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Chapter 2: Labor Law

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CHAPTER 1

Domestic Relations

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A. COURT DECISIONS

§1.1. Divorce: Jurisdiction. In two cases argued together, *Fiorentino v. Probate Court* and *Fernandez v. Fernandez,*[1] the Supreme Judicial Court considered the constitutionality of statutory provisions requiring that in certain cases a person be a resident of Massachusetts for two years before he or she may file a libel for divorce.[2] The Court acknowledged that the Commonwealth has a substantial and compelling interest "in protecting its courts from fraudulent invocations of their jurisdiction,"[3] but concluded that, because less drastic means are available to serve this interest, the two-year residence requirement violates the Equal Protection Clause of the Fourteenth Amendment.[4] *Fiorentino* appears to have been nullified by the United States Supreme Court, however. In January, 1975 in *Sosna v. Iowa,*[5] the Court upheld as constitutional a similar, one-year residence requirement.[6]

§1.2. Divorce: Grounds. *Lynch v. Lynch*[1] involved an appeal from a probate court decree dismissing a libel for divorce brought on the grounds of cruel and abusive treatment and desertion. The parties had been married for fifty years but had not lived together since 1931. At the hearing, the husband, who was seeking the divorce, alleged two instances in which his wife was verbally abusive.[2] His wife,

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§1.1. [1] 1974 Mass. Adv. Sh. 403, 310 N.E.2d 112.
[2] G.L. c. 208, §§ 4-5.
[3] 1974 Mass. Adv. Sh. at 409, 310 N.E.2d at 117.
[4] Id. at 407-08, 310 N.E.2d at 116-17.
[5] —U.S.—, 95 S. Ct. 553 (1975), aff'g 360 F. Supp. 1182 (N.D. Iowa 1973).
[6] 95 S. Ct. at 563.

§1.2. [1] 1973 Mass. App. Ct. Adv. Sh. 701, 304 N.E.2d 445.
[2] Id. at 701-02, 304 N.E.2d at 446. The court stated that the incidents involved merely an "exchange of epithets" in one instance and the wife's labeling of the husband as "a faker" in the other. In the second instance, however, the insult occurred in a courtroom, when the wife claimed that her husband was faking illness to avoid paying support. Id.

who stood to lose potential Social Security benefits if the marriage were terminated, contested the divorce, claiming the instances described were not sufficient to constitute cruel and abusive treatment. The probate judge agreed and dismissed the libel.[3]

The Appeals Court noted that although verbal abuse may sometimes be cruel enough to warrant divorce,[4] an examination of the report of material facts of *Lynch* did "not as a matter of law require a different decree from that which had been entered."[5] The case is noteworthy for two reasons. First, the court again affirmed the principle of granting probate judges broad discretion in determining what conduct does or does not constitute cruel and abusive treatment, and hence what kind of marital misconduct calls for divorce. Although appellate courts may be increasingly willing to affirm the granting of divorce on a minimal showing of cruelty,[6] the *Lynch* decision demonstrates that they have yet to declare that a minimal showing *compels* divorce. Until such a declaration is made, individual probate judges apparently may continue to apply somewhat stricter standards than those established in the 1973 *Ober v. Ober* decision.[7]

Second, apparently neither the probate judge nor the Appeals Court was swayed by the fact that the parties had not lived together for more than four decades. In approximately half the states — including all but one of those contiguous to Massachusetts — "living apart" for a period of time is a statutory ground for divorce.[8] It undoubtedly would have been an encroachment on the legislative function for the court here to declare that the long separation in itself justified divorce. The court could have taken, either expressly or tacitly, the position that acts which might not be regarded as cruel and abusive in marriages which show some countervailing signs of life must nevertheless be regarded as grounds for divorce when the parties have lived apart over an extended period of time. That the court did not do so indicates that judicial loosening of the grounds has come as far as it will, and that if further revision is in order, that responsibility must lie with the legislature.

§1.3. Divorce: Apportionment of joint property. In *D'Amico v. D'Amico,*[1] the divorce proceedings included a petition by the husband

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[3] Id. at 702, 304 N.E.2d at 446.

