

No-Fault Divorce- BEYOND GOOD & EVIL

—Les Bailey

We may take judicial notice that the family, held together by that legal, affectional, spiritual relationship called marriage, is the keystone of our social order. Yet vital to our civilized life as this crucial relationship is, it is being dissolved at an alarming rate through archaic legal machinery which encourages disrespect for the law; which is cumbersome, irrelevant, and socially costly and painful; and which makes no provision to help alienated spouses understand the causes of their disaffection and so effectively deal with them as to preserve the marriage.

A brief look at the abuses prevalent in the United States under the adversary, fault oriented divorce system will illustrate the sad truth of the previous statement characterizing archaic American divorce law and suggest the need for fundamental reform. In the divorce law of most states divorce will be granted only where one spouse is able to prove his mate guilty of some marital offense specified by statute such as adultery, desertion, extreme cruelty, etc.¹ Because such grounds are difficult to prove, parties are encouraged to perjure themselves, indulge deliberately in immoral staged acts or collude to consent to or not to contest divorce.² An alternative way to circumvent the stringent grounds of divorce required to be proved in one state was made possible by *Williams v. North Carolina*.³ The out-of-jurisdiction "quickie" divorce in some such place as Nevada legitimized by *Williams* not only circumvents the law but is wasteful of resources, both of the financial resources of the party involved and of the court resources of the State granting the divorce on the basis of what is often a perjured statement of domiciliary intent.⁴ In the adversary, fault system each spouse retains his own attorney and girds himself for a bitter battle which often involves exaggerated name-calling and fiercely pious and vindictive charges. The system promotes the struggle to establish the requisite fault grounds for divorce and to gain the upper hand in wrangles over property, custody, and support. The tension and hostility attendant to the acrimonious atmosphere of such a knockdown, drag-out battle not only renders slim the prospect for reconciliation but also heavily burdens the time of already badly congested courts. The greatest suf-

ferers from the tension and hate stimulated by the adversary-fault system are often the children who are buffeted by opposing forces beyond their comprehension.⁵

Absence of imputations of guilt and innocence would spare children the painful sense that one of their parents had been publically exposed as an evil or malicious person, while the other had been judged, by comparison, to be a paragon of virtue...Children would suffer much less as a result of their parent's divorce if they could see it as a human tragedy which everyone concerned had tried to prevent, but which despite all efforts, could not in the end be avoided.⁶

Perhaps the greatest source of abuse under the fault system is found in such defenses to an action for divorce as recrimination.⁷ This defense precludes relief for the complainant who does not approach the court with "clean hands".⁸ There are obvious flaws in such a defense. First, one indulges in social fantasy by believing that incident to most marriage failures, there is a guilt-innocence dichotomy.⁹ Secondly, by counter-charging complainant with a legally cognizable marital offense, a "vindictive spouse", on purely vengeful motivation, is enabled to block relief provided by law.¹⁰ Thirdly, one spouse can employ recrimination as a tool of extortion to win unconscionable concessions in matters of property division, custody, alimony, and support.¹¹ But surely the greatest flaw of the defense of recrimination is that where not proved in fact, its pleading so accentuates an already bitter misunderstanding as to severely dim the chances of reconciliation.

Thus there is a cornucopia of suffering and social waste incident to the abuses of an adversary divorce system unprofitably preoccupied with guilt. Why not then, one may ask, abolish all grounds for divorce and institute a system based, perhaps, upon the fulfillment of a required period of separation? Or why not grant a divorce at any time one is requested merely upon the consent of both parties? Both concepts are unworkable because afflicted with costly side effects. Separation as a divorce standard is undesirable because, if set too short, may encourage divorce, and if set too long, the parties must pay dearly in emotional suffering and financial loss caused by a delay attended by the absence of an immediate right to remarry.¹² Both concepts are utterly wrecked by the vindictive spouse who withholds the consent essential to the operation of both.¹³ Facile acceptance of consent as the



panacea among grounds for divorce is foreclosed by the necessary recognition that, as a third party to the marriage contract, the state is vitally concerned to ensure that marriage not be dissolved merely upon the whim of its partners.¹⁴ Surely that state is unwise whose facility of divorce provokes the death of a marriage whose partners hastily reacted to temporary frustration, a death which might easily have been prevented had the state provided a proceeding which required a delay long enough to expose the threatened marriage to the possible saving grace of skilled counseling.¹⁵

SUGGESTIONS & SOLUTIONS

The abuse potential, inequity, inefficiency, and suffering which is a tragic commentary on adversary, fault-oriented divorce can be eliminated only by fundamental reform. Concern with fault, guilt, etc. strikes only at the surface symptoms of a failing marriage, and even then, such concern does not respond to effectively remedy the desperate need of estranged spouses to identify, objectively understand, and attempt to deal with the real causes of their fractured marital relationship.¹⁶ A study commission in New Jersey has succinctly identified the relevant inquiry of substantive divorce law:

