STATE OF NEW JERSEY

DIVORCE LAW STUDY COMMISSION

Final Report

to the

Governor and the Legislature

(pursuant to P.L. 1967, c. 57, as amended by P.L. 1968, c. 170 and P.L. 1969, c. 25)

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LETTER OF TRANSMITTAL

GOVERNOR WILLIAM T. CAHILL

MEMBERS OF THE LEGISLATURE

GENTLEMEN:

May 11, 1970

The Divorce Law Study Commission, created pursuant to Chapter 57 of the Laws of 1967 (as amended by Chapter 170, P.L. 1968 and Chapter 25, P.L. 1969) "to study and review the statutes and court decisions relating to divorce and nullity of marriage," herewith respectfully submits its final report.

(s) RICHARD W. DeKORTE
RICHARD W. DeKORTE,
Chairman

(s) ROSEMARY HIGGINS CASS
ROSEMARY HIGGINS CASS,
Vice Chairman

(s) ALFRED N. BEADLESTON
ALFRED N. BEADLESTON

(s) FRANKLIN H. BERRY
FRANKLIN H. BERRY

(s) RICHARD J. COFFEE
RICHARD J. COFFEE

(s) MARTIN H. PADOVANI
MARTIN H. PADOVANI

(s) WILLARD B. KNOWLTON
WILLARD B. KNOWLTON

(s) ANNAMAY T. SHEPPARD
ANNAMAY T. SHEPPARD

(s) EUGENE RAYMOND, III
EUGENE RAYMOND, III

(s) THEODORE SAGER METH
THEODORE SAGER METH

(s) DAVID J. FRIEDLAND
DAVID J. FRIEDLAND

(s) DAVID A. FRIEDMAN
DAVID A. FRIEDMAN

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Trenton, New Jersey

STAFF

Samuel A. Alito, Secretary

Professor Henry H. Foster, Jr., Consultant

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CHAPTER 57

AN ACT establishing a study commission to study and review the statutes and court decisions relating to divorce and nullity of marriage, to consider the advisability and practicability of creating a family law court, and related matters, prescribing its powers and duties, and making an appropriation therefor.

WHEREAS, In 1907 there was a general revision of the statutory law of the State relating to divorce and nullity of marriage and related matters which followed a recommendation for a uniform divorce act, made by a conference of delegates from the States, including New Jersey; and

WHEREAS, Except for a statute passed in 1923, making extreme cruelty a ground for divorce, there has been no particular consideration given to this subject matter; and

WHEREAS, It has become increasingly evident that modern concepts in respect to divorce and nullity of marriage, and the sociological aspects of marriage, including many changes in viewpoint that require legislative investigation and study, and revision in the law; and

WHEREAS, The New Jersey State Bar Association has petitioned for legislative action in this regard; now, therefore,

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. There is hereby established a study commission to be known as the Divorce Law Study Commission, which shall consist of 3 members of the Senate to be appointed by the President thereof; 3 members of the General Assembly to be appointed by the Speaker thereof; and 6 citizens of this State to be appointed by the Governor. No more than 2 members of each group of 3 shall be of the same political party. Appointments by the Governor shall be made without regard to political affiliation. Each of the members of the commission appointed from either House of the Legislature shall serve so long as he shall be a member of the Senate or of the General Assembly, as the case may be. In case of vacancy, the same shall be filled in the same manner as the original appointment was made.

2. All of the members of the commission shall serve without compensation but they shall be entitled to be reimbursed for all necessary expenses incurred in the performance of their duties.

3. The commission shall organize as soon as may be after the appointment of its members and shall select a chairman and vice-chairman from among its members and a secretary who need not be a member of the commission.

4. It shall be the duty of the commission to study and review the statutes and court decisions concerning divorce and nullity of marriage and related matters, particularly as contained in Title 2A of the New Jersey Statutes as amended and supplemented and other legislative enactments, relating to the said subject matter and to study the advisability and practicability of creating a family law court.

5. The Law Revision and Legislative Services Commission shall render assistance to the said Divorce Law Study Commission in making its said study.

6. The commission shall be entitled to call to its assistance and avail itself of the services of such employees of any State, county or municipal department, board, bureau, commission or agency as it may require and as may be available to it for said purpose, and to employ such legal, stenographic, technical and clerical assistants and to incur such traveling and other miscellaneous expenses as it may deem necessary, in order to perform its duties, and as may be within the limits of funds appropriated or otherwise made available to it for said purposes.

7. The commission shall have all the powers provided by the provisions of chapter 13 of Title 52 of the Revised Statutes.

8. The commission may meet and hold hearings at such place or places as it shall designate during the sessions or recesses of the Legislature and shall report its findings to the Governor and the Legislature accompanying the same with any legislative bills which it may desire to recommend for adoption by the Legislature on or before July 1, 1968, or as soon thereafter as may be possible.

9. There is hereby appropriated to the commission the sum of $10,000.00 to carry out the purposes of this act.

10. This act shall take effect immediately.

Approved May 18, 1967.

Reporting date of Commission extended until January 13, 1970, pursuant to Chapter 25 of the Laws of 1969.

CHAIRMAN'S NOTE

The Chairman of the Commission would like to express, on behalf of the Legislature, deep and abiding gratitude to the members of the Divorce Law Study Commission for their efforts in the production of this report. Special thanks are extended to the Vice-Chairman of the Commission, Rosemary Higgins Case, Esq., and Annamay T. Shepard for their extra efforts.

The Commission itself is deeply indebted to Henry H. Foster, Jr., Professor of Law at New York University School of Law, for his help and assistance in compiling and preparing this report. Professor Foster himself would acknowledge the legal and research assistance of Andria Leiter, Bonnie Feldman Reiss, and Stephen Schwartz.

To all of the above I extend my own personal gratitude.

INTRODUCTION

"Today New Jersy is famous as being, if not the most archaic state in the field of divorce, then surely one of the most archaic . . . ."[1]

This is well illustrated in the record of the public hearings conducted by the Commission. It is better illustrated, perhaps, by the following excerpts from a few of the hundreds of letters received by the Commission from persons experiencing the ramifications of our present system.

A Wayne, New Jersey, Woman wrote:

> "I feel I have a problem that is shared by many others. I have been separated for more than three years. I tried very hard for many years to make my marriage work, but I just couldn't. My husband & I owned our own home & he just refused to

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[1]From the testimony of Bernard Hellring, a member of the New Jersey Bar and a member of the Conference of Commissioners on Uniform Laws; transcript of public hearing held January 30, 1969, page 14.

leave. After living in misery and unhappiness for a long time, I just couldn't stand it any more and left him. Due to this fact I can't ever get a divorce. I have talked to clergy and lawyers and all agree that this marriage is just finished. My husband realizes this, but refuses to get a divorce or even sign a legal separation. He tells me he wants me to suffer as much as possible."

Even when one of the parties is not motivated to inflict punishment, our laws do. A Garfield, New Jersey, man wrote:

"For nearly thirteen and one-half years I have been separated from my wife and unable to obtain a divorce. This separation is from a marriage which began January 29, 1955 and ended May of the same year. A marriage which lasted only four months.

"I made an attempt to get a divorce on the grounds of desertion, which I will describe briefly later. I spoke to several attorneys who either could not take the case or felt that a male did not have much of a chance in winning a divorce on these grounds in the Bergen County Courts, much less in the State of New Jersey. Mr. ----- of Paterson, New Jersey, took the case and thought we stood an excellent chance of winning.

"My case, after an extremely long wait, came before Honorable Judge ----- on July 23, 24 and 25, 1962. The trial lasted for three days. Judge ------- ruled against the divorce stating that both parties were equally at fault. Because of this ruling, and since my marriage is irreconcilable and completely dissolved, as far as I am concerned and I'm sure as far as my wife is concerned, I cannot get a divorce."

Another with experience wrote:

"I hope the law makers won't be punitive in formulating a new divorce code. That is to say to the divorcing couple 'You've made a mistake, now suffer and pay the price."

and continued:

"The rich are not really concerned with your divorce laws. A wealthy person can travel to another state or country and get a 'quickie' divorce."

And another wrote:

"I am a native of New Jersey, and have been separated from my wife for thirty years. Under New Jersey laws I don't have grounds for a divorce."

And another:

"One never knows why this comes about or how, but it is the most unhuman thing to stay married to someone when you don't love him, or her, as the case may be, and the only alternative is to turn elsewhere for love and affection, which as you might know, starts to effect [sic] the entire family, including the children."

Illustrative of another species of letter is the problem of a Passaic, New Jersey, man:

"I have been separated for 17 years. I have been trying to get a divorce from my wife and every lawyer or attorney tells me that I can't get a divorce in the State of New Jersey because my wife was committed to Graystone . . . ."

And still another problem susceptible to solution as told by a North Plainfield man:

"I filed suit for a divorce, on extreme mental cruelty, after my attorney informed me that N.J. Law's do not allow divorce on drunkness grounds. I can't understand why N.J. Law's deny either wife or husband a divorce when one or the other is a habitual drunkard. I am sure that if your commission could see first hand the turmoil, the humiliation, the heart breaks the children suffer . . . ."

Excerpts of the opinions of a priest, and a minister, in that sequence, are reproduced:

"(1) The present laws have very little relation to the preservation of the family unit. If

they do restrict the ease with which a person may be able to obtain a divorce, it does not necessarily mean that they promote family unity.

"(2) Present laws are being evaded to a considerable degree.

"(3) The temptation to exaggerate, and even lie, in order to obtain relief is perhaps most widespread in connection with desertion cases. Simple incompatibility may be the cause of the marital breakdown, but testimony is often concocted to show fault, when in fact real fault as envisioned by the law is not present."

"After twenty years as a pastor of Methodist Churches, my counseling ministry with unhappily married couples forces me to view the existing divorce laws as discriminatory, unrealistic and immoral. They are clearly discriminatory against persons financially incapable of paying the exorbitant legal fees required. Divorce may be purchased with relative ease by the well-to-do, while the poor are forced to continue bondage in a miserable marriage or to seek the comforts of a happier relationship outside the law, while being adjudged by society as 'living in sin.' Divorce laws are also unrealistic in the assumption that one person is wholely to blame for the break-up. Often both are at fault to some degree, but often neither should be 'blamed' for what proved to be an unfortunate union. If I were forced to pronounce a judgment in many cases it would be that the 'innocent party' was very much a contributor to the 'guilt' of the other, in provoking the 'desertion' or 'mental cruelty' by nagging or neglect, or by prompting the 'adultery' by denying the sexual fulfillment essential to marital harmony. More than this, the existing divorce laws are themselves immoral in encouraging dishonesty and immorality. To avoid some sacrifice of personal integrity is all but impossible as the law exists. The alleged 'grounds' of divorce are seldom the real reason for divorce, and a couple must either agree to a lie or one must deliberately involve himself in one of the 'grounds' to obtain the decree."

It is not suggested that the above quoted excerpts are representative of the opinions of any particular group, or of all communications received by the Commission. They do portray situations or express views to which the Commission is responsive, however, and a state of affairs for which, in the view of the Commission, some immediate legislative action is mandatory.

Our report is, we hope, a properly measured one, presenting for legislative consideration those recommended changes we feel immediately imperative, and reserving for future study those equally or more important considerations discussed in this report, for which the Commission recommends the creation of a permanent Family Law Commission.

Those matters which require immediate attention include new and revised grounds for annulment, divorce, and bed and board divorce; abolition and revision of defenses; an amendment to the alimony statute; a new legitimation provision; and the amendment or repeal of a few existing provisions. In addition, separate and independent bills may be introduced to effect certain procedural reforms which are collateral to the policy objectives of the substantive changes here recommended.

Central to our recommendations is a new ground permitting divorce based upon separation for at least one year where there is no prospect for reconciliation. This and most of the other new recommended grounds (as well as the

proposed elimination of defenses) have in common the following policy considerations.

The objective to strive for is to make it legally possible to terminate dead marriages.

Certainly this is so where both parties agree that the marriage is dead and furnish to the State evidence as objective as the fact of living apart for a period of one year or more.[2] In such cases the parties should not be required to resort to the hypocrisy of accusing one or the other of a marital wrong recognized by our present statutes, or to the remedy of migratory divorce, which may in any event be beyond their financial resources.

Similarly, the Commission is equally convinced that where both parties are guilty of offenses against one another, mutuality of fault should not be a bar to divorce. This can be viewed only as the infliction of punishment by the State. It cannot be justified.

More difficult, but nonetheless the subject of consensus within the Commission, is the case where fault is a factor and asserted to be so by only one of the parties. The Commission does not recommend, at this time, the complete

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[2] With equal certainty, the Commission concludes that it is in the public interest to permit termination of a marriage, the death of which is attributable to the mental illness of one of the parties.

elimination of fault as a consideration in marriage termination. The traditional grounds of adultery, desertion and cruelty, are retained (although redefined for reasons set forth in our comments to Part II) as causes or grounds for divorce. Further, fault, where so asserted as a ground for relief, will be a proper consideration for the judiciary in dealing with alimony and support. The central policy advocated by the Commission, however, that it be legally possible to terminate dead marriages, is reflected in the Commission's recommendation that fault in no case be deemed a bar or a defense to a divorce.

In the Commission's judgment, a dead marriage is no less dead because only one of the parties is demonstrably at fault. It must be observed, at this point, that the demonstrable fault is frequently the result of, rather than the cause of, marital breakdown. Certainly, the innocent and injured spouse must be regarded as a rara avis in any generation, and, in any event, the notion of divorce as a reward for virtue and a punishment for sin is not accepted by this Commission. We are, moreover, satisfied that to withhold divorce in such circumstances does not reunite a family. Almost never does a defeated plaintiff resume cohabitation with a victorious defendant. He or she merely plans for the next round, and sometimes cohabits with a partner of choice. Such is social reality. At the same time, there is great

ambivalence regarding divorce, and where one party is flagrantly at fault for the breakup, the common sentiment is that he or she should get his just deserts. This emotional and often unjustified reaction is the strongest factor favoring the retention of fault grounds, and it may be so widely held as to preclude acceptance of a pure breakdown theory, even if California's law ultimately proves a preferable solution to that herein recommended.[3] It should be noted, however, that perhaps the penalty should fit the "crime," i.e., the flagrant offender, whether plaintiff or defendant (husband or wife), may be subject to equitable principles when alimony, custody and property rights are determined.

It is the public interest in private morality, in marriage as an institution, that is best served by terminating marriages that have failed. The outmoded policy of suspending in limbo the offending spouse is the wrong remedy insofar as public morality is concerned. At the same time, there is no vested right to immunity from divorce, nor to the satisfaction which may be gained in "dog in the manger" fashion by blocking the offender from terminating a meaningless relationship and perhaps creating a socially desirable one.

By implementation of the Commission's recommendations, some may argue that divorce will be made "easier" in the State of New Jersey and the quality of family life be

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[3] See Appendix II, at page 139 et. seq.

thereby threatened. But is the proposal to be judged simply on the basis of the number of divorces granted? We submit that the answer is "no."

The incidence of divorce has little to do with divorce statutes. New Jersey, now, has one of the most restrictive divorce laws, if not the most restrictive, in the country. There is no evidence, however, that this results in fewer marital dissolutions among New Jersey's residents than among those of any other state, for there is no reliable evidence of how many New Jersey residents resort to migratory divorce, and even less evidence of how many of our residents simply ignore a prior legal relationship and cohabit illicitly. We do know, from our welfare agencies, that the latter phenomenon is all too common and all too closely related to poverty. We know, as well, that where legal aid or free legal services are provided for matrimonial actions, there is a substantial increase in the number of divorces. Yet most of these actions represent an effort to sever a legal bond to a former spouse so that a de facto family can become de jure and the children thus become legitimated. We think this in the public interest, notwithstanding the fact that our "divorce rate," as most frequently measured,[4] will there-

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[4] There is a lack of public understanding regarding the current stability of the American family. In part this is due to newspaper statistics comparing the number of divorces

by be increased.