[4] See Ober v. Ober, 1973 Mass. App. Ct. Adv. Sh. 33, 294 N.E.2d 449.

[5] 1973 Mass. App. Ct. Adv. Sh. at 702, 304 N.E.2d at 447.

[6] See Ober v. Ober, 1973 Mass. App. Ct. Adv. Sh. 33, 294 N.E.2d 449.

[7] Id. The court sustained the divorce awarded on grounds of cruel and abusive treatment where the wife made baseless accusations of infidelity. Id. at 36, 294 N.E.2d at 451.

[8] The required period of living apart varies greatly. In Vermont it is six months; in Rhode Island it is five years. Vt. Stat. Ann. tit. 15, § 551 (Cum. Supp. 1972); R.I. Gen. Laws Ann. § 15-5-3 (Supp. 1973). New Hampshire does not have a "separation" ground, but does allow divorce if there are "irreconcilable differences". N.H. Rev. Stat. Ann. § 458:7-a (Supp. 1973).

§1.3. [1] 1973 Mass. App. Ct. Adv. Sh. 669, 303 N.E.2d 737.

for determination of title to certain joint bank accounts. The accounts had been funded with deposits from the earnings of both the husband and wife; withdrawals were made periodically to pay for the parties' living expenses. The probate judge decreed, in effect, that the remaining balance in the accounts should be divided between the husband and wife in proportion to their respective contributions.[2] The wife objected to this division and appealed, contending that because her husband owed her a duty of support, all the withdrawals for mutual living expenses should be regarded as having been paid entirely from his contributions to the accounts. By attributing all the withdrawals to the husband's contributions, the resulting formula would have the effect of greatly increasing the wife's share of the remaining balance.

The Appeals Court rejected her contentions and affirmed the decree. "We agree that such a duty [to support one's wife] will ordinarily be imposed on a husband, but this is not invariably the case. Where, as here, the wife was at all times gainfully employed, the living expenses can be and often are shared by intention of the parties."[3] Noting that the wife had endorsed her pay checks to her husband and that their funds had been commingled, the court ruled that there was sufficient evidence to support the probate judge's finding that the parties intended to share the responsibility for living expenses.[4]

Although *D'Amico* by no means abolishes a husband's traditional duty to support his wife, it does seem to reveal a judicial willingness to construe that duty narrowly, at least where both spouses are wage earners. Although no explicit agreement to modify the scope of the husband's duty to support was proven, the court was willing to imply such an agreement from the parties' conduct. In light of changing sex roles and growing employment opportunities for women, such a conclusion may be just. Before determining that a couple has intended to share responsibility for support, however, courts should consider not only whether funds have been commingled, but whether the spouses shared responsibility for the management and use of their pooled resources.

§1.4. Tenancy by the entirety: Constitutional challenge. In *Klein v. Mayo*[1] the plaintiff and her estranged husband owned their marital home as tenants by the entirety. She commenced an action in federal district court seeking injunctive and declaratory relief, claiming that the operation of the Massachusetts statute governing the partition of certain mutually held property[2] deprived her of the equal protection of the laws guaranteed by the Fourteenth Amendment. Since probate judges have exclusive jurisdiction over petitions for partition of

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[2] Id.
[3] Id. at 670, 303 N.E.2d at 738.
[4] Id. at 671, 303 N.E.2d at 738.

§1.4. [1] 367 F. Supp. 583 (D. Mass. 1973).
[2] G.L. c. 241, §§ 1 et seq.

property,[3] they were named defendants in the action.[4]

The controverted portion of the statute provides that "[a]ny person, except a tenant by the entirety, owning a present undivided legal estate in land, not subject to redemption, shall be entitled to have partition in the manner hereinafter provided."[5] The plaintiff contended that this provision reflects the notion, false in her view, that men are more capable than women in managing jointly held property. As a consequence, she argued that "the statute invidiously discriminates against women in that they are not entitled to a partition of the jointly held premises as long as the marital relation endures."[6]