Demonstrable fault is frequently the result of, rather than the cause of marital breakdown. It is the public interest in private morality, in marriage as an institution, that is best served by terminating marriages that have failed. There is no vested right to immunity from divorce...blocking the offender from terminating a meaningless relationship and perhaps creating a socially desirable one.¹⁷

It would seem then that an enlightened substantive divorce law would focus on the marriage relationship itself, by providing some appropriate procedure to determine: (1) whether the marriage relationship has broken down, (2) whether the breakdown can be repaired, (3) if the latter is true, what are the causes of the breakdown and how can they be prevented or resolved. Why waste the state's time and resources in litigating guilt/innocence which is of questionable relevance to

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marriage viability when, as observed by a noted authority, "most people believe that marriage should be terminated when the husband-wife relationship is no longer able to function."¹⁸ The "marital breakdown concept...is the heart of most...recent legislation"¹⁹ and "is implicit in some of the statutory grounds for divorce appearing in the various states."²⁰ Since these statutory provisions embrace social reality by implying a no-fault basis for certain divorce grounds, why not bring the entire statute into alignment with the enlightened recognition that, where the marriage relationship is irreparably defunct, an efficient, consistent dissolution of the marriage contract not only averts needless suffering but increases the public respect for a vital segment of the law.

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THE THEORIES OF "NO-FAULT"

Granted that substantive divorce law should ground its authorization of a marriage dissolution on whether the marital relationship can be retored, the naturally resulting question is: what standard should be applied in making this determination? Perhaps only some experimentation will resolve the issue of whether the determination should be one of fact by experts in the behavioral sciences or one of law by the judge. Most states with new no-fault divorce legislation have made the determination one of law to be made by the judge upon the basis of all the evidence, both lay and expert.²¹ One eminent authority suggests that a grant of divorce be based on the "submission of satisfactory evidence that, on the basis of a thorough clinical investigation..., it was reasonably apparent that..." the marriage was shattered beyond repair. When the judge is so satisfied, "divorce would be granted without guilt being imputed to either party."²²

Clinical examination of the viability of the marital relationship with an eye to determining the likelihood of repairing the fracture should be the

crucial part of the no-fault evidentiary process. Since public interest in the stability of marriages is great, this clinical examination should be made incident to a prescribed series of conciliation sessions, participated in, if possible, by both spouses and directed by skilled professional counselors.

Divorce court conciliation departments exist in at least fifteen states²³ and are valuable not only in saving marriages but are particularly helpful in establishing a calm and objective attitude between the spouses during divorce proceedings even though reconciliation proves impossible.²⁴ Such an attitude is invaluable in the adjudication of such collateral issues as property division, alimony, support, and custody by making justice more likely and by saving much time for badly congested courts.²⁵ Such conciliation is badly needed because divorce petitions are often filed in search of some competent body which can provide help by impartially identifying the causes of the marital conflict and by suggesting practicable methods to resolve them.²⁶ One possible objection to conciliation counseling is that, if made mandatory, it may amount to a state invasion of the individual's constitutional right to Privacy.²⁸

Presently there is no clear statement in the law specifying the rights of divorce litigants to refuse to discuss or reveal their private or intimate relationships.²⁸

The effectiveness of conciliation counseling would be vitiated without such discussion and revelation. One solution to this problem, employed in proposed Virginia legislation, provides the incentive of accelerating the dissolution decree for those who agree to cooperate with the conciliation process.²⁹ Invasion of privacy problems are thus avoided by making conciliation counseling voluntary.

In summary then, what are the advantages of a system of no-fault divorce coupled with an incentive-oriented conciliation process? Reconciliation chances should be vastly improved; public respect for divorce law would be enhanced;³⁰ considerable time would be saved for badly congested courts; collateral issues could be more easily and justly resolved and children spared the painful and psychologically damaging exposure to needless hostility and tension; extortion-provoking defenses would be abolished. If reconciliation proved impossible, both partners could come away from the marriage as whole persons, cognizant of the reasons the marriage failed and thereby prepared with an awareness making more bright the prospects of future marital success.³¹ Society would be spared the existence of a residue of bitter and quilt plagued divorce(e)s.

"...providing a more "dignified and blameless way out" when a court finds...that the union is irreparably destroyed."