The number of divorces which may hereafter be granted is, of course, a source of concern of this Commission

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with the number of marriages, the common figure being one divorce for every four marriages, or in California two for three. The correct comparison, however, is that between the number of divorced individuals and the number of living married men and women. The Statistical Abstract of the United States (88th ed.) reports some 44.6 million married males in 1966 and roughly 1.5 million divorced males, or about 3.3 per cent as many. Among females (including widows who reported themselves as "married") the proportion was even higher: 44.7 million married and 2.2 million divorced, a ratio of about 4.9 per cent.

In 1968 there were 573,000 divorces in the United States according to incomplete reports, as compared with 499,000 in 1966. The reported divorce rate rose from 2.2 per 1,000 population to 2.5 between 1960 and 1966. New Jersey's reported rate for the same years rose from 0.8 to 1.0 and hence remains well below the national average. However, the comparable regional rate for the Middle Atlantic states (New York, New Jersey, and Pennsylvania) was 0.8 in 1960 and 0.9 in 1966. These figures are estimates and do not reflect migratory divorces nor annulments secured in lieu of divorce. However, they do indicate trends.

In 1968, over 4 million Americans established some 2.1 million new families, the second highest number since the postwar year 1946. This was a 200,000 increase over 1967 and brought the number of American families to a record high of over 50 million. The number of families is growing faster than the total population, and today 92 per cent of all Americans live in families, and for those under 18 the figure is 99 per cent.

Between 1960 and 1967 the divorce rate among persons "at risk" (annual divorces per 1,000 married women over 15) rose from 9.2 to 11.2. In 1967, for only the second time in history, more than a million adults were involved in divorce actions, and in 1968 the figure was 1.2 million. In 1967, 700,000 children were affected by divorce, twice as many as in 1955, and currently three-fifths of divorces occur among couples with children. Most people who divorce remarry.

and a proper concern of the Legislature. It is not, however,

Between 1960-1966 the remarriage rate for divorced men rose from 168 to 211 (remarriages per 1,000 divorced men per year), and the comparable rate for divorced women rose from 122 to 130.

In 1960, the proportion of women aged 45-59 who had never been married was 7 per cent. By 1967 it had dropped to 5 per cent. Most families--87 per cent--have a husband and wife in the home, but about 2 per cent have a male head living without a wife, 11 per cent a female head but no father in the home. The proportion of white children not living with both parents increased from 8 to 10 per cent between 1957 and 1966, for non-whites from about 34 to 38 per cent. Since 1960, the proportion of Americans aged 65 and older not living in families has grown from 27 to 30 per cent, but only 20 per cent of elderly men live apart from families as compared with 40 per cent of elderly women.

Between 1947 and 1967 the illegitimacy rate doubled to 24 illegitimate births per 1,000 never-married women aged 15-44. Non-white illegitimacy rates are higher than those for whites but have declined in comparison while the latter have substantially increased. In 1967, of family heads under 45, 28 per cent had gone to college, 57 per cent had gone to or through high school, and 15 per cent only to grammar school. In that year the median family income reached $8,000, a 35 per cent gain over 1957 in real dollars. In 1960, 15 per cent (6.2 million) of all white families and 49 per cent (2.1 million) of all non-white families were rated "poor" by Social Security standards. By 1968, only 8 per cent (3.8 million) of white families and 31 per cent (1.5 million) non-white families were considered poor. Popular opinion notwithstanding, a large proportion of the poor live in families where the head of the household works. The above figures are based upon the Population Reference Bureau's reports as published in the New York Times Encyclopedic Almanac 400-401 (1970).

Other sample and local studies have shown that if we subtract teen-age marriages and remarriages of the previously divorced, about eighty-five per cent of American marriages are terminated by death rather than divorce. The inclusion of teen-age marriages and those of the previously divorced produces the 1 to 4 ratio that is so highly publicized.

in the public interest to require dead marriages to continue for the sake of statistical neatness or comparison or on a misguided assumption that thereby family life is strengthened.

No more compelling argument for reform of this State's divorce laws exists than the spectacle, so frequently encountered, of the bar of recrimination as it operates among our poor. In its most typical application, this doctrine absolutely bars a deserted wife who has acquired a de facto family from legitimating her family. The Judiciary is to be congratulated for its recent amelioration of this doctrine, in uncontested actions for divorce. There remain within our divorce laws, however, equally unjust, if not so dramatic, bars to marriage termination, changes in which cannot and should not await remedy by judicial ingenuity.

The most important long-range recommendation, as viewed by the Commission, is that the Legislature create and fund a Family Law Commission to further the work begun by this body and to permit a continuing evaluation of New Jersey family law.

Early in our work it became apparent that a broader and more intensive study than our own would be necessary; necessary because the Commission lacked both the authority and resources to undertake a study of the scope warranted. We were enjoined by c.57, L 1967, to "study and review the statutes and court decisions concerning divorce and nullity of

marriage and related matters ... and to study the advisability and practicability of creating a family law court." Unfortunately, by the time this became a viable Commission,[5] another Commission had been created (JR12,L 1968) to study and review the statutes and court decisions relating to the problem of establishing a Family Court. This Commission did not regard itself as empowered to preempt the area subsequently assigned to another body by JR12, 1968, even though there are obvious areas of mutual concern.

More importantly, while "related matters," as used in our enabling act, could, by liberal construction, cover a study of the entire field of family law, our appropriation and resources could not. Nor could our time! Thus, for example, we found ourselves posing questions about fair allocation of property upon termination of a marriage by divorce without any confidence that New Jersey's present laws fairly allocate property among members of a family upon its creation,

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[5] While the Divorce Law Study Commission was created by Chapter 57 of the Laws of 1967, no appointments were made thereto until late in 1968, and the Commission was not able to organize itself until November 1968.

during its continuation, or upon its dissolution for reasons other than divorce. Nor can this aspect of the problem be considered incidental. To many, perhaps most of those who communicated with the Commission, "divorce reform" held the hope of some change in financial circumstances. And, whatever its merit otherwise, the approach to marriage dissolution adopted by California is probably only appropriate in a community property state.

And so we defined. We decided we couldn't restructure the law of descent and distribution, or the matrimonial property law, or the child custody law; that we couldn't intelligently address ourselves to another experiment in marriage counselling other than in the context of a family court; that we couldn't now involve ourselves in the critical relationship between our matrimonial or family law and our welfare law structure; in short, that as unsatisfying and unsatisfactory as it might be, our study would have to be confined, to the extent possible, to the grounds for divorce and defenses thereto, and our recommendations confined to those which we could now make with a high degree of confidence.

As we expected, this basic policy decision affected the substance of the recommendations made by the Commission. For example, and notwithstanding our awareness of New Jersey's first unsuccessful experiment with mandatory counselling and

consultation as a part of the divorce process, the Commission strongly feels that such services should be made available to divorce litigants. Yet that recommendation is felt to be beyond the scope of this study, or at least one which must be implemented in the context of a family court system.

Again, the consensus of the Commission is that the economics of divorce, especially as related to the poor, is a subject which requires consideration in greater depth. There are indications that the poor have been priced out of the market insofar as matrimonial relief is concerned, with resultant hardships to de facto families (and serious welfare ramification).[6] Courts must be open and the law must be responsive to the legitimate needs of the poor if our boast of equal justice is to be meaningful. Full realization of this goal must be the subject for further study, but our recommendation of a new non-fault divorce ground will at least eradicate the spectre of the affluent achieving a non-fault marriage dissolution denied the poor only by economic inability to travel elsewhere for this remedy.

Finally, but still only illustratively, the Commission appeared to reach a consensus that "fault" and "punish-

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[6] And the availability of counsel for divorce proceedings probably can be considered only in the context of legal aid generally.

ment" may have no proper place in the substantive law of divorce. Rather, the consensus of the Commission is that the breakdown of marriage should be and is the ideal criterion for its termination. However, there are serious obstacles and difficulties inherent in the complete abandonment of the fault approach and the substitution of the breakdown theory. It is a matter which deserves fuller study and evaluation, including that of the experience gained under California's new law. It may be that "irretrievable breakdown" is too subjective and is not a justiciable issue, or is so vague and uncertain as to be meaningless. This, again, of necessity, we leave to a fully funded, fully authorized entity for study.

Why, then, if all these problems beg solution do we recommend any changes at this time? Because in the unanimous view of the members of this Commission some problems are soluble and in good conscience cannot be made to await further study.

PART I

THE LAW OF DIVORCE IN NEW JERSEY

At present New Jersey recognizes only three grounds for divorce--adultery, desertion and extreme cruelty--all of them conditioned upon the establishment of the defendant's fault and the plaintiff's freedom from fault. Section A of this Part I summarizes very briefly the law applicable to each of these grounds, and some comparison is made in connection with each between the law of New Jersey and that of other jurisdictions. Section B deals with statutory and judicially created defenses and compares these with defenses available in other states. Section C outlines existing New Jersey law concerning annulment, divorce from bed and board, alimony and separate maintenance.

A. GROUNDS FOR DIVORCE

1. ADULTERY

a. Historical Background

Adultery was recognized by the ecclesiastical courts of England as a ground for divorce a mensa et thoro but became a ground for absolute divorce in 1857. New Jersey recognized it as such in the Divorce Act of December 2, 1794 (Pat. Laws 143) and today also recognizes it as a cause for an absolute divorce. N.J.S.A. 2A:34-2, 2A:34-3.

b. Judicial Interpretation of the Scope of Adultery

Adultery has been defined as "voluntary sexual intercourse of a married person with one not the husband or wife of that person." Johnson v. Johnson, 78 N.J. Eq. 507 (Ch. 1911).

This definition includes cases where a spouse has engaged in voluntary sexual intercourse with someone other than the complainant spouse, but did not do so until a void foreign divorce decree had been procured. The New Jersey courts have determined that as the decree is void, the marriage is still in existence and the act, therefore, fits within the definition of adultery. Flower v. Flower, 42 N.J. Eq. 152 (Ch. 1886). The same determination has been made

even when the voluntary sexual intercourse is with a new "spouse" after an ineffective attempt at "marriage." Newton v. Newton, 13 N.J. Misc. 613 (Ch. 1935).

Rape perpetrated by a husband against a third party also comes within the definition of adultery. Johnson v. Johnson, supra, at p. 509. However, an act of rape perpetrated upon a wife does not make her guilty of adultery, Flavell v. Flavell, 20 N. J. Eq. 211 (Ch. 1869), since the wife is subjected to rape against her will. When determining whether a fact pattern falls within the scope of the adultery ground, the New Jersey courts are only concerned with the volition requirement in regard to the spouse accused of adultery and not that of the non-spousal partner in the sexual act. Nor do the New Jersey courts look to the non-spousal partner's marital status.

Generally, the courts' concern is with the two spouses and their actions. However, they have failed to expand their approach to cover a third variation of circumstances, that where sodomy or bestiality is involved. Once the New Jersey courts determine that the non-spousal partner's identity is such as to have made the voluntary sexual intercourse an act of sodomy or bestiality, they will not grant an absolute divorce on the ground of adultery.

Direct evidence of adultery is most conclusive,

but it has not been necessary for more than a century. Day v. Day, 4 N.J. Eq. 444 (1844). Proof by circumstantial evidence is usual, because direct evidence is generally impossible to procure. Wagner v. Wagner, 140 N.J. Eq. 213 (E. & A. 1947). When adultery can be proven only by circumstantial or indirect evidence, the test of adultery has been defined to include "opportunity" and "guilty inclination." Eberhard v. Eberhard, 4 N.J. 535 (1950). Without these two elements, a cause of action for an absolute divorce on the ground of adultery will not have been proven. Shaffer v. Shaffer, 129 N.J. Eq. 42 (E. & A. 1941).

"Guilty inclination" may be inferred from an exchange of obscene literature as in Benjamin v. Benjamin, 111 N.J. Eq. 400 (E. & A. 1932); affectionate letters between the spouse and corespondent as in Atha v. Atha, 95 N.J. Eq. 275 (E. & A. 1923); or the wife's "obscene" character as in Wille v. Wille, 88 N.J. Eq. 581 (E. & A. 1918). However, mere indiscretions are not sufficient to establish "guilty inclination." Schwartz v. Schwartz, 104 N.J. Eq. 420 (Ch. 1929). "Opportunity" may be inferred from a wife's several visits to a brothel with another man as in Stackhouse v. Stackhouse, 36 A. 884 (Ch. 1897), or from a husband's sharing of a one-bed apartment with another woman for one week as in Reitemeyer v. Reitemeyer, 140 N.J. Eq. 393 (E. & A. 1947).

On the whole, wherever a situation may be interpreted either way, that interpretation which favors innocence--not adultery--is adopted and the divorce is not granted. Sargent v. Sargent, 92 N.J. Eq. 703 (E. & A. 1921). Since the evidence is circumstantial, rigid safeguards are applied in nearly every case involving adultery.

As with extreme cruelty, a cause of action for adultery arises at the time the offense is committed. Woodward v. Woodward, 41 N.J. Eq. 224 (Ch. 1886). However, unlike extreme cruelty, there is no statutory requirement that there be a cooling-off period before the vested right can be exercised.

c. New Jersey v. Other States

New Jersey is like all other states in that it recognizes adultery as a ground for absolute divorce. But New Jersey does not adequately provide for divorce in instances of sodomy or bestiality. Some states such as Alabama and North Carolina have sought to remedy this problem by creating a new ground for divorce: "crimes against nature."

New York includes "deviant sexual intercourse" within the statutory definition of adultery.

2. DESERTION

a. Historical Background

Desertion was not a ground for matrimonial relief under English canon law as administered by the ecclesiastical courts. However, it has been recognized as a ground for divorce in the United States since colonial days.

As usually understood, desertion requires a cessation of cohabitation, without consent or justification, for a prescribed period, plus an intent to desert or abandon. New Jersey established the ground of desertion in its first Divorce Act (Pat. Laws 143, the Act of Dec. 2, 1794). That Act required that the desertion be willful, continued and obstinate, and the time originally specified was seven years. Present New Jersey statutes continue the qualifying adjectives but reduce the period to two years. See N.J.S.A. 2A:34-2 , 3.

b. Judicial Interpretation

(1) The Scope of Desertion

(a) Cause of Action

The ground of desertion is unlike the two other grounds for absolute divorce in New Jersey in that the cause of action does not arise at the time of the original act but

only after the willful and obstinate desertion has continued for a period of two years. Mayerson v. Mayerson, 107 N.J. Eq. 63 (E. & A. 1930).

Desertion is regarded by the New Jersey courts as a continuing cause of action. Thus where a deserted spouse is domiciled in New Jersey when a cause of action for desertion arises, but thereafter moves to a state which does not recognize desertion as a ground for divorce, the deserted spouse may nonetheless prosecute an action for divorce on this ground upon returning to New Jersey and fulfilling the two year residence requirement of N.J.S.A. 2A:34-10. Adler v. Adler, 110 N.J. Eq. 381 (Ch. 1932).

(b) The Elements of Desertion

(i) The separation must be "obstinate"--it must be against the will of the deserted party. Stover v. Stover, 94 N.J. Eq. 703 (Ch. 1923). It is essential that the plaintiff show that the desertion was against his or her will. Howes v. Howes, 125 N.J. Eq. 272 (E. & A. 1939). Such obstinacy is generally shown by the defendant's deliberate and continuous refusal to return despite the plaintiff's sincere overtures and requests for reconciliation. Henderson v. Henderson, 134 N.J. Eq. 363 (E. & A. 1944). However, there is a dual standard which favors a wife as opposed to a husband who is the deserted plaintiff. Generally, a deserted husband must try to convince his wife to return. Budrick v.