The United States Supreme Court has closely scrutinized statutes which make classifications based on sex,[7] but the partition statute here makes no such classification, at least on its face. Neither wives nor husbands may obtain partition of property held in a tenancy by the entirety. The court rested its decision on this point and accordingly entered judgment for the defendants.[8]

The court did acknowledge, however, that the nature of a tenancy by the entirety favors males in that husbands are entitled to exclusive possession of property so held, as well as all rents and profits that such property produces. Married couples have the alternatives of owning property solely, as tenants in common, or as joint tenants, but a tenancy by the entirety offers certain unique features. The court observed that a "wife who wants the security of indefeasible survivorship can achieve it only by means of a male-dominated tenancy."[9] The court further noted, "There is no equivalent female-biased tenancy, nor is there a 'neutral' married persons' tenancy providing for indefeasible survivorship but not vesting paramount lifetime rights in the male."[10]

Since the *Klein* case did not squarely raise the issue of whether a tenancy by the entirety might in some larger sense violate the equal protection rights of married women, the court was careful not to decide that question. It did, however, offer some grounds which might be raised as a defense in the event a constitutional attack could be properly framed. "We are mindful as well that such a challenge may or may not be met by the fact that tenancy by the entirety is but one option open to married persons, and is in no way compelled by the

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[3] G.L. c. 241, § 2.

[4] The court also ordered the plaintiff's husband to be joined as a party defendant, but he did not respond to the amended complaint. 367 F. Supp. at 586 n.4.

[5] G.L. c. 241, § 1.

[6] 367 F. Supp. at 584. In the event of divorce, a tenancy by the entirety terminates and the parties become tenants in common.

[7] See, e.g., Frontiero v. Richardson, 411 U.S. 677, 688 (1973); but see Kahn v. Shevin, 416 U.S. 351 (1974).

[8] 367 F. Supp. at 586.

[9] Id. at 585.

[10] Id. These same ends might be accomplished through the use of a trust, however.

state."[11] Whether this argument alone would provide sufficient basis for upholding tenancies by the entirety may be open to question, but the Supreme Court has seemed somewhat reluctant to strike down state laws on equal protection grounds when those laws affect land title and the passage of property on death.[12]

§1.5. Abortion: Paternal rights. In *Doe v. Doe*[1] the Supreme Judicial Court confronted the question of what legal rights, if any, a husband has with respect to his wife's decision to have an abortion. This section will concentrate on the domestic relations aspects of the case; the constitutional issues are discussed at length in a student comment in §10.8 *infra*. In *Doe* the husband sought declaratory and injunctive relief against his wife when she planned to have an abortion despite his objection. A single justice of the Court ordered the appointment of a guardian ad litem for the fetus and granted the husband temporary relief restraining the wife from procuring an abortion, pending a hearing before the full bench.[2]

The majority of the Court ordered entry of a decree that an abortion might be performed on the wife without the consent of her husband. In an opinion handed down several months later, the Court explained its ruling. It noted both that this particular couple had separated some time before proceedings had begun and that there was evidence that the husband had told his wife he did not want to support the child or have his name appear on its birth certificate. Apparently the husband's purported indifference to his unborn child prompted his wife's decision to have an abortion, but after learning of her intentions the husband stated his objections and asserted his willingness to support the child and take custody of it.[3]

Although the Court took care to recite these facts, it did not limit its holdings to circumstances where the husband and wife are estranged. Instead, it scrutinized constitutional, statutory and common law for support for the petitioner's contention that all fathers have enforceable rights in the abortion decision and found none. It recognized a line of Supreme Court cases establishing that certain interests associated with the marital relationship give rise to rights guaranteed by the federal Constitution,[4] but distinguished them on the ground that "all those cases involved a shield for the private citizen against government action, not a sword of government assistance to enable him to overturn the private decisions of his fellow citizens."[5]

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[11] Id. at 586.

[12] The Supreme Court in Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 170 (1972), distinguished Labine v. Vincent, 401 U.S. 532 (1971), on this basis.