DISSENT AND DISSATISFACTION

To conclude this general discussion of no-fault divorce, two widely voiced objections to the concept will be considered. The first is that no-fault divorce legislation makes divorce so easy that it actually provokes or encourages divorce. There is no empirical evidence to support this charge, and the argument ignores the ease with which divorce can be presently obtained in almost any jurisdiction by such expedient means as perjury, fraud, collusion or flight to another state.³² The other objection is grounded on genuine and understandable Christian concern that by enacting no-fault divorce statutes the state is violating the principle laid down by God that divorce be based solely on adultery. One who makes this seemingly valid objection may be put at ease by being reminded of the Lord Jesus Christ's command to "render therefore unto Caesar the things which be Caesar's and unto God the things which be God's"³³ Every Christian marriage has two dimensions: its spiritual dimension, over which God is sovereign; and its legal dimension, over which Caesar, the state, is sovereign. The state does not initiate nor has it the authority to order the dissolution of the spiritual plane of a marriage. Only God can do that, and He has conditioned the grant of a divorce of separation (*a mensa et thoro*), the only type He authorizes, solely on the offense of adultery. Therefore, temporal courts have jurisdiction only to dissolve the marriage contract and its attendant legal obligations. Spiritual responsibility for transgression against the spiritual dimension of the marriage rests with its partners and not with the state, since it is they, who have the will and free choice to heal the fractured relationship and repent in the sight of God for their transgressions against the relationship. As one thoughtful commentator has observed:

Yet the marriage vows may persist in effect after the divorce on a moral-spiritual level with both parties refraining from remarrying and thus maintaining fidelity until the death of the other party.³⁴

It is the duty of all courts and attorneys, and especially Christian judges and attorneys to do everything which is ethically within their power to encourage reconciliation between spouses who come to them with marital problems or seeking divorce. Appropriate referrals should be made to professional counselors for conciliatory service which is beyond the competence of the attorney.

THE VIRGINIA PROPOSAL

Turning now to an examination of key provisions of the proposed revision to Title 20, Chapter 6 of the Virginia Code (Dissolution, Separation, and Annulment),³⁵ Section 20.1-153 of the revision admirably states it to be a policy of the law to deal with divorce by realistically focusing on the marriage relationship itself to assess its viability in determining whether a decree of dissolution should be granted.³⁶ This realistic orientation of the law is further illustrated by the policy goal of mitigating divorce-caused harm to spouses and children and by the goal of a dispute settlement process characterized by an amicable atmosphere.

In section 20.1-155(1) "Irreparable breakdown" is made the sole ground of divorce.³⁷ Wisely the section provides that such a breakdown of the marriage relationship may be found only when it is shown by substantial evidence that there are such fundamental differences that the "legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved." These terms seem to be to the point and will be further clarified in the context of particular cases which construe them in the Virginia Supreme Court of Appeals.

Sections 20.1-163 and 20.1-175 prescribe a conciliation procedure which must be subscribed to by the parties if they wish a decree of dissolution immediately after the required ninety day conciliation period instead of waiting for the prescribed period of one year to elapse, should they elect not to participate in conciliation.³⁸ This provision uses the incentive technique already discussed to avoid objections of invasion of privacy. However, section 20.1-163 requires respondent to complete and file a conciliation questionnaire within thirty days of being served with copies of petition and summons. This writer feels that this provision is an unwarranted invasion of respondent's privacy despite statutory assurances that respondent's questionnaire "shall be confidential and may be used only by the court, counsel for the parties, or persons authorized by the court."

Section 20.1-176, granting an emergency decree sooner than ninety days at the discretion of the court, is worded in such vague and overbroad language as to invite abuse. This provision should be re-written authorizing this accelerated decree only upon a showing of one of several specified grounds of emergency. Section 20.1-170 wisely abolishes all defenses to an action for divorce such as recrimination, connivance, and collusion.

That the court may "refuse to grant the petition on the uncorroborated testimony of the parties or either of them" is inconsistent with the basic reform objectives of this no-fault oriented revision. Where there are no third party witnesses to the conditions which evince an irreparably broken marriage relationship, one vindictive party can block dissolution of a dead and intolerable relationship. This inconsistent provision should be struck from section 20.1-105.

With the objections just noted remedied as suggested, this code revision would seem to bring Virginia's substantive divorce law into harmony with what appears to be the most enlightened modern thinking on the subject. This thinking, as already pointed out, espouses a divorce law that uses every reasonably available means of judicially encouraging the preservation of our society's key relationship while providing a more "dignified and blameless way out" when a court finds, on substantial evidence, that the union is irreparably destroyed. *

