massachusetts, Minnesota, Nebraska and Washington. *See* FAM. L. REP. (BNA) 401:0001 *et seq.* (Ref. file 1977).

44. IOWA CODE ANN. § 598.17 (West Supp. 1976). Michigan and Missouri have similar statutory provisions.

45. NEV. REV. STAT. § 125.010(10) (1969); N.M. STAT. ANN. § 22-7-1.8 (1954).

46. ALA. CODE tit. 34, § 20.7 (Supp. 1973).

47. MONT. REV. CODES ANN. § 48-316(b)(1) (Supp. 1975); VT. STAT. ANN. tit. 15, § 551(7) (1974); IDAHO CODE § 32-610 (1974); R.I. GEN. LAWS § 15-5-2 (1970). Nevada, North Carolina, Virginia, Wisconsin, and Georgia have provisions for living one year separate and apart. Connecticut and New Jersey have separation periods of eighteen months. Hawaii, Montana, Ohio, Tennessee, the District of Columbia and West Virginia have a twenty-four month period. Maryland, South Carolina, and Texas have a three year period. *See* FAM. L. REP. (BNA) 401:0001 *et seq.* (Ref. file 1977).

48. Alabama, Arkansas, Georgia, Idaho, Illinois, Kansas, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Caro-

if one spouse willfully deserts the other.[49] The vast majority of these states declare that a one-year desertion suffices. Maine requires, however, that desertion be for a period of three years,[50] and Pennsylvania and New Hampshire require a two-year desertion period.[51] Other common grounds for divorce in state statutes include impotency, conviction of a felony, sodomy, habitual drunkenness or addiction to drugs, incurable insanity, pregnancy at the time of the marriage, cruelty, and gross neglect.[52]

V. Conclusion

The opponents of divorce reform in the United States continue to contend that "no-fault" provisions make it too simple for one party to end the marriage. The strong countervailing argument to this point of view is found in the time requirements of most "no-fault" divorce statutes. It is difficult to sustain the position that divorce is simple and

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lina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin and Wyoming. *See* FAM. L. REP. (BNA) 401:0001 *et seq.* (Ref. file 1977).

49. Alabama, Arkansas, Connecticut, Georgia, Idaho, Illinois, Kansas, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia and Wisconsin. *See* FAM. L. REP. (BNA) 401:0001 *et seq.* (Ref. file 1977).

50. ME. REV. STAT. ANN. tit. 19, § 691 (West 1965).

51. PA. STAT. ANN. tit. 23, § 10 (Purdon 1955); N.H. REV. STAT. ANN. § 458:7 (1968).

52. The incurable impotency of the defendant at the time of marriage is a ground for the dissolution of marriage in Alabama, Arkansas, Georgia, Illinois, Indiana, Maine, Maryland, Massachusetts, Mississippi, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Utah and Wyoming.

Conviction of a felony or imprisonment for various causes for an extended period of time is a ground for divorce in Alabama, Arkansas, Connecticut, Georgia, Idaho, Indiana, Louisiana, Maryland, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin and Wyoming.

Sodomy is a ground for divorce in Alabama, North Carolina and Virginia.

Habitual drunkenness or being addicted to alcohol or drugs is a ground for divorce in Alabama, Arkansas, Connecticut, Georgia, Idaho, Illinois, Kansas, Maine, Massachusetts, Minnesota, Mississippi, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, West Virginia, Wisconsin and Wyoming.

Incurable insanity or confinement to a mental institution for a certain period of time is a ground for divorce in Alabama, California, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Maryland, Massachusetts, Minnesota, Mississippi, Nevada, New Jersey, North Carolina, Oklahoma, Pennsylvania, Texas, Utah, Vermont, West Virginia and Wisconsin.

The pregnancy of the wife at the time of her marriage is a ground for divorce in Alabama, Georgia, Mississippi, North Carolina, Oklahoma, Tennessee and Wyoming.

Cruelty is a ground for divorce in Alabama, Arkansas, Connecticut, Georgia, Idaho, Illinois, Kansas, Maine, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

Failure to adequately support a spouse or gross neglect is a ground for divorce in Alabama, Arkansas, Idaho, Kansas, Maine, Massachusetts, North Dakota, Iowa, Rhode Island, South Dakota, Utah, Vermont, Wisconsin and Wyoming. *See* FAM. L. REP. (BNA) 401:0001 *et seq.* (Ref. file 1977).

quick when the parties in most instances must have lived separate and apart for at least one year. Logic and justice would favor that once adequate and fair financial arrangements have been made, a marriage should be ended if the parties have not maintained a common domicile for twelve months.