Budrick, 6 N.J. Super. 247 (App. Div. 1950). The major exception to this rule occurs when the deserting wife is living with another man and is probably unchaste. Smith v. Smith, 95 N.J. Eq. 657 (E. & A. 1924). A second exception occurs when the "faultless" husband's efforts would be futile. Coyle v. Coyle, 6 N.J. Super. 141 (App. Div. 1950). On the other hand, a deserted wife need not seek a reconciliation even in the absence of adultery or futility. Jacobs v. Jacobs, 100 N.J. Eq. 482 (Ch. 1927).

The time at which a complaint is filed is a consideration in determining the absence of consent. A delay in filing, despite the vesting of the cause of action after the two year period, may lend further credence to the "aggrieved" party's lack of consent to the separation. If that delay is accompanied by proof of plaintiff's attempts to reconcile, the "obstinacy" of the defendant is established even more clearly. Mayerson v. Mayerson, supra. However, immediate filing, if combined with other circumstances, may indicate that the "aggrieved" party was not obstinately opposed to the separation. Meldowney v. Meldowney, 27 N.J. Eq. 328 (Ch. 1876).

(ii) "Desertion must be willful"--intended by the "deserter." Galichio v. Galichio, 85 N.J. Eq. 213 (E. & A. 1915), but it need not be shown by the plaintiff. Howell v. Howell, 63 N.J. Eq. 293 (E. & A. 1901). There are two excep-

tions. Motive will not be assumed if consensual separation may be inferred. Nor will it be assumed if there has been sufficient provocation. Thus, the motive of the deserter is usually considered only to indicate the absence of intent to desert rather than to establish the willful intent to desert. Coe v. Coe, 68 N.J. Eq. 157 (Ch. 1905).

The intent to desert need not exist at the time of the spouse's departure but may be formed at a later point, at which time the duration period begins to run. Kelly v. Kelly, 95 N.J. Eq. 246 (E. & A. 1924). If the actual "willfulness" disappears before the expiration of two years and the deserter offers to return, the requirement of "willfulness" is not met, and the divorce cannot be granted on the ground of desertion. If the offer is accepted, the deserting spouse must be taken back unconditionally. Henderson v. Henderson, supra.

Although it would appear that imprisonment, restraint, compulsory army service, or any other form of involuntary absence logically precludes "willfulness" on the part of the deserting spouse, there are instances where the New Jersey courts will apply N.J.S.A. 2A:34-2 so as to grant an absolute divorce to the deserted spouse. When the initial separation was willful and obstinate desertion, the courts will impute intent to the defendant and impute lack of consent to the plaintiff during an immediately subsequent enforced separation. The plaintiff need only prove the fact

of imprisonment or of compulsory military service and need not offer any proof of the defendant's willfulness during the imprisonment or service period.

This major exception to the "willfulness" requirement does not apply to insanity which occurs before the two year period has elapsed. The initial "willfulness" is not imputed to the insane period, Gordon v. Gordon, 89 N.J. Eq. 535 (E. & A. 1918), because the courts consider that in this instance restraint is the result of something beyond the defendant's control. Porter v. Porter, 82 N.J. Eq. 400 (Ch. 1913). The distinction between insanity and other forms of enforced separation is probably the result of a policy of protecting the mentally ill, since compulsory military service and imprisonment are also forms of involuntary restraint, but do not toll the time period.

(iii) The requirement of cessation of cohabitation can be met without the two parties occupying separate households. Rodie v. Rodie, 138 N.J. Eq. 470 (E. & A. 1946). The requirement's focus is upon the cessation of sexual relations. Mayerson v. Mayerson, supra. The New Jersey courts have recognized that cohabitation may have to continue for such non-marital reasons as money. However, the courts still retain a dual standard for the requirement of cessation of sexual relations. If the husband is the deserting party, and he fraudulently induces his wife to engage in sexual intercourse

with promises of reconciliation, the two year period is not interrupted and the deserted wife may obtain a divorce on the ground of desertion. Kirschbaum v. Kirschbaum, 94 N.J. Eq. 87 (Ch. 1922). On the other hand, when the wife is the deserting party, a brief period of sexual intercourse is sufficient to interrupt the two year period and the husband will not be able to obtain a divorce on the ground of desertion. Tracey v. Tracey, 43 A. 713 (1899).

(iv) The fourth element or requirement is that of a time period: the other three elements or requirements must be "continued" for the two year period without interruption. Stover v. Stover, supra. However, there are two possible exceptions. These are a fraudulently induced resumption of sexual intercourse for a brief period of time where the deserted party is the wife, Kirschbaum v. Kirschbaum, supra; or interruption due to the pendency in good faith of a prior matrimonial suit. Hartpence v. Hartpence, 121 A. 513 (Ch. 1923). The general rule against tacking of discontinuous periods of desertion discourages reconciliation attempts, since, should the deserter and the other spouse engage in sexual intercourse during a period of honest reconciliation, the deserted spouse cannot tack on the time preceding the reconciliation even when the deserter leaves again.

c. Constructive Versus Simple Desertion

The distinction between these two forms of desertion rests on "intent." Intent is necessary to establish "simple desertion," which intent is shown by the voluntary departure of the deserting party. But the party responsible for the separation is not always the party who leaves the home. If the responsible party's actions were such as to constitute the ground of extreme cruelty, the New Jersey courts will not consider that party's actual "intent" but will, rather, "construct" his intent in doing such acts as an intent to desert.

Requirements for the establishment of the ground of constructive desertion are stringent. First, the deserter's actions must have met the requirements for extreme cruelty. Second, the separation must have been a direct result of that extreme cruelty. Jones v. Jones, 29 A. 502 (Ch. 1894.) Third, acts of extreme cruelty arising after a voluntary separation cannot give rise to the ground of constructive desertion. The acts must occur while the parties are still cohabiting.

The New Jersey courts' view of the scope of constructive desertion is best illustrated by their view of extreme cruelty. By definition, the acts amounting to each are the same. Any of the examples listed in the section dealing with the ground of extreme cruelty may amount to constructive

desertion if followed by a two-year separation.

The scope of simple desertion is illustrated by the following court decisions in New Jersey: A wife does not follow her husband to a new domicile when his choice is not unreasonable, Ford v. Ford, 133 N.J. Eq. 33 (E. & A. 1943); a spouse commits acts of extreme cruelty and voluntarily leaves the victimized spouse (while it is possible here to make a case for constructive desertion by reason of the commission of extreme cruelty, the voluntary departure by the guilty spouse makes it unnecessary to construct intent), Cowen v. Cowen, 106 A. 366 (Ch. 1919); a husband leaves home to live openly with and support his mistress, Carroll v. Carroll, 68 N.J. Eq. 724 (E. & A. 1905); a husband witholds support from his spouse despite ability to support her and does so for the obvious purpose of driving her away from him, Paxton v. Paxton, 98 N.J. Eq. 476 (Ch. 1925); a spouse refuses sexual intercourse without just cause or excuse, Munger v. Munger, 130 N.J. Eq. 279 (E. & A. 1941); a spouse refuses treatment for impotency, Yawger v. Yawger, 86 A. 419 (Ch. 1913); a spouse insists upon contracepted intercourse (which is tantamount to a refusal to have children), Kreyling v. Kreyling, 20 N.J. Misc. 52 (Ch. 1942); a husband encourages or ignores his parents' cruelty (which need not be extreme cruelty) to his wife but the wife still indicates that she is willing to live with him in their own home.

If all the elements necessary to establish simple desertion are present, the husband's continued support of his wife and family will not bar his spouse's suit for divorce on the ground of desertion. Young v. Young, 94 N.J. Eq. 155 (E. & A. 1922). Destitution is not a requirement. However, a husband's inability to provide for his spouse is not sufficient to establish "willfulness." Fehmel v. Fehmel, 118 N.J. Eq. 294 (E. & A. 1935), nor is it enough to justify his wife's departure and a subsequent claim of constructive desertion. Shockey v. Shockey, 112 N.J. Eq. 370 (E. & A. 1933).

d. New Jersey and Other States

In some form, desertion is a ground for divorce in all states except Louisiana and North Carolina, both of which have separation grounds.

3. EXTREME CRUELTY

a. Historical Background

While under the classical canon law, extreme cruelty was not a ground for absolute divorce, the English ecclesiastical courts did eventually permit it as a ground for divorce a mensa et thoro. New Jersey, which had followed the English ecclesiastical rule, did not recognize it as a ground for absolute divorce until the passage of the Black-

well Act of 1923. Prior to that Act, extreme cruelty was utilized as a back door entrance to the divorce court, for it served as a basis for establishing constructive desertion.

Both before and after the passage of the Blackwell Act, the connotation of extreme cruelty was one of conduct which would "justify the court in believing that if he [the husband] is allowed to retain his power over his wife and she is compelled to remain subject to him, her life or her health will be endangered, or--he will render her life one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife." Soos v. Soos, 14 N.J. Misc. 381 (Ch. 1936).

However, the Blackwell Act did more than merely add another remedy. It fixed the cause of action at the moment it occurred, although it could not be exercised until six months after it had vested in the complainant. The purpose was to provide a six month cooling-off period so that a "saveable" marriage would not be destroyed by hasty and angry reactions. Such six month cooling-off period does not apply to counterclaims. N.J.S.A. 2A:34-2 .

Judicial application of the Blackwell Act has made it retroactive and applicable to both spouses; acts which could be classified as amounting to "extreme cruelty" but which arose after the initial cause of action vested (within the six month period), may be considered by the court as

"giving character" to those acts which do constitute the cause of action; and the specific allegations of cruelty must appear in the pleadings and be proven in order to establish a ground for absolute divorce.

b. Judicial Interpretation of the Scope of Extreme Cruelty

A brief examination of New Jersey court decisions best illustrates the scope of the ground of extreme cruelty.

The following are circumstances which the courts have deemed to be outside the scope of "extreme cruelty": overbearing, unkind and self-centered conduct as in Hall v. Hall, 9 N.J. Eq. 402 (Ch. 1900); repeated choking which does not create reasonable apprehension of future repetition as in Regan v. Regan, 100 N.J. Eq. 158 (Ch. 1926); a husband's alleged attempted suicide as in Dodge v. Dodge, 103 N.J. Eq. 45 (Ch. 1928); "respectable" husband's conduct--physical assaults such as striking and choking--that do not endanger wife's health as in McElnea v. McElnea, 103 N.J. Eq. 304 (Ch. 1928); cruel conduct which was provoked--unless the conduct was out of proportion to the provocation--as in Sachse v. Sachse, 107 N.J. Eq. 41 (E. & A. 1930); incompatibility and constant quarreling, Sachse v. Sachse, supra; refusal to engage in sexual intercourse--unless for a period of two years, and even then, such conduct is considered to be "simple desertion" rather than "extreme cruelty" as in Gilson v.

Gilson, 113 N.J. Eq. 32 (E. & A. 1933); habitual drunkenness or vile language as in Cruikshank v. Cruikshank, 115 N.J. Eq. 322 (E. & A. 1934); past acts "unless there is reasonable apprehension that continuance of cohabitation would result in further injury" as in Julian v. Julian, 127 N.J. Eq. 77 (E. & A. 1940); establishing a rival business with funds received from a husband as in Bamberg v. Bamberg, 123 N.J. Eq. 570 (E. & A. 1938); occasional acts of violence which do not create danger as in Schnatter v. Schnatter, 129 N.J. Eq. 373 (E. & A. 1941); and a single act of violence which does not create fear of continuance as in Stutz v. Stutz, 139 N.J. Eq. 385 (E. & A. 1947).

The requirement of "reasonable apprehension" of continuing conduct, exemplified by the Julian case, supra, was justified by the court on the ground that the remedy of divorce for extreme cruelty was "preventative" rather than "punitive." The more recent trend, expecially since the passage of N.J.S.A. 2A:34-2, has been towards less emphasis upon the test of "reasonable apprehension" of the continuance of cruel conduct and greater emphasis upon "endangering" conduct or "reasonable apprehension" of such conduct. Steinbrugge v. Steinbrugge, 2 N.J. 77 (1949).

The following are circumstances which the courts have deemed to be within the scope of "extreme cruelty": physical violence which would endanger health or life if con-

tinued as in Strietwolf v. Strietwolf, 47 A. 14 (Ch. 1900); unjust accusations of infidelity which, however, was not established as in Pfender v. Pfender, 103 N.J. Eq. 367 (E. & A. 1928); groundless charges of unchastity, threats to cut spouse's throat and driving spouse from the home, as in Perguidi v. Perguidi, 138 N.J. Eq. 559 (E. & A. 1946); and such cruel conduct as endangers life or health, be it actually inflicted or reasonably apprehended, as in Stutz v. Stutz, 139 N.J. Eq. 385 (E. & A. 1947).

The commission of adultery within the home, false accusations of incest where there is no justifiable reason for suspicion, and the transmission of venereal disease--or the attempted transmission of venereal disease--to an unknowing or unwilling spouse, also fall within the scope of "extreme cruelty." However, drunkenness will be a ground only if it is habitual and is accompanied by other acts which are considered to constitute "extreme cruelty" in the first place (i.e., physical assaults or false and malicious charges of infidelity). Vile and offensive language is usually considered only as lending character to other acts without constituting "extreme cruelty" of itself. Nor does non-support constitute "extreme cruelty." However, while the courts will consider a spouse' "cruel" acts occurring after the cause of action has vested, so as to lend character to the acts complained of, the courts will also consider that spouse's repen-

tant attitude in order to determine whether the acts complained of constitute "cruelty." Soos v. Soos, supra, at p. 391.

c. New Jersey v. Other States

New Jersey is like most other states in that it now recognizes "extreme cruelty" as a ground for absolute divorce. (Forty-five other states have a similar ground for that remedy.) As in most other states it no longer regards actual physical violence as the only form of cruelty. (South Carolina and Illinois are the exceptions, and Illinois goes so far as to require that the violence occur at least twice.) Moreover, it is with the majority in not requiring intent as an essential element. (Georgia, Maine, Massachusetts and Rhode Island are the four exceptions, although Maine does not require "intent" for "cruel and abusive treatment" as opposed to "extreme cruelty," and Rhode Island does not require "intent" in the event of actual physical violence.)

New Jersey's "cooling-off" period is a unique approach to a difficult problem. Other states which have tried to prevent the injured party from acting in haste and anger to destroy a "saveable" marriage have developed time periods which are far too long and so filled with red tape as to be unfair. New Jersey's shorter six month period is a relative improvement as far as time periods go (as opposed to one or

more years). However, it is doubtful that a cooling-off period, whatever its length, serves its intended purpose of preventing hasty divorces, procured in anger. Such was the conclusion reached by the California Governor's Commission Report (1966) on the same issue.

Despite these advances, the scope of extreme cruelty in New Jersey is limited when viewed in the light of its current meaning in other states. One such trend is to broaden the scope of cruelty itself. Among the alternatives for acts which are classifiable as "cruel" Arizona allows those which would destroy the legitimate objects of marriage; Nevada allows misconduct which makes the other spouse's life miserable; Kentucky allows mental cruelty without a showing of injury; Montana allows grievous mental suffering due to conduct occurring and persisting for one year before the commencement of suit; Ohio allows mental cruelty without a showing of impairment of health to the extent that continuous nagging and opposition and interference regarding a spouse's business constitute cruelty; Oregon allows indignities which include pure mental cruelty without requiring a showing that health has been impaired; South Dakota also allows mental cruelty without a showing of the impairment of a spouse's health to the extent of calling that spouse vile names; and Texas allows any type of cruelty which makes life together insufferable and unendurable.