§1.5. [1] 1974 Mass. Adv. Sh. 1089, 314 N.E.2d 128.

[2] Id. at 1090, 314 N.E.2d at 129.

[3] Id.

[4] Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[5] 1974 Mass. Adv. Sh. at 1093, 314 N.E.2d at 130.

Finding no Massachusetts statute to support the husband's claim, the Court also noted that the efforts of some state legislatures to require consent on the part of husbands have not withstood constitutional attack.[6] The Court concluded that even "[i]f it is within our power, free of constitutional prohibition, to fashion a rule of decision recognizing an enforceable right in the husband, we decline to do so, at least where the fetus is not viable."[7]

The Court professed to have jurisdiction to determine the substance of the claim, at least to the extent of being able to grant declaratory, if not injunctive, relief. Yet in essence, the Court's dismissal of the husband's bill seems ultimately to be based on jurisdictional considerations.

> We would not order either a husband or a wife to do what is necessary to conceive a child or to prevent conception, any more than we would order either party to do what is necessary to make the other happy. We think the same considerations prevent us from forbidding the wife to do what is necessary to bring about or to prevent birth, at least before the fetus is viable and in the absence of any danger to maternal life or health. *Some things must be left to private agreement.*[8]

In recognizing the limits of judicial power in such sensitive matters — and in particular, the ineffectiveness of possible sanctions — the Court recalled that even when most abortions were prohibited by criminal statutes, women who obtained them were not punished. The Court also expressed a fear that injunctions or other such sanctions might "drive determined women into the waiting offices of persons not licensed."[9] It might also have been noted that if a woman wished, she might well be able to conceal a pregnancy and abortion from her husband. Granting husbands enforceable rights might thus lead to the ironic result that a wife could be dissuaded from even informing her husband of her condition.

In short, the Court's decision appears to rest at least as much on the proposition that it would be impractical to establish an enforceable right in favor of the husband as it does on a woman's right of privacy as set forth in *Roe v. Wade.*[10] Dissenting in part, Justice Hennessey agreed that the Court should not grant an injunction as it would be "unseemly, almost unthinkable" to imprison a woman for contempt for having a legal abortion.[11] Nevertheless, he argued that if only "for the moral force of the pronouncement," the Court should declare that "the wife has a duty in these circumstances to refrain from any inten-

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[6] Id. at 1094, 314 N.E.2d at 131.
[7] Id. at 1096, 314 N.E.2d at 132.
[8] Id. (emphasis added).
[9] Id.
[10] 410 U.S. 113 (1973).
[11] 1974 Mass. Adv. Sh. at 1100, 314 N.E.2d at 134.

tional interference, by herself or by cooperation with others, with the progress of her pregnancy to full term and birth."[12]

The Court in *Doe* clearly ruled that regardless of a father's wishes, it would not interfere in a woman's abortion decision, except to protect maternal health, until the fetus is viable.[13] It also strongly suggested that it would not interfere in situations where spouses disagree on the practice of birth control. It did, however, leave some important questions unresolved. What effect, for example, does a wife's unilateral decision to have an abortion have on the status of her marriage? Such a decision might not be considered "cruel" in the narrow sense of being intended to inflict pain upon a husband, but it might well be regarded as much more threatening to a marital relationship than a thrown frying pan or even an isolated act of adultery.

Should then the courts or legislature grant a divorce to a husband whose wife has had an abortion over his objections? Several problems might arise in doing so. First, if the divorce system is to be truly fault-based, it is difficult to conceive of this legal act by the wife as being a wrong against the husband, though it might be viewed as a wrong against the marriage. Second, if her action could be seen as marital misconduct, should it be considered as a factor detrimental to her in the determination of financial and custodial issues? Third, since it would be difficult to determine the legitimacy of a husband's objections to the abortion, opponents of "easy divorce" might fear that a couple could fabricate grounds. Given the ease with which uncontested divorces can be obtained on the ground of cruel and abusive treatment, however, this does not seem to be a significant problem. Finally, if a husband were permitted to divorce a wife who gets an abortion over his objection, should he also be able to obtain a divorce if he does not approve of his wife's practice of birth control? Similarly, what should be the outcome where the roles are reversed, *i.e.*, where the husband insists on abortion or contraception but the wife refuses?

