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Delmar David Steinbock Jr.

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Legal systems have long grappled with the complexity of family and marriage dissolution, attempting to reconcile the individual's desire for divorce with society's desire to perpetuate marriages and thereby strengthen the family unit. Different cultures have advanced different methods for achieving this reconciliation. Consideration of these methods is significant today because antiquated thinking continues to govern much of the Anglo-American treatment of the problem.

The present analysis will treat the primary means of dissolution, divorce—past, present, and future. The treatment will focus on the fault-oriented aspects of divorce laws in California, Iowa, and Oklahoma with a discussion of the proposed Uniform Marriage and Divorce Act, promulgated by the American Bar Association Family Law Section. The author's concluding recommendations will suggest reforms keyed, in part, to the Uniform Act. It is hoped that this list of proposals will prompt inert legislators everywhere to begin considering some form of reformation of their respective divorce laws, and that these proposals will represent a springboard toward that end.

A fault-oriented approach to divorce has existed since the Middle Ages. The history of divorce is curious, not so much for the lessons it teaches as for its continuing influence on twentieth century law. Precepts formulated during more unenlightened periods remain immovable. In early Rome marriage was a civil contract and quite freely terminable at will, but family mores rendered divorce quite rare. As these mores began to break down, divorce became more commonplace. Often marriages lasted for days only. Rome had developed that raucously free life style so often maligned in movies and sermons. The fear of a return to such a life style permeates much of present day law and literature.[1]

1. Bodenheimer, *Reflections on the Future of the Grounds for Divorce*, 8 J. FAM. L. 179, 185 (1968).

The reaction to this hedonistic pattern of life fostered the development of the fault-oriented approach to divorce.[2] Early Christians disapprovingly witnessed the sexual freedom of the time and sought a change to the other extreme. When the empire became Christian, and as the Catholic Church became stronger, the concept of indissoluble marriages surfaced and developed.[3]

During the Dark Ages, divorce based on marital fault became the only divorce available. Under the reign of Charlemagne, the Ecclesiastical Courts were entrusted with the disposition of marital problems. It was during this period that marriage was raised to the dignity of a sacrament. A spouse could only dream of divorce during the days of chivalry and honor. Marriage became a bond that no man could put asunder.[4]

The Protestant Reformation signaled another shift in policy. Marriage and divorce once again became a civil contract. This returned family law to the courts of the state.[5]

The current movement in the United States for more realistic grounds is a development of the last forty years. The Soviet Union adopted a modern approach to marital breakdown as long ago as 1917.[6]

A few states in America have taken dramatic steps toward implementing the "no-fault" concept by revamping their traditional divorce statutes. California[7] and Iowa present the most progressive examples of the reformation to "no-fault" divorce.[8] Provisions of their divorce laws offer sensible and effective alternatives to present divorce laws in other jurisdictions.[9]

Oklahoma is a curious focal point because early in the divorce reformation movement Oklahoma pioneered in expanding the traditional grounds for divorce to include incompatibility. Much as this had seemed to signal an advance toward "no-fault" divorce, subsequent interpretation[10] and legislative inertia have revealed that Oklahoma is

2. Walker, *Beyond Fault: An Examination of Patterns of Behavior in Response to Present Divorce Laws*, 10 J. FAM. L. 261, 271 (1971).
3. Rheinstein, *Trends in Marriage and Divorce Law of Western Countries*, 18 LAW & CONTEMP. PROB. 3, 7 (1953).
4. Whaling, *The No-Fault Concept*, 47 N. DAME LAW. 959, 960 (1972).
5. *Id.* at 962.
6. Gsovski, *Marriage and Divorce in Soviet Law*, 35 GEO. L.J. 209 (1947).
7. CAL. CIV. CODE § 4506-1 (West. Supp. 1969).
8. *Id.* § 4507.
9. *Id.* § 4509.
10. Waller v. Waller, 439 P.2d 952 (Okla. 1968); Wegener v. Wegener, 365 P.2d 728 (Okla. 1961); Hughes v. Hughes, 363 P.2d 155 (Okla. 1961); Rakestraw v.

really not much closer to "no-fault" divorce than she was in 1953 when incompatibility was included in the grounds.

California took a giant step toward "no-fault" divorce in 1970 by reforming its divorce laws.[11] Prior to the change, in order to obtain a divorce, the plaintiff needed to prove his spouse "guilty" of one of the specific grounds for divorce.[12] The fault concept was also an integral part of property divisions and alimony awards.[13] The same process still applies in many jurisdictions.