Another trend has been to increase the number of grounds for absolute divorce. These grounds are related to "extreme cruelty," and thus the same effect can be achieved without tampering with the existing scope of the technical ground of extreme cruelty. While judges, lawyers and legislators may argue as to what heinous actions come under which classifications, the injured party who has been the victim of cruelty (used here in the vernacular sense) is more concerned with obtaining the relief of absolute divorce than he is with the title given to a ground, unless the title of a ground affects custody, visitation rights, property settlements, and the like. Among the states which have added the ground "indignities which make life intolerable" are Arkansas, Missouri, Pennsylvania, Tennessee and Wyoming. "Incompatibility" has become an additional statutory ground in Alaska (which also recognizes the ground of "personal indignities"), Nevada, New Mexico, Oklahoma and the Virgin Islands. "Habitual drunkenness" which has lasted for one year is recognized in Arkansas, and South Carolina. Arkansas and some other states include habitual use of drugs for a similar period of time. South Carolina's recognition of this additional ground is particularly interesting in view of the fact that South Carolina is one of the few states which, generally, still requires physical violence for the "cruelty" ground. Unlike Kentucky's decision to expand the scope of

the cruelty ground, Hawaii's decision regarding mental cruelty was to create the additional ground of "grievous mental suffering" which is also known as a "mental cruelty statute." Furthermore, twenty-six states, Puerto Rico and the District of Columbia now have "living apart" statutes.

Of the twenty-eight jurisdictions with "living apart" statutes, thirteen states require that there be some form of a court decree--be it a separation decree, a decree of limited divorce, or an order for maintenance and support--preceding the time period. The required time periods vary from any time as in Connecticut to four years in Alabama. The divorce in these states may be granted to either party--as in Connecticut--or there may be limitations, as in the District of Columbia, where it can be granted only to the innocent spouse. A few of these jurisdictions require a decree in certain instances but do not do so in others. For example, Alabama requires either a decree followed by four years or no decree at all for a wife when there have been only two years of non-cohabitation and non-support. The thirteen jurisdictions requiring that there be some form of court decree include Alabama, Colorado, Connecticut, the District of Columbia, Hawaii, Louisiana, Minnesota, New York, North Dakota, Pennsylvania, Utah, Virginia and Wisconsin.

In the instances where a decree is not required, the time period varies from one year to Rhode Island's dec-

ade. Some states, such as Arkansas, greatly restrict the scope of the ground so that it benefits only the injured party and is considered only in relation to the division of property and the allotment of alimony. Others have no restriction on the scope of the ground itself and require only that the non-cohabitation be for a certain period of time. The jurisdictions which do not require a decree include Arizona, Arkansas, Delaware, Idaho, Kentucky, Maryland, Nevada, New Hampshire, North Carolina, Puerto Rico, Rhode Island, Texas, Vermont, Washington, and Wyoming.

The aforementioned examples have been cited to show where New Jersey stands in comparison with the rest of the nation. New Jersey is in line with other states regarding the existence of a cruelty ground; the absence of physical violence as a requisite; and the absence of "intent" as an indispensable requirement in all cases. However, New Jersey differs from other states in regard to its cooling-off period and is also set apart by the scope of cruelty as a ground and lack of related grounds. In New Jersey, the scope of the ground is limited and the related grounds are non-existent.

B. DEFENSES IN DIVORCE SUITS

Innocence is not the sole defense for a defendant in a divorce suit. A variety of defenses are available to the cruel, adulterous and/or deserting New Jersey spouse. All of these defenses are based upon the alleged fault or misbehavior of the plaintiff.

There are defenses which ordinarily could be the grounds for a separate divorce suit instituted by the defendant if he were innocent of the grounds charged by the plaintiff ("recrimination"). Moreover, there are a number of defenses based on the plaintiff's misbehavior which, while wrongful, would not amount to a ground for divorce in a suit by the defendant spouse. These include the equitable defense of "unclean hands," connivance and collusion. In fact, the defense of collusion is based upon the wrongful behavior of both the plaintiff and the defendant. A third category of defenses is based on behavior which is less wrongful, and, on occasion, commendable. It is comprised of laches and condonation. Finally, a number of the aforementioned defenses, and several additional defenses, are treated uniquely when used to defeat a specific ground. These include insanity, provocation, recrimination and "half-way" devices such as repentance.

1. DEFENSES WHICH COULD BE THE GROUNDS FOR A SEPARATE DIVORCE SUIT INSTITUTED BY THE DEFENDANT: THE DOCTRINE OF RECRIMINATION

The doctrine of recrimination is a part of New Jersey's case and statutory law. Huster v. Huster, 64 N.J. Super. 29 (App. Div. 1960). Some states such as Arkansas, Kansas, Louisiana, Nevada, Oklahoma, Texas, Utah, and Washington, have rejected this doctrine--by statute or decision--and instead use that of comparative rectitude, which permits the party less at fault to obtain a divorce.

a. Historical Background

By definition recrimination operates as a valid defense when the plaintiff's behavior meets the requirements of extreme cruelty, adultery, or desertion as a ground for divorce in New Jersey. The statutory bar of recrimination occurs when the defense to the defendant's adultery is the plaintiff's adultery. N.J.S.A. 2A:34-7. This has been the case since the first Divorce Act in 1794 (Pat. Laws 143). The unwritten law of recrimination has threaded its way through the laws of Moses, Rome and the Church of England and, for more than a century, New Jersey has denied a divorce in cases where both spouses have been "guilty." Marsh v. Marsh. 16 N.J. Eq. 391 (Ch. 1863). The general rules as applied in New Jersey are that the defensive recriminatory charge amounts to a matrimonial offense and that the matri-

monial offense must be one which is recognized under New Jersey's statute. Reeves v. Reeves, 106 N.J. Eq. 532 (Ch. 1930).

Unlike the doctrine of comparative rectitude, which operates so as to grant the divorce decree to whichever party is less at fault, the doctrine of recrimination has operated so as to bar the New Jersey plaintiff from obtaining a divorce. Unfortunately, the bar has become mechanical and absolute whether its source is statutory, as in the case of adultery, or equitable.

b. Judicial Interpretation

The Wells case is a prime example of the inequities of the doctrine. In that case the trial court insisted on applying the doctrine even while admitting that the plaintiff was meeting an unfair fate. (The plaintiff's adultery was with a woman he had married, in good faith, a full eleven years after his first wife's desertion. He had believed his first wife to be deceased.) The Supreme Court reversed and held that raising the bar was discretionary with the court. Wells v. Wells, 41 N.J. 594 (1964).

In Caffrey v. Caffrey, 54 N.J. 223 (1969), the Supreme Court went even further to remedy New Jersey's past application of the doctrine. In that case, the court held that, unless there are extraordinary circumstances, the trial

court, in uncontested cases, should not raise the defense upon its own motion. The courts have not, however, yet made any changes in the recriminatory defense in contested cases, or in uncontested cases where there is a problem concerning the wife's support. At the present time, therefore, the absolute bar may still apply to such cases.

c. New Jersey v. Other States

Twenty states, the Virgin Islands, and the District of Columbia, have chosen to modify or abolish the doctrine of recrimination. Different methods were used to do so (statutes were used in states such as Colorado, Delaware, Kentucky, Minnesota, Mississippi, Nevada, and North Dakota, while the state courts acted on their own in states such as Utah, and the federal courts acted in the Virgin Islands and the District of Columbia), and different approaches or doctrines replaced the doctrine of recrimination.

Some jurisdictions have adopted the doctrine of comparative rectitude in place of that of recrimination (Nevada, Texas, Utah, Washington, Arkansas, Kansas, Louisiana and Oklahoma); some have retained recrimination in limited form (Florida and Mississippi leave its application to judicial discretion, and Florida also allows for comparative rectitude; the Virgin Islands limits recrimination to adultery and New Mexico abolishes recrimination as an absolute

bar when the ground is incompatibility but recrimination may prevail when dealing with plaintiff's adultery); and a few states allow divorce to both parties (Colorado, New York, Oklahoma and Washington do so by statute, while California, Florida, Idaho, Illinois, Montana, Oregon, Tennessee and the Virgin Islands have court decisions to this effect). See Appendix II, infra.

2. DEFENSES BASED UPON PLAINTIFF'S WRONGFUL ACTIONS

a. "Unclean Hands"

The general principles supporting the defense of "unclean hands" are rules of equity to be applied in light of the total fact pattern. Untermann v. Untermann, 19 N.J. 507 (1955).

The defense may apply where the plaintiff had "unclean hands" before the suit was instituted or where the plaintiff did not soil his hands until after the suit was instituted. Generally, the doctrine applies to situations arising after the action is commenced, as in instances of concealment of facts or giving false testimony. Pfender v. Pfender, supra.

This equitable defense is not often used in divorce actions. It is used frequently, however, in nullity suits.

b. Connivance or Consent

Connivance or "corrupt consent" is most commonly used as a defense to the charge of adultery. Under N.J.S.A. 2A:34-7, the defense of connivance against the charge of adultery requires that a divorce be denied. When used to defeat the ground of desertion, the plaintiff's "corrupt consent" bars the very existence of a cause of action, and when used against the ground of extreme cruelty, the plaintiff's "corrupt consent" has a similar effect, since the plaintiff's consent is usually implied from the plaintiff's provocation.

Connivance is often confused with the defense of collusion. It differs in that, unlike collusion, which requires an agreement or an understanding, connivance is usually unilateral behavior on the part of the plaintiff. Sheehan v. Sheehan, 77 N.J. Eq. 411 (Ch. 1910).

c. Collusion

This general defense is unique in that it is rarely pleaded by the defendant because he would thereby be adding an admission of his own guilt in the plaintiff's wrongful behavior. Thus the bar of "collusion" usually arises as a result of unexpected court questioning or revelations.

The corrupt agreement or understanding may be inferred from the parties' actions. De Jonge v. De Jonge, 15 N.J. Super. 333 (Ch. Div. 1951). The New Jersey courts

will not, however, find collusion unless there is some sort of agreement or understanding between the parties. Drayton v. Drayton, 54 N.J. Eq. 298 (Ch. 1896). This agreement generally consists of a plan either to suppress or manufacture evidence, or a plan to suppress a defense. The simple desire on the part of both the plaintiff and defendant--the desire to be divorced--is not collusion. McCauley v. McCauley, 88 N.J. Eq. 392 (Ch. 1918).

3. OTHER GENERAL DEFENSES

a. Laches

Laches, or undue delay in instituting suit, is another equitable defense. It is not a clearly defined defense as there is no set time limit or specific statute of limitations. However, it is a factor to be considered with other defenses, and, in the absence of a good excuse, is usually indicative of insincerity.

The one definite requirement for a valid defense of laches is that the delay must occur after the plaintiff gains knowledge of the offense.

On occasion, laches actually indicates commendable behavior on the part of the plaintiff. This will work to the plaintiff's advantage when the plaintiff's ground for the divorce is the defendant spouse's desertion, because the

delay strengthens the court's belief in the plaintiff's obstinacy. However, such delay will hurt the plaintiff when it implies the plaintiff's forgiveness of the injury, and thus provides the defendant with the additional defense of condonation.

b. Condonation

The defense of condonation involves commendable behavior on the part of the plaintiff, i.e., forgiveness by the plaintiff of that spousal misbehavior which constitutes a ground for divorce. This commendable behavior may operate to bar relief.

Condonation differs from connivance or "corrupt consent" in that it does not precede the commission of the act, but occurs after the act has been completed and the injured spouse has acquired knowledge of that act.

The defense of condonation is more limited than other defenses in that it is not final. It may be defeated by the defendant's subsequent actions. As the condonation is only the condonation of acts known to the injured plaintiff at the time of condonation, acts subsequent to the condonation do not fall within the forgiven area. There is a special duty upon the defendant to refrain from repeating the condoned offense. Seeburger v. Seeburger, 57 N.J. Eq. 631 (E. & A. 1899). Furthermore, there is an additional duty to

treat the injured spouse kindly. Michels v. Michels, 110 N.J. Eq. 393 (E. & A. 1932). Thus, it is not necessary that the defendant repeat the original offense in order that that offense be revived. It is sufficient that the defendant's subsequent actions indicate his failure really to repent his prior wrongdoings.

4. SPECIFIC DEFENSES TO SPECIFIC GROUNDS NOT DISCUSSED ABOVE

a. The Ground of Extreme Cruelty

A specific defense to the charge of extreme cruelty is provocation. "Repentance," on the other hand, is not a defense to this charge. Soos v. Soos, supra. "Repentance" does qualify, however, as a half-way device, in that the New Jersey courts will consider the defendant's repentant attitude as a factor in determining whether the acts complained of by the plaintiff actually constitute extreme cruelty. Id. at 391.

Habitual drunkenness or intoxication of the defendant is insufficient to establish a defense to the charge of extreme cruelty. McVicker v. McVicker, 46 N.J. Eq. 490 (Ch. 1890). Furthermore, insanity is not a defense when it arises after the cause of action has accrued. Soos v. Soos, supra, at p. 390. Insane delusions are also insufficient as a defense. Youmans v. Youmans, 3 N.J. Misc. 576 (Ch. 1925).

Provocation by the plaintiff is a defense to the charge of extreme cruelty. Bamberg v. Bamberg, supra. However, the defense fails when the defendant's cruel conduct was out of proportion to the plaintiff's provocation. Sachse v. Sachse, supra.

b. The Ground of Adultery

The defense of insanity will only defeat a charge of adultery when that insanity is so pronounced as to have rendered the defendant unable to understand adultery's nature at the time of commission. Bailey v. Bailey, 115 N.J. Eq. 565 (E. & A. 1934). Insanity, which occurs after the adulterous act, is not a defense but it will be considered as a factor when determining the defendant's condition at the time of commission.

c. The Ground of Desertion

The plaintiff's acquiescence in the separation or absence is a valid defense. Garney v. Garney, 13 N.J. Misc. 125 (Ch. 1934), affirmed 117 N.J. Eq. 559 (E. & A. 1935). In actuality, the plaintiff's acquiescence means that the plaintiff has not established a cause of action since the plaintiff's "obstinacy" or lack of acquiescence is a requirement for the establishment of the ground of desertion. This defense is even stronger when the defendant has requested a

reconciliation and the plaintiff has ignored that request. Coyle v. Coyle, supra. A separation agreement is excellent evidence for the defense unless certain conditions exist. Thus, separation agreements do not operate as a valid defense per se if they are drawn up after the cause of action for this ground--or the other two grounds--has accrued. Furthermore, an agreement will not operate as a defense when the plaintiff was unable to procure support, immediately, by any other means. Power v. Power, 66 N.J. Eq. 320 (E. & A. 1904).

C. OTHER MATRIMONIAL ACTIONS AND STATUTORY PROVISIONS

1. ANNULMENT ACTIONS

Although in some if not most states, the law governing nullity of marriages is purely or predominantly statutory, in a few states, such as New Jersey, it is a mixture of statutes and equity jurisprudence.

a. Grounds

Decrees of nullity may be awarded for insanity or intoxication of a party at the time of the purported marriage; fraud, duress or want of mutual assent. Such matters affect capacity or competence to marry, and equity jurisdiction is assumed to apply in order to "rescind" the marriage contract just as equitable relief may be available on a broader basis

to invalidate commercial contracts.