The Court in *Doe* refused to resolve these issues. "Nothing we say here is intended to affirm or deny a right in the husband to divorce, separation, child custody, or the like by reason of an abortion procured by his wife without his consent."[14] It is likely, however, that these issues will soon have to be confronted by the courts and the legislature.

B. Legislation

§1.6. Divorce: Desertion. Chapter 358 of the Acts of 1974 has reduced the minimum length of time necessary to establish desertion

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[12] Id.
[13] Id. at 1096, 314 N.E.2d at 132.
[14] Id. at 1097, 314 N.E.2d at 133.

as a ground for divorce from two years to one.[1] It is still necessary to prove utter desertion, *i.e.*, that the libellee left without justification and without the libellant's consent.[2] The statute has been amended, however, to provide that "[a] libel for divorce for desertion shall not be defeated by a temporary return or other act of the libellee if the court finds that such return or other act was not made or done in good faith, but with intent to defeat such libel."[3]

§1.7. Divorce: Alimony. Chapter 565 of the Acts of 1974 substantially expands the probate court's power to order alimony and the conveyance of property on divorce. It also sets forth in some detail the criteria the court should apply in making such orders.

The previous law simply stated that "the court may decree alimony to the wife, or a part of her estate, in the nature of alimony, to the husband."[1] The new section provides that "the court may order either of the parties to pay alimony to the other."[2] Thus, for the first time in Massachusetts, a woman may be compelled to pay periodic, as opposed to lump-sum, alimony to a former husband. Judging from the experiences of other states with similar provisions, this is not likely to be a frequent occurrence.[3] Nevertheless, it reflects a general trend on the part of legislatures and courts to require women to assume greater financial responsibilities both during and after marriage.

The new section also provides that "[i]n addition to or in lieu of an order to pay alimony, the court may assign to either the husband or wife all or any part of the estate of the other."[4] Under existing statutes the probate court had some equitable powers to order the conveyance of real property in divorce proceedings;[5] the new section apparently expands the power of the court since the phrase "any part of the estate of the other" seems to encompass personal, as well as real, property of both the husband and wife.

Alimony has traditionally been considered an allowance for the support of a dependent former spouse,[6] and not as a device for dividing property.[7] The prior law permitted the court to order a wife to convey "a part of her estate, in the nature of alimony, to the husband."[8] The new section not only permits the issuance of such an order against the husband, but also removes the requirement that it be "in the nature of alimony." Indeed, it specifically provides that

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§1.6. [1] Acts of 1974, c. 358, § 1.
[2] Acts of 1974, c. 358, § 2.
[3] Id.

§1.7. [1] G.L. c. 208, § 34, repealed by Acts of 1974, c. 565.
[2] Acts of 1974, c. 565.
[3] See Wheeler, No-Fault Divorce 60-61 (1974).
[4] Acts of 1974, c. 565.
[5] See, e.g., G.L. c. 183, §§ 43-44 and c. 208, § 34A.
[6] See Brown v. Brown, 222 Mass. 415, 111 N.E. 42 (1916).
[7] See Ober v. Ober, 1973 Mass. App. Ct. Adv. Sh. 33, 294 N.E.2d 449.
[8] G.L. c. 208, § 34, repealed by Acts of 1974, c. 565.

such orders may be made "in lieu of alimony."[9] As a result, section 34 may be construed to authorize awards differing in both amount and nature from mere support payments for a dependent former spouse.

Some proponents of divorce reform feel that alimony awards can be both arbitrary and excessive, and hence favor the adoption of more specific standards for the determination of alimony. Under the new section, courts are instructed to "consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income."[10] In addition, the court may consider the contribution of each of the parties to his or her respective estate.[11] Although the catalogue of considerations is relatively precise, it is not likely to reduce the probate court's broad discretion in fixing alimony, primarily because no specific weights are assigned to any of the factors. Emphasis on one consideration, such as length of marriage, might justify a generous award, while reliance on a different factor, such as the parties' conduct, might support a contrary result. In short, it will remain difficult to establish on appeal that a probate judge's determination of alimony is plainly wrong.