Several objections to the fault system influenced the move for reform. The realization that only in exceptional cases would a single act of fault or misconduct cause an irreparable breakdown of the marriage was one objection.[14] Another factor was the constant bitterness and acrimony promoted by the traditional system.[15] Often the process created an occasion for perjury. It tempted a party to lie to satisfy a particular fault ground in order to use the fault-determination to win a more favorable monetary award.[16] The situation reached scandalous proportions resulting in a distinct loss of prestige and public confidence in the courts.[17]

The new California divorce law repeals the traditional grounds and replaces them with two distinct bases for marital dissolution.[18] Incurable insanity is one of the two new grounds;[19] the other is "irreconcilable differences which have caused the irremediable breakdown of the marriage."[20] Irreconcilable differences are defined as those which constitute "substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved." Unfortunately, this definition is vague and uncertain. The standard lends itself to subjective judicial interpretation, a situation that

Rakestraw, 345 P.2d 888 (Okla. 1959); Chappell v. Chappell, 298 P.2d 768 (Okla. 1956).

11. Comment, *The End of Innocence: The Elimination of Fault in California Divorce Law*, 17 U.C.L.A. L. REV. 1306, 1324 (1970) [hereinafter cited as *Innocence*].

12. CAL. CIV. CODE § 92 (West 1954).

13. *Id.* § 146. *See also*, Comment, *California's Divorce Reform: Its Effect on Community Property Awards*, 1 PAC. L.J. 310 (1970).

14. *Innocence, supra* note 11, at 1310.

15. *Id. See also*, Philips, *Mental Hygiene, Divorce and the Law*, 3 J. FAM. L. 63 (1963).

16. Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 83 (1966). *See also* J. CALIF. ASS., 1969 Reg. Sess., 8058 (Aug. 8, 1969) [hereinafter cited as *Assembly Report*].

17. *Innocence, supra* note 10, at 1312.

18. *Id.* at 1315.

19. CAL. CIV. CODE § 4506-2 (West Supp. 1969).

20. *Id.* § 4506-1.

the framers were attempting to remedy.[21]

In the new proceeding, evidence of fault or misconduct will not be permitted except when relevant in a child custody determination. However, there is an exception that could effectively emasculate the "no-fault" guidelines. The court may determine that evidence of misconduct is "necessary to establish the existence of irreconcilable differences."[22] This is an open invitation for the introduction of instances of marital fault and misconduct, in direct contravention of the avowed legislative purposes of the new act. Neither is it clear what degree of marital fault will satisfy the requirement of irreconcilable differences.

The property division provisions of the new law eliminate consideration of fault. Community property is divided equally. This requirement removes the previously existing incentive to present fault evidence in order to obtain a larger share of the property. Arguments still remain as to where to draw the line on valuation of the property, but the acrimony engendered by the old finger-pointing is now dead. Factors considered in the property division are (a) duration of the marriage, (b) the ability of the supported spouse to engage in gainful employment, and (c) the economic condition of the parties. Alimony is determined, thus, by a standard of fairness rather than fault or guilt.[23]

In the area of child custody, all evidence relative to the child's best interests is considered, including parental fault or misconduct.[24] This proceeding may easily be separated from the dissolution and property portions of the hearing to insure that the fault evidence does not influence the other determinations. Also, a lawyer may be appointed to guard the interests of the child if the court deems it necessary. A later recommendation will indicate a more desirable plan for providing lawyers for the children and for limiting the scope of admissable fault evidence in the child custody proceeding.

California's law is not perfect. It is an example of the proper direction to be followed and may serve as a model to suit the needs and desires of particular jurisdictions as they see fit. A major problem with the California law is its failure to provide definitive standards for

21. Bodenheimer, *supra* note 1, at 183; *see Innocence, supra* note 11, at 1323; *cf. Assembly Report, supra* note 15, at 8057.

22. CAL. CIV. CODE § 4507; *see, In re* Walton's Marriage, 104 Cal. Rptr. 472, 479, 28 Cal. App. 3d 108 (1972).

23. *Innocence, supra* note 10 at 1316; *see,* CAL. CIV. CODE § 4509 (West Supp. 1969).

24. CAL. CIV. CODE § 4509 (West Supp. 1969).

courts to follow. The present vague definition of "dissolution" permits too much judicial adjustment, too much opportunity for the judge to impose standards on the parties before him. In the hands of an artist, the law becomes a judicial work of art. In the hands of a hack, a work of ugliness.[25]

In 1970, the Iowa state legislature also made a pronounced move toward "no-fault" divorce. The traditional grounds for divorce were replaced with a standard based upon the actual breakdown of the marital relationship.[26] Now dissolution of the broken marriage occurs without casting blame on either spouse for having caused the factual ending of the marriage. Under the Iowa law, the "irretrievable breakdown of the marital relationship"[27] is the sole basis for ending the marriage. A marriage may be terminated "when the court is satisfied from the evidence presented that there has been a breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there is no reasonable likelihood that the marriage can be preserved."[28] Unfortunately, the Iowa law provides insufficient guidelines as to what is a satisfactory presentation of evidence to please the court.[29] Once again, as in California, the personal views of the judge may be easily imposed on the parties.