In addition, N.J.S.A. 2A:34-1 sets forth statutory causes for judgments of nullity which include bigamy, consanguinity (incest), impotence, and non-age. Non-age may be pleaded by a party who was under the age of eighteen when the marriage was contracted. This section also gives the court discretion regarding the granting of nullity judgments where a child has been born or the purported wife is pregnant. N.J.S.A. 2A:34-20 saves the legitimacy of children born of an annulled marriage except where there is a non-ceremonial bigamous marriage. In the latter event, the children are illegitimate.

b. Jurisdiction

Jurisdiction over annulment actions differs from that in divorce cases and may be acquired where either party is a bona fide resident of New Jersey at the time of commencement of suit and process is served upon the defendant as prescribed by rules of the Supreme Court. N.J.S.A. 2A:34-9. Contrast absolute divorce and divorce from bed and board where, except in the case of adultery, two years' prior residency is required. N.J.S.A. 2A:34-10.

c. Annulment by Parents

N.J.S.A. 2A:34-14 provides that a parent or guardian

shall not be precluded from prosecuting or defending an annulment action of his child, but apparently there is no standing to file a petition as a matter of parental right. Niland v. Niland, 96 N.J. Eq. 438 (Ch. 1924). In New York and a few other states, parents in their own right may seek an annulment of their child's marriage.

d. Property Rights

The common law consequences of a judgment of nullity are to wipe the slate clean as if no marriage had been undertaken. Such may work a great economic hardship upon a putative wife. For this reason, various devices have evolved in other states to mitigate such harsh consequences. In a few states (e.g., Indiana, Kansas, Oklahoma and Washington) a so-called "quasi-partnership" theory is employed so that the wife becomes equitable owner of her portion of property accumulated through joint effort or expenditure. Some community property states also permit a putative wife to have a share in the community. See Sclamberg v. Sclamberg, 220 Ind. 209, 41 N.E. 2d 801 (1942). In New Jersey, as in most states, the harsh common law remains in effect. Minder v. Minder, 83 N.J. Super. 159 (Ch. Div. 1964).

e. Alimony

N.J.S.A. 2A:34-23 does not permit alimony in nulli-

ty actions. Contrast New York which, since the 1940's, has had a statutory provision conferring judicial discretion to award alimony in annulment cases.

2. BED AND BOARD DIVORCE

a. Grounds

The grounds for divorce a mensa et thoro are the same as the current grounds for absolute divorce. N.J.S.A. 2A:34-3.

3. SEPARATE MAINTENANCE

There is a special matrimonial action covering the situation where a husband, "without justifiable cause," abandons his wife and refuses or neglects to provide for her. In such cases the court may order "suitable support and maintenance" for her and any children of the marriage, and enforcement may be had by seizing his property, requiring security to be posted, and by contempt. However, during the time of the maintenance order, the husband is not chargeable with the debts of his wife. See N.J.S.A. 2A:34-24.

4. DEFENSES

a. Nullity Cases

In the case of nullity actions, the equitable principles embodied in the clean hands doctrine, estoppel, and laches may operate by way of defense. Although equity principles may be applied with greater vigor in New Jersey than in most states, usually a just result is achieved. For example, a husband who knew that his wife's prior Mexican divorce was of questionable validity when he married her may be denied a decree of nullity. Tonti v. Chadwick, 1 N.J. 531 (1949); Weise v. Hughes, 1 N.J. Super. 104 (App. Div. 1949). Even in a suit to annul a marriage for non-age, not all equitable defenses are barred. B. v. L., 65 N.J. Super. 368 (Ch. Div. 1961); Gibbs v. Gibbs, 92 N.J. Eq. 542 (Ch. 1921). In the case of bigamous marriages, continued cohabitation after removal of the impediment, especially for many years, may work an estoppel. Pollino v. Pollino, 39 N.J. Super. 294 (Ch. Div. 1956); Mick v. Mart, 65 A. 851 (Ch. 1907); Chamberlain v. Chamberlain, 68 N.J. Eq. 414 (Ch. 1905), affirmed 68 N.J. Eq. 736 (E. & A. 1905). Laches, or undue delay, also may bar the action. Gahn v. Gahn, 30 N.J. Super. 427 (Ch. Div. 1954).

In the case of fraud, consummation of the marriage is an important factor, the result being that the fraud must

go to the essentials of the marriage where the marriage was consummated, but where unconsummated it may be such fraud as would be the basis for the rescission of an ordinary contract. Thus, proof of consummation may defeat an annulment action based on fraud.

b. Divorce a mensa et thoro

In the case of bed and board divorce, the same defenses which are available in divorce actions apply. However, since such a decree does not sever the marriage bond, perhaps more leeway is given to the defense that the misconduct was provoked by the other party. Thus, where the husband's alleged extreme cruelty was provoked by the wife, she may be denied a bed and board decree.

c. Separate Maintenance

The husband's defenses to a separate maintenance or abandonment action brought by the wife are relatively limited. If she has given grounds for divorce, the husband will be excused from maintaining and providing support for her. Conduct short of extreme cruelty, such as constant nagging, will not excuse him. "Justifiable cause," i.e., conduct which excuses him for leaving her, is equated with grounds for divorce rather than lesser misconduct. Bradbury v. Bradbury, 74 A. 150 (Ch. 1909). Moreover, although a husband has no obliga-

tion to support a wife who deserts him, he may be liable for support under some circumstances where the separation is by mutual consent. Since the law favors cohabitation of husband and wife, consent of the husband is not justifiable cause for separation, and consent of the wife thereto does not absolve the husband from his support duty. Munger v. Munger, 21 N.J. Super. 49 (Ch. Div. 1952), affirmed 24 N.J. Super. 574 (App. Div. 1953). Thus, the legal duty of support does not cease because of the wife's absence from the home at his instance or with his consent, and it is only where the husband desires her to remain that such may be made a condition precedent to his obligation to support. Nor does her consent to his leaving the family home end the husband's support obligation.

If the wife is not in necessitous circumstances, and the family home is available to her and the children and the husband provides for their maintenance, a support order may be denied. Handelman v. Handelman, 17 N.J. 1 (1954).

Of course, if the alleged husband is able to show that he is not validly married to the plaintiff, it will be a good defense to a separate maintenance action. Reconciliation will terminate a pending separate maintenance action and will require its dismissal. However, the fact that the husband is providing some support does not preclude the wife from bringing the action.

PART II

STATUTORY RECOMMENDATIONS

Chapter 34

DIVORCE AND NULLITY OF MARRIAGE--ALIMONY AND MAINTENANCE--CARE AND CUSTODY OF CHILDREN

(New material underlined,
bracketed material to be repealed)

ARTICLE I. CAUSES FOR NULLIFICATION AND DIVORCE

2A:34-1. Causes for judgments of nullity

Judgments of nullity of marriage may be rendered in all cases, when:

a. Either of the parties has another wife or husband living at the time of a second or other marriage;

b. The parties are within the degrees prohibited by law. If any such marriage shall not have been annulled during the lifetime of the parties the validity thereof shall not be inquired into after the death of either party.

c. The parties, or either of them, were at the time of marriage physically and incurably impotent, provided the party making the application shall have been ignorant of such impotency or in-

capability at the time of the marriage, and has not subsequently ratified the marriage.

[d. The parties, or either of them, were at the time of marriage incapable of consenting thereto and the marriage has not been subsequently ratified, provided that where the party capable of consent is the applicant, such party shall have been ignorant of the other's incapacity at the time of the marriage and shall not have confirmed the marriage subsequent to the regaining of capacity by the other party.]

d. The parties, or either of them, lacked capacity to marry due to want of understanding because of mental condition, or the influence of intoxicants, drugs, or similar agents; or where there was a lack of mutual assent to the marital relationship; duress; or fraud as to the essentials of marriage; and has not subsequently ratified the marriage.

e. The demand for such a judgment is by the wife [and she] or husband who was under the age of 18 years at the time of the marriage, unless such marriage be confirmed by her or him after arriving at such age.

[f. The demand for such a judgment is by the

husband and he was under the age of 18 years at the time of the marriage, unless such marriage be confirmed by him after arriving at such age.

g. Allowable under the general equity jurisdiction of the superior court.

No judgment of nullity shall be made where a child of the parties has been born, either before or after the marriage, or is likely to be born, unless the court upon an examination of all the facts of the case shall be of the opinion that such judgment will not be against the best interests of the child.]

Comment

The above revision of the current provision leaves intact the substance of the existing law but eliminates present sub-section d. and the remainder of the statute, substituting in lieu thereof the underlined sub-section.

The major recommended change is to provide in sub-section d. for those grounds for annulment within the current general equity jurisdiction of the Superior Court so that they clearly appear in the statute. Although present sub-section g. makes express reference to such general equity jurisdiction there is no statutory indication as to what is involved. It is highly desirable to specify all grounds for nullity judgments in the statute. No attempt is made to limit such equity jurisdiction. Rather, the aim is to de-

scribe it in familiar terms. Want of understanding may be due to mental condition (insanity), or intoxication (liquor, drugs, etc.). In rare cases, one party may not have known the nature of the ceremony or may have thought it was a hoax. Fraud and duress are the other examples of a lack of consent to marriage. In accordance with equitable principles, the proposed ground is not available if the error is ratified.

Sub-sections e. and f. are combined without change in substance. The age of consent of 18 years is retained for both parties, and ratification or confirmation eliminates the ground.

The concluding paragraph is eliminated because of the recommended revision of 2A:34-20, which saves the legitimacy of all children of an annulled marriage. Hence, there is no need for the present grant of judicial discretion.

If there is a broadening of the grounds for divorce it may be anticipated that judgments of nullity will become rare. Moreover, if there is a comprehensive recodification, consideration may be given to stipulating one action for dissolution that embraces annulment as well as divorce. The above revision is an effort to preserve existing law without any major change in policy but at the same time to adapt it to other recommended changes. The only innovation is to set forth in more specific form the present reference to general equity jurisdiction.

2A:34-2. Causes for divorce from bond of matrimony

Divorce from the bond of matrimony may be adjudged for the following causes:

a. Adultery, which is defined to include sexual or deviant sexual intercourse voluntarily performed by the defendant without the consent of the plaintiff with a person other than the plaintiff after the marriage of the plaintiff and defendant;

Comment

It is recommended that a definition of adultery be added in order to make it clear just what marital infidelity is included. The suggested language is a paraphrase of N.Y. Dom. Rel. Law 170 (4).

Under the proposed definition, deviant sexual intercourse would be equated with adultery, and hence sodomy or overt homosexual behavior would become a specific ground for divorce. The term "deviant sexual intercourse" is taken from the New York provision (Dom. Rel. Law 170 (4)) which also makes a cross-reference to the Revised Penal Law sections 130.00 (2) and 130.20 (3), which refer to contacts between the penis and anus, the mouth and penis, or the mouth and vulva. A similar cross-reference is not regarded as necessary in the proposed definition, although it might be included. It should also be noted that bestiality may not be included in either the New York or proposed definition but

that such may be done by inserting the words "or animal" after "with a person" and before "other than the plaintiff" in the last full line of the definition.

In the above proposal, adultery is defined in terms of sexual intercourse. Hence, in accordance with New Jersey case law, indiscreet conduct short of intercourse is not comprehended (although such might qualify as proof of cruelty as defined, infra). Moreover, the proposed definition would not include artificial insemination by a third party donor (A.I.D.). Lower court decisions from other jurisdictions are divided as to whether or not A.I.D. constitutes adultery. The preferable view is that A.I.D. is not adultery. However, this does not mean that A.I.D. without the husband's consent could not constitute cruelty as hereafter defined. The proposed language should safeguard the legitimacy of the child that results from A.I.D. with the husband's consent. Although these matters appear to be theoretical, in recent years there has been a marked increase in artificial insemination and it may be prudent to anticipate such cases.

The proposed language requires that the sexual intercourse of the defendant be "voluntary" and that it not be consented to by the plaintiff. This preserves case law to the effect that a wife who is raped or insane does not commit adultery.

Unless all grounds for divorce are abandoned and

marriages may be terminated upon proof of irreparable breakdown, the adultery ground should be included in a modern divorce code if only because it is commonly regarded as the most serious marital sin and the gravest insult to the other party. At the same time, as previously stated, it may be appropriate to discourage utilization of this ground. Discouragement already exists in that many if not most lawyers are reluctant to use the adultery ground if any other reasonable alternative is present. This is so because there is general recognition that such cases are harmful to children of the marriage, and such charges further embitter and antagonize parties who may need to cooperate with regard to custody and visitation matters.

b. Willful[,] and continued [and obstinate] desertion for the term of six or more months, which may be established by satisfactory proof that the parties have ceased to cohabit as man and wife despite the willingness of the plaintiff to continue or to resume such cohabitation;

Comment

Because of the recommendation that a separation ground be provided for in 2A:34-2, the ambit of the desertion ground as it presently exists is reduced by the above proposal. Since the separation ground will be available to cover

many if not most cases of separation due to estrangement, the desertion ground should be circumscribed and limited to the situation of the recalcitrant spouse who separates despite the wishes of the other party, or refuses to return despite the latter's willingness to resume cohabitation. The proposed definition entails the following:

The recommended period is reduced from two years to six months. Such is necessary because the recommended period for the new separation ground is one year, and it may be regarded as equitable for a deserted spouse to have a shorter waiting period. It should be noted, however, that one year is the most common period provided for in desertion statutes. See Clark, Law of Domestic Relations 333 (1968). Realistically, the six months period is not too short to constitute strong proof that the marriage is dead. New Jersey's brief experiment with counseling in the courts demonstrated that reconciliation is extremely unlikely when the parties are separated for a substantial period of time. Looked at from the deserted spouse's point of view, six months deprivation is long enough to endure.

In addition to the difference in time between the proposed desertion and separation grounds, there may be a difference in economic consequences. Desertion remains as a fault ground for divorce whereas separation is a non-fault ground. This revision proposes that 2A:34-23 be amended to

permit the fault of the parties to be considered in awarding alimony but that such element should be excluded when the divorce is based upon the new separation ground. It becomes important, therefore, to distinguish desertion and separation and admittedly it may be a difficult distinction to make in some fact situations. It is, however, a distinction which courts are accustomed to making with reference to the present ground of desertion and in the law governing support and maintenance. Such difficulty is merely continued for the time being and if upon eventual recodification, all fault grounds are eliminated and irretrievable breakdown or separation is made the sole ground for divorce, it may be logical to eliminate fault considerations entirely from the law of alimony.

There is no apparent reason for retention of the quaint pejorative "obstinate" (which is peculiar to New Jersey, Florida, and Mississippi) unless it is felt that the case law makes it important to retain it in order to make out the requisite intent or mens rea for desertion. It is difficult if not impossible to give modern justification for past distinctions as to the "obstinacy" of the husband as compared with that of the wife where desertion is alleged, and it is even more difficult to reconcile "obstinate" with the tacking of a period of enforced separation due to military service or imprisonment (see 2A:34-4) onto a prior

period, as is presently done under New Jersey case law. In any event, "willful" is an adequate adjective to describe the situation.

For the most part, the new language reflects existing case law, which equates cessation of cohabitation with cessation of sexual relations. Thus, in New Jersey, desertion may occur when the parties live under the same roof but not as man and wife. The revised provision perpetuates that construction.