§1.8. Child abuse. Chapter 1076 of the Acts of 1973 represents a sweeping revision of earlier statutes governing the reporting of child abuse. Sections 39A-C of chapter 119 have been repealed and sections 51A-G have been substituted.[1] In addition to the physicians, medical interns, social workers, and school officials who were previously required to report suspected instances of child abuse, the new section 51A also requires dentists, nurses, family counselors and police to file such reports.[2] Lawyers are not required to report child abuse, but the statute permits anyone who has learned of such a problem to report it. The prior law did not precisely define child abuse, whereas the new statute specifies a variety of situations which can lead to physical or emotional injury.[3]

As under the old law, those who are required to report child abuse to the Department of Public Welfare are not subject to any statutory penalties if they fail to do so. It is possible, however, that such a failure which leads to further injury of a child might be the basis of a private action in tort. Some commentators believe that not all people who observe signs of child abuse report them, possibly out of fear of retaliatory libel actions by the parents. To overcome this, section 51A

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[9] Acts of 1974, c. 565.
[10] Id.
[11] Id.

§1.8. [1] Acts of 1973, c. 1076, §§ 5-6.
[2] Acts of 1973, c. 1076, § 5.
[3] Id.

provides that any person required to report child abuse is immune from civil or criminal liability which might otherwise stem from filing a report; for such persons, the former requirement of good faith reporting has been eliminated.[4] The new sections also establish a number of procedures to facilitate temporary custody in emergency situations; other provisions more clearly delineate the powers and duties of the Department.[5] The law additionally provides for the creation of a central registry to collect and coordinate data received through the new reporting procedures.[6] This last feature may concern those who fear governmental encroachments on privacy.

C. Probate Rules and Practices

§1.9. Probate rules. Probate Rule 49, which went into effect in 1974, requires parties in divorce or separate support proceedings who are either requesting alimony or support or seeking a modification of such an order to file a sworn financial statement. In a contested proceeding either party may request the other to produce such a statement. Probate judges may require new statements during the course of proceedings.[1] These financial statements will be kept separate from other court papers and will not be available to the general public.

Most judges in Middlesex County are now refusing to order husbands to pay their wives' attorneys fees under Probate Rule 47,[2] on the apparent ground that the failure of the rule to provide a similar remedy for financially handicapped husbands makes operation of the rule violative of the equal protection rights of men. In view of the Supreme Court's recent decision in *Kahn v. Shevin,*[3] this conclusion may be erroneous. In *Kahn* the Court upheld the constitutionality of a Florida statute giving widows a special property tax exemption not available to widowers. The Court ruled that sex classification was permissible in that instance in light of the state's purpose of lessening "the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden."[4] It would seem likely that Rule 47 could be upheld on similar reasoning, but the issue has not yet been considered by a higher court.

§1.10. Probate practices. A committee appointed by the Chief Judge of Probate has promulgated more than a dozen new "uniform practices" which have gone into effect in all the probate courts in the

[4] Id.
[5] Id.
[6] Id.

§1.9. [1] The rule does not specify any sanction for those who fail to file a required statement, though anyone who refuses to comply clearly risks displeasing the court.
[2] As an alternative, attorneys for either the wife or the husband may attempt to procure fees under G.L. c. 208, § 38.
[3] 416 U.S. 351 (1974).
[4] Id. at 355.

Commonwealth. Because the practices are not Rules, they do not need the approval of the Supreme Judicial Court. Yet although these practices are in theory less formal than court rules (which are in the process of being redrafted), they have significantly altered probate proceedings. For example, Practice II eliminates the need for corroborating witnesses in almost all uncontested divorces. While this previously was the case in some courts, it is now the practice in all the probate courts. Establishing consistent practices in the probate courts is expected to facilitate the tasks of both lawyers and court officials.