The Iowa statute directs that the division of assets of the parties, support of either party, and support of children be based on "competent and relevant evidence." The Iowa Supreme Court answered some questions involving fault and the financial settlement in *In re Marriage of Williams* holding that the evidence of fault for the marriage breakdown is not a factor in the determination of financial rights and obligations.[30]

A commonly voiced fear of "no-fault" divorce is that it will cause a marked increase in the already soaring divorce rate. Two years following passage of the Iowa Act an empirical study was conducted among judges and lawyers in Iowa. This study revealed that, by and large, the reaction to the new law was favorable.[31] There has been an increase in the actual number of divorces by approximately 550[32]

25. D. CANTOR, ESCAPE FROM MARRIAGE 108 (1971).
26. Sass, *The Iowa No-Fault Dissolution of Marriage Law in Action*, 18 S. DAK. L. REV. 628 (1973).
27. IOWA CODE ANN. § 598 (1973).
28. *Id.* § 598.17 (West Supp. 1972).
29. Sass, *supra* note 26, at 632.
30. *In re* Marriage of Williams, 199 N.W.2d 399 (Iowa 1973).
31. Sass, *supra* note 26, at 648.
32. *Id.* at 636.

per year in 1971 and 1972.[33] A good portion of these increases may have been attributable to the growth of legal aid services—in 1970 legal aid offices were established in the seven largest cities in Iowa[34]—and the consequent increase in the availability of divorce to those in lower income brackets.

In any event, there certainly has not occurred the deluge of litigants that had been forecast by critics. Divorce has become easy in Iowa, easy to the extent that unrealistic legal obstacles have been removed in order to provide a just and quiet dissolution to an "empty legal bond." This is as it should be throughout the law.

The divorce laws of Oklahoma are hardly satisfactory, despite legislative attempts at revision. The laws represent a historical mixture of religion, sentiment, and accident.[35] Oklahoma statutes presently provide twelve specific grounds for divorce.[36] In 1953 the ground of incompatibility was added. In terms of what had been the attitude toward divorce, this was a revolution. "No-fault" divorce seemed to be on the horizon. This vision has not been realized, however.

In adding incompatibility as a ground, the legislature failed to define it. Incompatibility is predicated on the theory that if two spouses can no longer cohabit as husband and wife, they should be divorced upon the application of either party. For a time in Oklahoma it was held that both partners needed to be incompatible with each other in order for the ground to exist.[37] In *Rakestraw v. Rakestraw*[38] the Oklahoma Supreme Court held that only one partner need feel incompatible; that is, if one party could not live harmoniously with the other, then the relationship was incompatible, notwithstanding that the other

33. IOWA STATE DEP'T HEALTH, ANNUAL REPORTS OF VITAL STATISTICS show the following:

Year	Divorces
1967	6018
1968	6464
1969	6923
1970	7124
1971	7658*
1972	8238*

* Excludes estimated annulments which were also includes in the dissolution figures.

34. Cedar Rapids, Council Bluffs, Davenport, Des Moines, Dubuque, Iowa City, and Muscatine.

35. Sonberg, *Grounds For Divorce in Oklahoma*, OKLA. L. REV. 395, 396 (1961).

36. OKLA. STAT. t t. 12, § 1271 (1971).

37. Kirkland v. Kirkland, 488 P.2d 1222 (Okla. 1971); Waller v. Waller, 439 P.2d 952 (Okla. 1968); Rakestraw v. Rakestraw, 345 P.2d 888 (Okla. 1959); Chappell v. Chappell, 298 P.2d 768, 771 (Okla. 1956).

38. 345 P.2d 888 (Okla. 1959).

spouse was perfectly contented. The most recent guideline appeared in *Kirkland v. Kirkland* where the court held that actionable incompatibility is determined to exist when there is "such a conflict of personalities as to destroy the legitimate ends of matrimony and possibility of a reconciliation."[39] This language is curiously similar to the Uniform Marriage and Divorce Act, a recent attempt at "no-fault" divorce described below.

One problem with incompatibility is in distinguishing it from the other 11 grounds. Adultery is hardly a manifestation of a compatible relationship. The same rationale would remain true for the other grounds. Incompatibility would seem to encompass all the grounds and render them superfluous.