The cessation of cohabitation must be continued for the prescribed period. This means that there cannot be desertion by day, copulation by night, inter sese et pendente lite. Thus, to a limited extent, the policy behind forgiveness or condonation is embodied in the customary definition of desertion; and this is so even though it is proposed herein that the traditional defenses to divorce be eliminated. The seeming paradox, however, is theoretical. Desertion as a ground for divorce carries with it by definition an unconsented to and uncondoned separation, just as cruelty implies a lack of provocation for the complained of behavior. In some situations the former resembles condonation and the latter recrimination but they are not affirmative defenses. The plaintiff merely fails to make out essential elements of his case. If the desertion ground is limited to the situation of the recalcitrant spouse and the separation ground is avail-

able for cases of estrangement due to marital difficulties and the defense of condonation is modified or eliminated as to the latter, some current problems will be mitigated. For example, under case law a distinction is made and a double standard is imposed where the alleged deserter fraudulently induces the other to engage in sexual relations. New Jersey courts are more willing to find the husband fraudulent in this situation and are reluctant to find that a wife who resumes relations did so in bad faith. The co-existence of a separation ground may make such a distinction unnecessary. In any event, with reference to the separation ground it is recommended that good faith efforts at reconciliation should not interrupt the running of the one year period, but that in the case of the desertion ground a resumption of cohabitation does toll the running of the six months period.

c. Extreme cruelty, whether the acts of cruelty have been heretofore or are hereafter committed; provided, that [no complaint for divorce on the ground of extreme cruelty shall be filed until after 6 months from the date of the last act of cruelty complained of in the complaint, but this proviso shall not be held to apply to any counterclaim] <u>extreme cruelty is defined as including any physical or mental cruelty which endangers the safety</u>

or health of the plaintiff or makes it improper or unreasonable to expect the plaintiff to continue to cohabit with the defendant.

Comment

It is recommended that the first portion of the present statute be retained in order to assure retroactivity as at present, but that the proviso be deleted and in lieu thereof the underlined definition be added to the sub-section. The anomalous six months "cooling-off" period would be eliminated. There is no evidence that such period has accomplished any social good and the delay may entail hardship. The Governor's Commission in California reported in 1966, after thorough study, that "cooling-off" periods are ineffiacious. They arbitrarily suspend legal remedies without any compensating public good. In some situations, the delay may encourage fabrication of other grounds or provide unfair bargaining leverage for settlements. Retention of the six months delay is not in the public interest.

In large measure the current rigidity of New Jersey divorce law is attributable to the narrow definition and construction which has been given to this ground. In other states, and in the nation as a whole, it has been the expanded meaning of cruelty which has made old divorce statutes tolerable. By expanding the concept of cruelty, courts have adapted old law to some present needs. Because of New

Jersey's case law on extreme cruelty, it is essential to supply a new definition.

The above definition constitutes an effort to modernize the concept of cruelty in a moderate fashion. It is broad enough to cover serious marital misconduct which endangers health or safety, or makes it improper or unreasonable to expect continued cohabitation. The terms are flexible but do not include trivial misconduct or ordinary contretemps. Minor frictions or frustrations, such as nagging or bullying, would not suffice unless in the aggregate when combined with other misconduct the cumulative effect endangers health or makes the relationship so intolerable that further cohabitation cannot reasonably be expected.

An attempt is made to focus upon the effect of extreme cruelty upon the plaintiff, rather than upon the defendant's mens rea or intent to inflict pain. The result, insofar as the plaintiff is concerned, is the same whether the "cruelty" is calculated and designed or a by-product of the defendant's self-centeredness. Moreover, the result to the marriage relationship may be the same regardless of the defendant's motives. The focus should be upon what the misconduct has done to the marriage, not on punishing the defendant.

The phrase "or makes it improper or unreasonable to expect the plaintiff to continue to cohabit with the de-

fendant" is admittedly vague. Courts will be able to read into it community standards of marital misconduct. Such an opening may invite abuse. Yet, on the other hand, the phraseology is also readily adaptable to changing views as to marital misconduct and should prevent the stultification that was experienced under the old judicial definition of "extreme cruelty."

As noted in Part I, cruelty is a ground for divorce in all states except Louisiana, Maryland, North Carolina, Vermont, and Virginia. Twenty-six of the forty-six states having cruelty as a ground for divorce recognize mental cruelty based on subjective evidence; eighteen require the plaintiff to show by medical evidence or objective means a threat to or an impairment of health; two states require actual physical violence. Of course, since over ninety per cent of divorce cases are uncontested, and more often than not testimony is unchallenged, the distinctions tend to be academic. It should be noted, however, that the meaning of the concept of cruelty does have an important bearing on the negotiations which commonly occur before the uncontested case is heard, and that a narrow definition gives a distinct advantage or leverage power to the defendant, which often affects the course of negotiations. Such may be undesirable depending upon the character of the misconduct that destroyed the marriage.

Since it is proposed that there be a new separation ground, it may be argued that extreme cruelty should be left with its existing rubric, even though it is archaic. That argument is rejected because the proposed revision contemplates a modernization of New Jersey law so that it will be responsive to current legitimate needs. There will be some instances where the separation ground will be inapplicable such as the situation where a party seeks a divorce immediately after the defendant's misconduct and does not want to wait a year or more before separation ripens into a cause for divorce. A victim of extreme cruelty should not be required to wait. For this reason, as well as the fact that there is no evidence that the "cooling-off" period has achieved any social advantage, the present clause imposing a six months waiting period should be deleted.

d. Separation, provided that the husband and wife have lived separate and apart in different habitations for a period of at least one year and there is no reasonable prospect of reconciliation;

Comment

The above sub-section is the major reform in divorce grounds which is proposed for immediate enactment. It is tailored to fit in with the other new grounds and the proposed revisions of existing grounds. The separation, unlike

the cessation of cohabitation under the desertion ground, cannot take place under the same roof. The court must find that there is no "reasonable prospect of reconciliation." Thus, the proposed new ground is qualified in order to give objective proof that the marriage is dead and that its continuation could serve no social or individual good.

States which have adopted a separation ground differ as to whether the separation must be voluntary or not. A majority of states do not require that the separation be voluntary or by mutual assent, and it is submitted that this is the preferable view if the policy is one of adopting a non-fault ground for divorce. Insofar as the public interest in terminating dead marriages is concerned, there should be no distinction based upon the character of the separation. To insist that the separation be "voluntary" perpetuates some of the problems and anomalies of fault grounded divorce.

The proposed measure is a cautious and moderate approach to non-fault divorce and does not entail the social and individual dangers that may be incident to the breakdown approach where the latter is subjective rather than objective and there are neither adequate guidelines as to what "breakdown" means nor adequately trained personnel and sufficient facilities to make a determination of breakdown.

The period of separation suggested is one year. Congress in enacting divorce legislation for the District of

Columbia settled on the one year period and a few other states [7] stipulate the same period of time. Although it is a matter of opinion or judgment as to how long a period is necessary to warrant an inference of irreconcilability, the overwhelming majority of professionals would agree that the period specified is long enough. New associations and relationships have almost invariably been formed within that length of time, and as shown by the New Jersey compulsory conciliation experiment, it is difficult if not impossible to reconcile such estranged couples. In any event, the requirement that there be a showing of no reasonable prospect of reconciliation safeguards the matter.

Because the above sub-section is new and somewhat novel, it receives extended comment and a comparison is made with the law of other jurisdictions in Appendix II of this report. The premise for the provision is that dead marriages should be legally terminated and the fact of prolonged separation is objective proof that the marriage is not viable. The focus is on the consequences which prolonged separation has for the marriage relationship.

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[7] North Carolina, and Louisiana and Virginia stipulate a one year period, the former for ordinary separation and the latter two states where there is "conversion." Maryland specifies 18 months, while Alabama, Louisiana, Minnesota, New Hampshire, New York, and Wyoming specify 2 years.

e. Drug addiction, alcoholism, or institutionalization for mental illness, for a period of one or more years next preceding the filing of the complaint;

Comment

It may be argued that the above provision is superfluous due to sub-section d, the "separation for whatever cause" provision, supra. Experience has shown, however, that it is not uncommon for courts to interpret this ground narrowly as has been done in North Carolina. Such is likely to occur where the separation is involuntary.

The premise is that dead marriages should be terminated at the option of either party. It follows that fault is immaterial. A divorce should not be granted as a reward for virtue or imposed as a punishment for marital sin. The public interest is concerned with the stability of functioning and meaningful marriages. From the standpoint of the non-institutionalized spouse, he or she needs and is entitled to a partner in the household and a surrogate parent for children, if any. It is the absence of the other party from the home, for whatever cause, that constitutes a deprivation.

Moreover, if the family relationship has so far deteriorated that the plaintiff seeks a divorce, there is no social good to be achieved by withholding that remedy. If

the marriage remains viable, the non-institutionalized spouse will not petition for divorce.

Although the period of institutionalization is set at one or more years so as to be consistent with the separation ground, it is likely that in most cases there will be a longer or indeterminate commitment. It also makes sense to cover mental illness, alcoholism, and drug addiction together, since today there is a consensus that each should be regarded as an illness and as a medical problem. Since use of this ground does not imply fault but merely a recognition that marriages may break down in the covered situations as well as where there is separation because of estrangement, the granting of a divorce does not constitute "punishment" of a sick partner.

In the case of mental illness, thirty-one states have some form of an insanity ground for divorce, and New York also makes post-nuptial insanity a ground for annulment. Most insanity grounds are worded in archaic language and employ non-medical terms. Moreover, frequently it is required that the insanity be "incurable" (e.g., Alabama, Arkansas, California, Delaware, Georgia, Kansas, Minnesota, Nebraska, Washington), or that the defendant be confined in a mental institution (e.g., Alabama, California, Connecticut, Delaware, Georgia, Minnesota, Nebraska, North Carolina), or has been examined and certified as insane by several doctors

(e.g., Kansas, New York). Such statutes also usually require that the institutionalization have continued for a period of years (5 years in Alabama, Delaware and Minnesota; 3 years in Arkansas, Colorado, and Georgia).

The red tape and restrictions upon the insanity ground have made it non-functional. See Robitscher, Pursuit of Agreement, Psychiatry and Law, Chap. 7 (1966). Psychiatrists, doctors and superintendents of hospitals are reluctant to testify or to certify when non-medical terms are imposed by the statute.

The terms used in the proposed draft constitute an attempt to make the proposed ground functional. It is a non-fault ground for divorce. Red tape has been eliminated. Mental illness, drug addiction and alcoholism in effect are equated as medical problems, which is in accord with current thinking. It may be of interest that drunkenness or drug addiction is a basis if not a ground for divorce or annulment in all states except New Jersey, Louisiana, Maryland, North Carolina, Texas, Vermont and Virginia.

f. Imprisonment of the defendant for one or more years after marriage, provided that where the action is not commenced until after the defendant's release the parties have not resumed cohabitation following such imprisonment.

Comment

All states except Florida, New Jersey, North Carolina, Rhode Island and South Carolina, provide that conviction and imprisonment for a serious felony is a basis or ground for divorce. Some statutes refer to felonies, others to infamous crimes, or crimes of moral turpitude. Also, it is common to specify that the sentence must be for a stipulated length of time, e.g., in New York for three years.

The basic policy choice is whether this ground is viewed as additional punishment for a felon or whether the enforced absence from the home constitutes a deprivation for the plaintiff and family. The above draft attempts to choose the latter, limits it to conviction and imprisonment after marriage, and is inapplicable if the parties have resumed cohabitation after the defendant's release. It may be of passing interest that one of the best publicized arguments for divorce reform in New York came from wives who were confronted with a possible return home of a brutal husband about to be released from prison, who in some instances had been convicted of incest, attempted murder, or other heinous crime.

It is consistent with the policy expressed in the separation and institutionalization grounds, supra, in that the focus is on the separation of the parties rather than the character of the criminal offense. Thus, although some

states distinguish between crimes involving "moral turpitude" and ordinary crimes, no such distinction is made here. From the standpoint of deprivation and damage to the marital relationship it makes little difference what the imprisonment was for, the important factor being the disruption of the family

2A:34-3. Causes for divorce from bed and board

[Divorce from bed and board may be adjudged for the following causes:

a. Adultery;

b. Willful, continued and obstinate desertion for the term of 2 years;

c. Extreme cruelty.]

Divorce from bed and board may be adjudged for the same causes as divorce from the bonds of matrimony whenever both parties petition or join in requesting such relief, provided that in case of a reconciliation thereafter the parties may apply for a revocation or suspension of the judgment, provided further that the granting of a bed and board divorce shall in no way prejudice either party from thereafter applying to the Court for a conversion of said divorce to a divorce from the bonds of matrimony, which application shall be granted as

a matter of right.

Comment

It is recommended that present 2A:34-3 and 2A:34-5 be repealed and the above section be enacted in lieu thereof. Bed and board divorce would be limited to the situation where for religious reasons, or otherwise, both parties desire it. Moreover, the granting of such decree would not constitute an election of remedy nor bar a later action for divorce, by either party, on any ground other than desertion. Presumably, case law to the effect that separation pursuant to a bed and board decree cannot be regarded as desertion would remain the rule. See Kimball v. Kimball, 129 N.J. Eq. 169 (1941).

The only arguments for retention of bed and board divorce are that it was the traditional remedy of the ecclesiastical courts in England and that it is favored by some clerical authority and some few litigants for religious reasons. According to Joel Bishop, the nineteenth century authority on the law of marriage and divorce, the anomoly of bed and board divorce came about haphazardly and due to the gradual withdrawing of the privilege of remarriage following a "divorce" decree.

It is in the public interest, as well as in the interest of defendants, to limit bed and board divorces to situations where both parties desire and request it. Such

decrees are not an appropriate way to punish the miscreant or to vindicate morality, any more than branding with the "scarlet letter" would be permissible in modern times.

But religious preference for bed and board divorce is and should be respected when both parties seek it. However, such a decree should not preclude a later divorce on appropriate grounds. The new California law is in accord and limits bed and board divorce to the situation where both parties desire it.

Because of the substitution of the above provision in lieu of present 2A:34-3, there is no need to retain 2A:34-5 which grants authority to decree bed and board divorce for either a limited or permanent time. However, 2A:34-6, dealing with property rights during the time that any judgment for bed and board divorce remains in effect, must be continued so that the property rights of the parties are clear.

2A:34-7. Defenses abolished; divorce decree to both; perjury

[If it appear to the court that the adultery complained of shall have been occasioned by the collusion of the parties, and done with an intention to procure a divorce, or that the party complaining was consenting thereto, or that both

parties have been guilty of adultery not condoned, no divorce shall be adjudged.]

Recrimination, condonation, connivance, collusion, and the clean hands doctrine are hereby abolished as defenses to divorce from the bonds of matrimony or from bed and board, and if both parties make out grounds for divorce, a decree may be granted to each; provided that nothing herein shall preclude or abrogate the responsibility of a party for the penalty provided by law for perjury or the subornation of perjury.

Comment

In order to secure the objective of permitting the legal termination of "dead" marriages, it is essential that the traditional defenses be abolished or narrowly limited. The above provision abolishes defenses as such but preserves the state's interest in punishing perjury or subornation of perjury. The latter is essential to safeguard the administration of justice, and matrimonial litigation should be no exception to the general rule.

The myth of the innocent and injured spouse today is generally recognized as being just that. For many years realists have pointed out that in the great majority of cases both parties are at fault, or neither is to blame, or that it is difficult if not impossible to make a fair apportion-

ment of guilt. This is especially true when over ninety per cent of divorce cases are uncontested and the court receives only a partial and partisan version of the facts. New York in 1966 eliminated defenses to its new grounds for divorce and retained them only for the ground of adultery. California's new law, which went into effect in 1970, continued the former policy of that state of abolition of the traditional defenses. The above proposed statute also permits the court to award a decree of divorce to both parties when each makes out a cause for divorce. At least twelve American jurisdictions, mostly western states, have adopted this policy. The practical and legal consequence of the issuance of a divorce decree to both parties under the statutory scheme herein proposed is that, although the marriage will be terminated, in some cases alimony may be withheld from a wife who has been guilty of a fault ground such as adultery. The Commission, however, believes that equity is best achieved by a grant of discretionary power to award alimony, taking into account all of the circumstances of the parties. See the Comment to section 2A:34-23, infra.