FOOTNOTES

1. Rose, *Non-Fault Divorce in Ohio*, 31 Ohio S. L.J. 52, 55 (1970); Va. Code Ann. § 20-91 (Supp. 1970).
2. *A Divorce Reform Act*, 5 Harv. J. Legis 563, 568(1968); Mace, *Marriage Breakdown or Matrimonial Offense: A Clinical or Legal Approach to Divorce*, 14 Am U.L. Rev. 178, 187(1965); Note, *The No-Fault Concept: Is This the Final in the Evolution of Divorce*, 47 N.D. Lawyr 959, 963-64(1972); Pound, *A Symposium on the Law of Divorce-Foreword*, 28 Iowa L. Rev. 179, 180(1943). The legal form of the adversary system is followed, but the spirit of the law is circumvented as facts are fabricated to fit the law in order to achieve desired results. Such duplicity can but result in increasing disregard for law through steadily bolder techniques of circumvention on the road to ultimate defiance of the law and the breakdown of its effective control over social behavior.
3. 317 U.S. 287(1942). There the Court held that where the court of X acting per procedural due process alters the marital status of one domiciled in X by granting him a divorce from his spouse residing in Y, the original marriage domicile which he left, the said divorce is entitled to "full faith and credit" in the courts of Y.
4. *A Divorce Reform Act*, supra note 2, at 570.
5. Mace, supra note 2, at 186.
6. *Id.*
7. Rose, supra note 1, at 55-56; Bodenheimer, *Reflections on the Future of Grounds For Divorce*, 8 J.Fam. L. 179(1968).
8. I.e., complainant to qualify for relief, must not himself be guilty of action recognized as a ground for divorce.
9. Rose, supra note 1, at 56; *A Divorce Reform Act*, supra note 2, at 567.
10. *Id.*
11. Rose, supra note 1, at 57.

12. Mace, supra note 2, at 183; note, supra note 2, at 967.
13. Mace, supra note 2, at 183.
14. *Id.*
15. *Id.*
16. New Jersey, Final Report of Divorce Law Study Commission 7-10 (1970); *A Divorce Reform Act*, supra note 2, at 568.
17. *Id.* at 6-8.
18. Mace, supra note 2, at 181.
19. Rose, supra note 1, at 55; Cal. Civ. Code § 4350 (West 1970); Iowa Code § 598(1970); Mich. Comp. Laws Ann. § 552.6(); N.J. Rev. Stat. § 2A:34-2(); *A Divorce Reform Act*, supra note 2, at 565. "Grounds which imply the breakdown of marriage, rather than matrimonial offense are insanity (29 states), living apart (18 states) disappearance (4 states)...." Mace, supra note 2, at 182 n.6. Virginia prescribes two such no-fault divorce grounds: living apart and incurable or natural impotency. Va. Code Ann. § 20-91(Supp.1970).
21. See generally statutes cited note 19.
22. Mace, supra note 2, at 185.
23. McIntyre, *Conciliation of Disrupted Marriages by or Through Judiciary*, 4 J. Fam. L. 117(1964).
24. *Id.* at 129.
25. *Id.*
26. *Id.* at 118.
27. *Id.* at 121.
28. *Id.*
29. Va. Code Ann. § 20.1-109(Proposed Revision).
30. Note, supra note 2, at 964.
31. Mace, supra note 2, at 186; *A Divorce Reform Act*, supra note 2, at 569.
32. Schoenlaub, *No-Fault Divorce: A Practical Approach to the Problems of Marital Failure*, 27 J.Mo. Bar 579, 580(1971).
33. Luke 20:25 (King James).
34. *A Divorce Reform Act*, supra note 2, at 571.
35. This revision was done by William and Mary Law students Sam Powell and Tom Wright under the supervision of Williamsburg-James City County Del. Russell Carneal.
36. § 20.1-153. *Policy*.—This chapter shall be liberally construed and applied to promote its underlying purposes to make the law of legal dissolution of marriage effective for dealing with the realities of matrimonial experience by making the irreparable breakdown of the marriage relationship the sole basis for its dissolution, to mitigate the potential harm to the spouses and their children caused by the process of legal dissolution, and to promote the amicable settlement of disputes between parties to triag.
37. § 20.1-155. *Definitions*.—For the purposes of this chapter the following definitions shall apply:
(1) "Irreparable breakdown" means that condition of fundamental differences determined by the court to be substantial evidence of a breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.
38. § 20.1-175. *Conciliation procedure*.—Except where conciliation procedures are not required under § 20.1-173 (2), court shall require the parties to a petition for dissolution to participate in conciliation measures for a period of at least ninety days from the issuance of an order setting forth the conciliation procedure and the conciliator. Such procedure may include, but shall not be limited to, referrals to the domestic relations division of the court, if any is established, public or private marriage counselors, family service agencies, community health centers, physicians and clergy. The costs of such conciliation procedures shall be paid by the parties. However, if the court determines that such parties will be unable to pay without prejudicing their financial ability to provide themselves and any minor children with economic necessities, such costs may be paid from the court expense fund.