The continued existence of these other grounds serves the function of perpetuating the fault concept, the punishment-reward system of divorce. Oklahoma retains the concept explicitly in section 1278 of title 12, where alimony is taken from the property of the spouse at fault and awarded to the innocent spouse.[40] Other factors utilized in the determination of alimony include needs of the parties, ability to earn, duration of the marriage, and conduct as to frugality.[41] These are the factors which should govern the determination. Fault should not be part of the assessment. The quest for more satisfactory and beneficial monetary awards through assertion of fault has been the cause of much, if not most, of the bitterness and acrimony attendant in divorce proceedings. The inherent difficulties in determining fault in a divorce militate against such a frequent resort to the concept in the resolution of divorce cases.

"No-fault" divorce statutes are predicated on a recognition of the fact that most marriages break down for a number of reasons and because of an interaction of factors that bears no reasonable relation to fault. In many cases marital wrongs are not the causes of the breakdown but are merely symptoms of dead marriages which came to an end because of circumstances for which neither or both spouses were to blame—differences in education, religion, moral views, financial views and others. Often the subsequent marital breakdown becomes manifested in acts of marital misconduct. It is in recognition of these social facts of married life that "no-fault" divorce statutes are being enacted in many jurisdictions across the country.

39. 488 P.2d 1222, 1226 (Okla. 1971).
40. OKLA. STAT. tit. 12, § 1278 (1971).
41. Dresser v. Dresser, 164 Okla. 94, 22 P.2d 1012 (1933).

Thus far, this article has concentrated on the status of "no-fault" divorce to date. Assuming a state desires reformation of its divorce laws, what should it consider in order to realize this desire? The previously mentioned Uniform Marriage and Divorce Act will serve as a solid foundation on which to build. The following recommendations are based in part on the Uniform Act and in part on the author's thoughts toward modification of the provisions of the Act.

1. *Statement of Purpose*—The preamble of such a new act should contain a clear and definite statement to the effect that "this act is fostered to promote an amicable settlement of disputes and to make the law of divorce effective in dealing with the realities of matrimonial experience." This type of statement leaves little room for confusion of purpose among those who shall administer the law.[42]

2. *Form*—The form of the petition should read *In re Marriage of Doe* rather than *Doe v. Doe.* The purpose of this is to alert the parties that divorce is no longer to be considered an adversary contest.[43]

3. *Grounds/Evidence*—Divorce should be available when serious circumstances have rendered continuation of the marital relationship impossible. The parties should be permitted to prove this condition either by concluding a specified period of separation or by demonstrating the impossibility of reconciliation. Marital fault should have no bearing on this determination.[44]

4. *Alimony*[45]—Alimony awards should be based on relevant factors such as needs of the parties and ability to earn, but in no case should marital fault be a relevant factor in arriving at a fair award.[46]

5. *Child Custody*—The best interests of the child should be the paramount consideration in determining custody. To this end an attorney should be appointed in every child custody situation to guard these best interests. The court should not consider conduct of a proposed custodian that does not affect his relationship with the child.[47]

6. *Conciliation*—Counselors should be made available to aid in the possibility of reconciliation. Counselling should be available on a voluntary basis, not as a prerequisite to entering divorce hearings. Conciliation services on a mandatory basis are expensive and of negli-

42. UNIFORM MARRIAGE AND DIVORCE ACT § 102 [hereinafter cited as U.M.D.A.].
43. OKLA. STAT. tit. 12, § 1273 (1971); U.M.D.A. § 301.
44. OKLA. STAT. tit. 12, § 1271 (1971); U.M.D.A. § 302.
45. OKLA. STAT. tit. 12, § 1278 (1971); U.M.D.A. § 308.
46. OKLA. STAT. tit. 12, § 127 (1971); U.M.D.A. § 307.
47. OKLA. STAT. tit. 12, § 1275, 1277 (1971); U.M.D.A. § 402.

gible value. By the time parties are seeking a legal solution to their problem they are usually adamant in their desire to dissolve the relation. The effectiveness of conciliation courts and facilities in both California and Iowa have not demonstrated sufficient effectiveness to warrant their inclusion in any other jurisdiction. They seem to serve some hidden public longing for hope in a situation that is most often, quite simply, hopeless.

The previous list of recommendations is partial and serves only to highlight important areas that might cause difficulty in drafting. Obviously these suggestions are offered to promote an enlightened approach to the state's role in marital dissolution and not as a panacea for divorce problems.

Under the present fault concepts, divorce proceedings are quite often a veritable "parade of horribles." The words "just and equitable" in this area have become little more than mere pious cliches. No-fault divorce takes a progressive step toward replacing the horror of fault divorce with an atmosphere more conducive to the settlement of issues collateral to the termination of the marriage.[48] Thoughtful legislation will carry society a long way down the road to that final goal of "providing a just, expeditious, and quiet termination of those marriages which society has no legitimate interest in preserving."[49]

48. Sass, *supra* note 26, at 648.
49. *Id.* at 649.