It also should be noted, as previously pointed out, that abolition of the standard defenses does not completely eliminate the fault element nor make it completely irrelevant. It remains part of the plaintiff's case where desertion is the ground for divorce to prove that there was no

consent to the separation, an element somewhat similar to condonation. Provocation of the alleged extreme cruelty also negates that ground. Mutual adultery presents a more difficult problem. The proposed definition of the adultery ground, supra, stipulates that it not be consented to, because on balance it was concluded that where there was consent the serious and stigmatic ground of adultery should not be available, although by separation a ground for divorce would eventually accrue. However, the granting of a divorce to both parties, pursuant to this statutory section, would appear to obviate the difficulty.

As to the defense of recrimination, witnesses at the Commission hearing were unanimous in rejecting it and in recommending its abolition. It was pointed out that the doctrine works against the poor, that fifty per cent of legal services divorce cases were turned away because of recrimination, and that in a typical case it was a deserted wife who had acquired a de facto family who was barred from legitimating her family because of the doctrine. It was also shown that in the case of the poor a probation report might divulge an irregular relationship to the court which sua sponte would raise the bar. The elimination of this defense, except perhaps in the case of the adultery ground where it is a statutory bar, was recommended by all witnesses who spoke to the issue.

Moreover, there is no real justification for the doctrine as an absolute bar. The Supreme Court stated in the Caffrey decision, supra, that the doctrine really amounted to punishment when applied mechanically, as it forced the parties to live together. While it seems unlikely that the parties will begin to cohabit again when a divorce is denied, the Supreme Court in this case validly pointed out that the bar is also punitive because it prevents the spouses from finding future happiness and homes in new marriages. The old justification for the doctrine--keeping a family together--was merely a fiction.

The real justifications for granting a divorce are the disruptive home atmosphere, the commission of wrongdoings, and the inability of the parties to live together. DeBurgh v. DeBurgh, 250 P. 2d 598 (Calif. 1952). These reasons are in no way diminished by the commission of wrongful acts by both spouses, even if New Jersey only considers the statutory, wrongful acts as the real justifications for granting a divorce. In fact, where both spouses have committed wrongful acts such as adultery, there is double the reason to grant a divorce, for there is little doubt that not even one spouse wants to save the marriage. The marriage destroyed by the acts of only one spouse is rare indeed.

The New Jersey courts have recognized the need for

changing common law rules where change is necessary to meet today's needs. Collopy v. Newark Eye and Ear Infirmary, 27 N.J. 29 (1958). However, while our courts have come a long way during the past five years, they have not yet dealt with any changes in the recriminatory defense in contested cases, or in uncontested cases where there is a problem concerning the wife's support. At the present time, therefore, the absolute bar still applies to such cases. The Commission therefore recommends its abolition.

The defense of condonation involving commendable behavior on the part of the plaintiff, as noted in Part I, should not operate as a bar to relief, for the obvious reason that reconciliation is to be encouraged rather than discouraged.

The provision of a non-fault ground for divorce and the elimination of the defenses of recrimination, condonation and unclean hands make unnecessary the retention of the defenses of connivance or collusion. At the same time elimination of these defenses in no way lessens the obligation of the plaintiff to prove his cause of action nor does it insulate from criminal penalties those who perjuriously misuse the courts.

The summary and brief description of the traditional defenses contained in Part I of this report demonstrate their metaphysical flavor and archaic character. The exist-

ence of the present defenses is the immediate cause of much of the fraud and perjury incident to divorce. Although a rigid traditionalist might find satisfaction in exploring the nuances and intricacies of such defenses, their retention entails too great a cost. Application of the defenses does not reunite the family but merely places the parties in limbo. No social good is achieved. Withholding a divorce decree in such cases is the wrong remedy. The administration of divorce law inevitably will be tainted, corrupted and perverted as long as the defenses remain. A modern law of divorce must eliminate or severely restrict these defenses.

2A:34-8. Jurisdiction of superior court over matrimonial actions

[The superior court shall have jurisdiction of all causes of divorce or nullity and of alimony and maintenance by this chapter directed and allowed.

In any action under this chapter the superior court may afford incidental relief as in other cases of an equitable nature.]

The superior court shall have jurisdiction of all causes of divorce, bed and board divorce, or nullity when either party is and has been a resident of this state for a continuous period of one

year next preceding commencement of a matrimonial action. The superior court shall have jurisdiction of an action for alimony and maintenance when the defendant is subject to the personal jurisdiction of the court, is a resident of this state, or has tangible or intangible real or personal property within the jurisdiction of the court. The superior court may afford incidental relief as in other cases of an equitable nature and by rule of court may determine the venue of matrimonial actions.

Comment

The above provision is drafted to serve in lieu of sections 2A:34-8, 2A:34-9, and 2A:34-10, which would be repealed. Jurisdiction for all matrimonial actions would be the same, i.e., one year's prior residency of at least one party, instead of the current two years for divorce and a mere "bona fide resident" in the case of nullity. An action for alimony and maintenance, however, may be brought without regard to any prior period of residency.

Specification of a one year prior residency is in line with the period prescribed in some 33 states. There are 8 states which require a longer period, including the 5 year requirement in Massachusetts and 3 years in Connecticut. Six states require 6 months or less, including Arkansas and Utah which stipulate 3 months, Wyoming which specifies

60 days, and Nevada and Idaho which require only 6 weeks. Alabama, at least formerly, stipulated no time limit where there was a domicile and both parties were subject to personal jurisdiction. Domicile is also the jurisdictional nexus for Maryland.

The requirement of one year's prior residence is long enough to preclude the attraction of migratory divorce to New Jersey. Constitutional issues may be raised if access to the courts for matrimonial relief is unduly delayed, and an analogy might be made to the social security assistance cases where a year's prior residency requirement was held unconstitutional. There is a legitimate reason for the prior residency requirement in divorce cases, however, as a state should be free to guard against its courts becoming havens for migratory divorce.

The jurisdictional time period should be neither too long nor too short, and it is a matter of judgment. The draft of a model divorce law which is under consideration by a committee of the National Conference of Commissioners on Uniform State Laws recommends 90 days. As compared with the existing law of most states, and in the opinion of the Commission, such period is too short. However, the average American family moves once every 5 years, and in a recent one-year period approximately 35.2 million persons one year or older (19.6 per cent of our population) changed their

residences, many across state lines. See Current Population Reports. Population Characteristics, Series p-20, No. 127, at 1-2 (Jan. 15, 1964). On balance, reduction of the period to one year appears to be fair and realistic although good arguments may be made for an even shorter period.

It should be noted that for full faith and credit or comity purposes the jurisdictional concern may be domicile without regard to length of residence regardless of the language employed in 2A:34-8.

Repeal of 2A:34-10 also would eliminate the proviso in the existing statute regarding a cause for divorce which originally arose in another state. As shown by the decision in Fitzgerald v. Fitzgerald, 66 N.J. Super. 277 (Ch. Div. 1961), wherein a divorce on grounds recognized in New Jersey but not in New York where the marital offense was committed, was denied to a plaintiff wife who had lived in New Jersey for more than two years, the proviso may work in arbitrary fashion and hence should be eliminated.

Currently venue is prescribed by Rule 4:94, and proposed 2A:34-8 continues that policy. 2A:34-11 regarding personal jurisdiction over the defendant in matrimonial actions is retained in its present form as is 2A:34-12 dealing with counterclaims.

2A:34-20. Legitimacy of children whose parents inter-marry

[A judgment of nullity of marriage shall not render illegitimate the issue of any marriage so dissolved, except in a case where the marriage, not being a ceremonial one, is dissolved because either party had another wife or husband living at the time of a second or other marriage. In such a case the marriage shall be deemed void ab initio, and the issue thereof shall be illegitimate.]

A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid, in the manner authorized by the law of the place where such marriage takes place, is the legitimate child of both natural parents notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void.

Nothing in this amendatory act shall be deemed to affect the construction of any will or instrument heretofore executed or any property right or interest or right of action vested or accrued or to

limit the operation of any judicial determination containing an express provision or provisions with respect to the legitimacy, maintenance or custody of any child, or to affect any adoption proceeding heretofore commenced, or limit the effect of any judgment or order entered in such adoption proceedings.

Comment

The above provision is the same as New York Domestic Relations Law section 24 (Laws 1969, ch. 324, effective April 30, 1969) and is in lieu of present 2A:34-20 which generally saves the legitimacy of children of an annulled marriage but excludes the children of non-ceremonial bigamous marriages. There is no sound legal or social reason for the exception. Children should not be made the victims for parental shortcomings. Throughout the country the trend is to declare legitimate the children of any purported marriage, and the above proposal is in line with that policy which indirectly acquires added support from Levy v. Louisiana, 391 U.S. 68 (1968).

2A:34-23. Alimony; maintenance; custody and maintenance of children; security; failure to obey order; sequestration; receiver; modification of orders; factors to be considered in awarding alimony

Pending any matrimonial action brought in this

state or elsewhere, or after judgment of divorce or maintenance, whether obtained in this state or elsewhere, the court may make such order as to the alimony or maintenance of the [wife] parties, and also as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just, and require reasonable security for the due observance of such orders. Upon neglect or refusal to give such reasonable security, as shall be required, or upon default in complying with any such order, the court may award and issue process for the immediate sequestration of the personal estate, and the rents and profits of the real estate of the party so charged, and appoint a receiver thereof, and cause such personal estate and the rents and profits of such real estate, or so much thereof as shall be necessary, to be applied toward such alimony and maintenance as to the said court shall from time to time seem reasonable and just; or the performance of the said orders may be enforced by other ways according to the practice of the court. Orders so made may be revised and altered by the court from time to time as circumstances may

require.

In all actions brought for divorce, divorce from bed and board, or nullity the court may award alimony to either party and in so doing shall consider the actual need and ability to pay of the parties and the duration of the marriage. In all actions for divorce other than those where judgment is granted solely on the ground of separation the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just.

Comment

Section 2A:34-23 is retained in its present form with the exception of a change of the word "wife" to "parties" so that alimony may be awarded to a husband as well as a wife. The underlined portion is added in order to reflect the policy considerations embodied in the proposed new grounds for divorce. The new language is an interim measure which would be in effect pending a full scale study by a reconstituted Commission of the present system of alimony and matrimonial property law and the possible need for substantial reform and modernization.

The proposed amendment to section 2A:34-23 would permit alimony to be awarded in nullity actions as well as

in divorce and divorce from bed and board actions. Unfortunately, only a minority of states at present permit alimony to be awarded in annulment cases. This is due to historical accident rather than because of deliberate statutory design. There is no sound reason why a wife who is the victim of fraud or who unwittingly enters into a bigamous marriage should be deprived of alimony. The court should have discretion to award alimony in appropriate cases where the relief sought is an annulment.

As was done in New York by the recent amendment to Domestic Relations Law section 236, an attempt is made by the above language to direct the courts' attention to economic factors and the duration of the marriage as the primary considerations in setting an amount of alimony that is fit, reasonable and just. The court retains discretion, the factors enumerated are but guidelines, but their importance is stressed.

The last sentence of the proposed amendment permits the court to deny alimony to a spouse who is guilty of one of the fault grounds for divorce. As long as fault grounds are retained, it is traditional logic that fault also should affect judicial discretion in awarding alimony. After further study a new Commission may conclude that fault has no place in either the provision of grounds for divorce or in determining alimony but for the time being the substance of

existing law is retained.

Where both parties make out a ground for divorce the court may deny alimony to either party. There is no automatic bar, as in New York, nor disregard of matrimonial fault, as under the new California law. Thus, the adulterous, deserting, or extremely cruel wife may be deprived of alimony at the court's discretion. Fault is irrelevant, however, where the non-fault ground of separation is the ground for divorce, and in such cases the economic factor and the duration of the marriage will be the determinants as to alimony.

The objective of the proposed amendment is to adapt section 2A:34-23 to the new and revised grounds for divorce with the least possible amount of disruption pending a full scale study by a new Commission of the present law of alimony and matrimonial property. The major change in policy is the granting of discretion to award alimony where both parties make out a cause for divorce. In other words, giving cause for divorce would not be an automatic bar to alimony where there was actual need and ability to pay, but the court may consider it in the exercise of its judicial discretion. In the case of the non-fault separation ground, it appears to be logically consistent to make fault irrelevant both as to the ground and the possible grant of alimony.

2A:34-28. Repealer

The following sections are repealed: N.J.S. 2A:34-4, 2A:34-5, 2A:34-9, 2A:34-10 and 2A:34-22.

Comment

The recommended elimination, revision, or amendment of each of the above enumerated sections has been explained in the comments with the exception of section 2A:34-22, which deals with the full faith and credit obligation or comity accorded to foreign divorce decrees. Section 2A:34-22 is one version of the Uniform Recognition of Foreign Divorce Law which has been adopted in original or modified form in only ten states and was repealed in Louisiana. This measure attempts to discourage evasion of local divorce law but creates more problems that it solves, including serious constitutional issues. In practice, it has little, if any, efficacy in eliminating migratory divorce. See Note, 16 Hastings L.J. 121 (1965), and Foster, Recognition of Migratory Divorces, 43 N.Y.U.L.Rev. 429 (1968). This uniform act is in general disrepute and should be immediately repealed.

CONCLUSION

The Commission deems that it is practical, if not imperative, to make a distinction between short and long term objectives in recommending changes in matrimonial law. To this end the Commission recommends creation and funding of a Family Law Commission to study and report on all laws of the State relating to marriage and the family. It should be the function of this new Commission to assimilate the hitherto uncoordinated inquiries authorized by this legislation into specific areas such as divorce, to which this study has been addressed, the desirability of a Family Court, to which another Commission study is presently directed, a family conciliation service, thought imperative by this Commission, and such other matters as the economics of marriage and divorce, including modernization of the law pertaining to matrimonial property both during and after termination of a marriage, the possible enactment of the Uniform Child Custody Jurisdiction Act, and the experiences of those jurisdictions using the concept of "irretrievable breakdown" as the sole ground for terminating a marriage. These are but illustrative of the areas requiring coordinated study if our statutory laws relating to the family as an institution are to become or remain instruments serving the public interest.

There are, however, some matters which require immediate legislative attention in order to meet the legitimate needs of our citizens. To these immediate needs we have addressed the foregoing recommendations. It is urgent, in the view of the Commission, that grounds of divorce be broadened and that the non-fault ground of separation be added as a basis for freeing parties from a dead marriage. Such changes also require the elimination or curtailment of the traditional defenses. The recommended changes as to legitimation by inter-marriage, matrimonial jurisdiction, and the repeal of the limitation on recognition of foreign divorces, are minor in comparison but also merit immediate action.

The Commission views its recommendations for immediate legislative action as a matter of extreme urgency and utmost importance. Matrimonial actions, other than traffic cases, are the most frequent point of contact between the average citizen and the courts. Traditionally, divorce law has been negative and destructive rather than helpful in the solution of family problems. Widespread perjury, collusion and fraud, and resort to migratory divorce, have tainted the administration of justice and have led to disrespect for law, courts, and lawyers. Such has occurred because the structure of our law is out of tune with the modern concept of matrimonial justice that is shared by an overwhelming majority of our population. Various public opinion samples and polls

have shown that at least 75 to 80 per cent of the population favors simple divorce laws which enable courts to terminate dead marriages. If the law does not adjust to such widely held values, it will be circumvented, evaded and twisted. The result will be monumental hypocrisy.

The present law of divorce may be acceptable to the affluent who are agreed upon divorce, but it is unacceptable to the poor and to the honest at all economic levels who have compunctions against taking part in the make believe required by existing divorce law. Over 90 per cent of divorce cases are uncontested, and usually divorce by consent is arranged for those who may agree upon the financial and custodial terms incident to divorce. Honest citizens should not be subjected to the indignity and humiliation of fabricating grounds and testimony, or participating in migratory divorces. The legitimate public concern is the quality of marriage rather than the quantity of divorce. In large measure, this is a matter of education for the responsibilities of marriage. Usually it is too late to salvage a meaningful marital relationship when either or both parties have finally decided upon divorce as the only alternative. Denial of a divorce decree does not rehabilitate the marriage or occasion a reconciliation.

The public policy herein advocated is that dead marriages should be subject to a fair and equitable termina-

tion. Public morality will be better served by such a policy. It is the public interest, and only secondarily that of the parties, which requires the termination of dead marriages. Such is the policy choice arrived at after lengthy and careful consideration in New York, California, Canada and England. The case for divorce reform is amply documented, and of all states New Jersey has the most urgent need for immediate modernization of its archaic divorce law. The recommendations herein are the minimum for immediate action to correct the inequities and hardships of the existing law pending the time when even more constructive family laws may be enacted to meet the needs of the twentieth century. This Commission believes that such a better system cannot be created in the short run without full consideration of the practicality of conciliation and counseling services in matrimonial actions, the provision of guardians ad litem for children to protect their interests in divorce cases, and the feasibility of family courts. The long range study of such matters, and the matrimonial problems of the poor, custody jurisdiction, and the economics of marriage and divorce, however, in no way detract from the urgency for the enactment of emergency measures to correct some of the most glaring defects in existing law. It is obvious that maintenance of the status quo comes at too high a price in terms of injustice, inequities, immorality, and a widespread

disrespect for law.

APPENDICES

APPENDIX I

THE DIVORCE REFORM BILL

An Act concerning actions for divorce and nullity of marriage, alimony, maintenance and custody of children, and amending N.J.S. 2A:34-1 through 2A:34-3, 2A:34-7 and 2A:34-8, 2A:34-20 and 2A:34-23 and repealing N.J.S. 2A:34-4, 2A:34-5, 2A:34-9, 2A:34-10 and 2A:34-22.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. N.J.S. 2A:34-1 is amended to read as follows:

2A:34-1. Judgments of nullity of marriage may be rendered in all cases when:

a. Either of the parties has another wife or husband living at the time of a second or other marriage;

b. The parties are within the degrees prohibited by law. If any such marriage shall not have been annulled during the lifetime of the parties the validity thereof shall not be inquired into after the death of either party.

c. The parties, or either of them, were at

the time of marriage physically and incurably impotent, provided the party making the application shall have been ignorant of such impotency or incapability at the time of the marriage, and has not subsequently ratified the marriage.

[d. The parties, or either of them, were at the time of marriage incapable of consenting thereto and the marriage has not been subsequently ratified, provided that where the party capable of consent is the applicant, such party shall have been ignorant of the other's incapacity at the time of the marriage and shall not have confirmed the marriage subsequent to the regaining of capacity by the other party.]

d. The parties, or either of them, lacked capacity to marry due to want of understanding because of mental condition, or the influence of intoxicants, drugs, or similar agents; or where there was a lack of mutual assent to the marital relationship; duress; or fraud as to the essentials of marriage; and has not subsequently ratified the marriage.

e. The demand for such a judgment is by the wife [and she] or husband who was under the age of 18 years at the time of the marriage, unless such

marriage be confirmed by her or him after arriving at such age.

[f. The demand for such a judgment is by the husband and he was under the age of 18 years at the time of the marriage, unless such marriage be confirmed by him after arriving at such age.

g. Allowable under the general equity jurisdiction of the superior court.

No judgment of nullity shall be made where a child of the parties has been born, either before or after the marriage, or is likely to be born, unless the court upon an examination of all the facts of the case shall be of the opinion that such judgment will not be against the best interests of the child.]

2. N.J.S. 2A:34-2 is amended to read as follows:

2A:34-2. Divorce from the bond of matrimony may be adjudged for the following causes:

a. Adultery, which is defined to include sexual or deviant sexual intercourse voluntarily performed by the defendant without the consent of the plaintiff with a person other than the plaintiff after the marriage of the plaintiff and defendant;

b. Willful[,] and continued [and obstinate] desertion for the term of [2 years] six or more

months, which may be established by satisfactory proof that the parties have ceased to cohabit as man and wife despite the willingness of the plaintiff to continue or to resume such cohabitation;

c. Extreme cruelty, whether the acts of cruelty have been heretofore or are hereafter committed; provided, that [no complaint for divorce on the ground of extreme cruelty shall be filed until after 6 months from the date of the last act of cruelty complained of in the complaint, but this proviso shall not be held to apply to any counterclaim] extreme cruelty is defined as including any physical or mental cruelty which endangers the safety or health of the plaintiff or makes it improper or unreasonable to expect the plaintiff to continue to cohabit with the defendant.

d. Separation, provided that the husband and wife have lived separate and apart in different habitations for a period of at least one year and there is no reasonable prospect of reconciliation;

e. Drug addiction, alcoholism, or institutionalization for mental illness, for a period of one or more years next preceding the filing of the complaint;

f. Imprisonment of the defendant for one or

more years after marriage, provided that where the action is not commenced until after the defendant's release the parties have not resumed cohabitation following such imprisonment.

3. N.J.S. 2A:34-3 is amended to read as follows:

2A:34-3. [Divorce from bed and board may be adjudged for the following causes:

a. Adultery;

b. Willful, continued and obstinate desertion for the term of 2 years;

c. Extreme cruelty.]

Divorce from bed and board may be adjudged for the same causes as divorce from the bonds of matrimony whenever both parties petition or join in requesting such relief, provided that in case of a reconciliation thereafter the parties may apply for a revocation or suspension of the judgment, provided further that the granting of a bed and board divorce shall in no way prejudice either party from thereafter applying to the Court for a conversion of said divorce to a divorce from the bonds of matrimony, which application shall be granted as a matter of right.

4. N.J.S. 2A:34-7 is amended to read as follows:

2A:34-7. [If it appear to the court that the adultery complained of shall have been occasioned by the collusion of the parties, and done with an intention to procure a divorce, or that the party complaining was consenting thereto, or that both parties have been guilty of adultery not condoned, no divorce shall be adjudged.]

Recrimination, condonation, connivance, collusion, and the clean hands doctrine are hereby abolished as defenses to divorce from the bonds of matrimony or from bed and board, and if both parties make out grounds for divorce, a decree may be granted to each; provided that nothing herein shall preclude or abrogate the responsibility of a party for the penalty provided by law for perjury or the subornation of perjury.

5. N.J.S. 2A:34-8 is amended to read as follows:

2A:34-8. [The superior court shall have jurisdiction of all causes of divorce or nullity and of alimony and maintenance by this chapter directed and allowed.

In any action under this chapter the superior court may afford incidental relief as in other

cases of an equitable nature.]

The superior court shall have jurisdiction of all causes of divorce, bed and board divorce, or nullity when either party is and has been a resident of this state for a continuous period of one year next preceding commencement of a matrimonial action. The superior court shall have jurisdiction of an action for alimony and maintenance when the defendant is subject to the personal jurisdiction of the court, is a resident of this state, or has tangible or intangible real or personal property within the jurisdiction of the court. The superior court may afford incidental relief as in other cases of an equitable nature and by rule of court may determine the venue of matrimonial actions.

6. N.J.S. 2A:34-20 is amended to read as follows:

2A:34-20. [A judgment of nullity of marriage shall not render illegitimate the issue of any marriage so dissolved, except in a case where the marriage, not being a ceremonial one, is dissolved because either party had another wife or husband living at the time of a second or other marriage. In such a case the marriage shall be deemed void ab initio, and the issue thereof shall be illegitimate.]

A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid, in the manner authorized by the law of the place where such marriage takes place, is the legitimate child of both natural parents notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void.

Nothing in this amendatory act shall be deemed to affect the construction of any will or instrument heretofore executed or any property right or interest or right of action vested or accrued or to limit the operation of any judicial determination containing an express provision or provisions with respect to the legitimacy, maintenance or custody of any child, or to affect any adoption proceeding heretofore commenced, or limit the effect of any judgment or order entered in such adoption proceedings.

7. N.J.S. 2A:34-23 is amended to read as follows:

2A:34-23. Pending any matrimonial action brought

in this state or elsewhere, or after judgment of divorce or maintenance, whether obtained in this state or elsewhere, the court may make such order as to the alimony or maintenance of the [wife] parties, and also as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just, and require reasonable security for the due observance of such orders. Upon neglect or refusal to give such reasonable security, as shall be required, or upon default in complying with any such order, the court may award and issue process for the immediate sequestration of the personal estate, and the rents and profits of the real estate of the party so charged, and appoint a receiver thereof, and cause such personal estate and the rents and profits of such real estate, or so much thereof as shall be necessary, to be applied toward such alimony and maintenance as to the said court shall from time to time seem reasonable and just; or the performance of the said orders may be enforced by other ways according to the practice of the court. Orders so made may be revised and altered by the court from time to time as circumstances may

require.

In all actions brought for divorce, divorce from bed and board, or nullity the court may award alimony to either party and in so doing shall consider the actual need and ability to pay of the parties and the duration of the marriage. In all actions for divorce other than those where judgment is granted solely on the ground of separation the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just.

8. The following sections are repealed: N.J.S. 2A:34-4, 2A:34-5, 2A:34-9, 2A:34-10 and 2A:34-22.

9. This act shall take effect _____.

APPENDIX II

A COMPARATIVE STUDY OF SEPARATION GROUNDS

One of the more acceptable methods of achieving substantial divorce reform is the addition of non-fault grounds. A total of some 28 states, and most countries in Europe, have accepted some form of separation or living apart as a non-fault ground for divorce. The usual objective of such provisions is to grant legal authority to terminate the marriage which has failed, whatever the cause of the breakdown.

The marital fault doctrine compels the court to concentrate upon superficial aspects of the relationship of the parties. The non-fault grounds ask whether a particular marriage relationship has so far deteriorated that the legitimate objects of matrimony have been destroyed and there remains no likelihood that the marriage can be saved.

The major arguments for separation statutes are as follows:

1. Allegation and proof that the parties have lived separate and apart for a specified time due to marital difficulties is an honest ground for divorce. It eliminates the need for the kind of perjury and exaggeration that has brought divorce law into disrepute.

2. Non-fault grounds eliminate the adversary na-

ture of divorce litigation and the parties do not have to wash their dirty linen in public, hence they can be spared humiliation and embarrassment.

3. The traditional defenses of recrimination, collusion and connivance have no relevance where the ground is living apart and it is in the public interest to eliminate these technical grounds to divorce.

There are two types of statutes: (1) the living apart and (2) the conversion type. A total of 28 states have adopted a living apart statute. These statutes require that the separation continue without interruption for a prescribed minimum period immediately preceding commencement of the divorce action. Such statutes are based on the premise that a lengthy separation serves both as a check on capricious dissolution and as an indication that the marriage is sufficiently disrupted. In the conversion type of divorce, a judicial decree or separation is later converted into an absolute divorce.

LIVING APART AS A GROUND FOR DIVORCE

The living apart ground can further be divided into several categories. Although the length of separation varies considerably, the principal differences which distinguish the statutes are such factors as cause of separation or the degree to which the fault of the parties may be considered by the courts. The categories are as follows:

1. Voluntary separation statutes, which permit spouses to agree to separate in order later to obtain a divorce based on the separation after the requisite time period has elapsed without a manifested change of heart by either. Examples of voluntary or consensual separation statutes are found in Delaware, Louisiana, Maryland, Wisconsin and the District of Columbia.

The Delaware provision, which was added to the state's divorce law in 1957 (Del. Code Ann. Tit. 136) (§1522 Supp. 1964) is fairly typical. It allows divorce at the suit of either party "when husband and wife have voluntarily lived separate and apart without any cohabitation for three consecutive years prior to the filing of the divorce action and such separation is beyond any reasonable expectation of reconciliation." Maryland's statute (Md. Ann. Code Art. 16, 224) (Supp. 1965), while similar, requires a separation period of only eighteen months. Wisconsin requires the parties to live apart for five years (Wis. State. Ann. §247.07(6) (Supp. 1965), and its statute contains no specific mention of reconciliation. The District of Columbia (D.C. Code Ann. §16-904(a) (Supp. V, 1966) amended its statutes in 1965 to allow divorce for "voluntary separation from bed and board for one year without cohabitation."

The Louisiana (La. Rev. Stat. Ann. §9:302) (1965) statute differs from the others in that a voluntary living

apart for one year is a ground only for a legal separation from bed and board. However, if this decree has been obtained and an additional year and sixty days have elapsed without reconciliation, either party may sue for absolute divorce.

The voluntary separation statutes are considered as non-fault grounds in two respects. First, the parties may agree to divorce and then provide grounds by living apart for a specified period. Second, the cause of separation is irrelevant, since the divorce is based on the fact of voluntary separation even though it may have been caused solely or primarily by the fault of one of the spouses.

The voluntary separation statutes fall short of a truly non-fault ground. Because the separation must be consensual, a party at fault in the traditional sense is precluded from obtaining a divorce on the ground of separation unless his spouse also wants a divorce. Thus, a spouse who leaves under circumstances amounting to desertion has no recourse except to wait to be sued for divorce based on such a ground.

This type of statute has led to a great many legal problems. Since voluntariness is a basic element of the statutes, it must be alleged and affirmatively proved by the spouse who seeks divorce. Sometimes this may be established through testimony as to what was said at the time of separation, or through a written separation agreement executed by

both of the parties. But neither a formal document nor a specific oral agreement is essential to establish mutual voluntariness. In Delaware, the state's highest court took a broad view of voluntariness. In Maloney v. Maloney, 182 A. 2d 172 (Del. 1962), the defendant husband had neither contested his wife's divorce action nor sought to effect a reconciliation, and the court held that "such silence and inaction . . . for the required statutory period constituted tacit acquiescence in a voluntary separation in which there was no reasonable expectation of reconciliation." The Maryland courts, however, have taken a more restrictive view than Delaware. Its view is that "acquiescence to or assent to what one cannot prevent does not amount to a voluntary agreement thereto."

The question as to whether the separation must be voluntary at the outset or whether the original separation may be the result of the husband's desertion has been given varying answers by the courts of the District of Columbia. In Helfgott v. Helfgott, 179 F. 2d 39 (D.C. Cir. 1949), the Court of Appeals held a separation for the statutory period voluntary where the living apart was caused by the husband's desertion of his wife. The fact that the separation originated by the husband's fault was immaterial. In another cause, however, the District Court held that there must be a showing that the separation was voluntary at the outset.

Another question which arises is whether a separation, entered into voluntarily, must continue to be voluntary for the entire statutory period. This was answered in the affirmative by the Court of Appeals for the District of Columbia which refused a divorce to a husband on the ground the separation did not remain voluntary on the part of the wife where she made repeated efforts to effect a reconciliation. Martin v. Martin, 160 F. 2d 20 (App. D.C. 1947). This case can be distinguished from other cases where a divorce was granted either because there was no effort at reconciliation by the other spouse or such a slight effort was made as to really constitute a silent acquiescence. It appears that the courts will not permit a token or purely strategic last minute offer of reconciliation to interrupt the separation period.

In Maryland, the courts demand a strong quantum of proof that the separation was voluntary in its inception and that it remained so. In the case of Stumpf v. Stumpf, 179 A. 2d 893 (1960), a wife was denied a divorce on the ground that her refusal to allow her husband to come home from the hospital amounted to desertion in the absence of proof that he had agreed to a voluntary separation, and in the case of Moran v. Moran, 149 A. 2d 399 (1959), the Maryland Court of Appeals held that where a husband abandoned his wife, her resignation to the situation she could not prevent, did not make the sep-

aration voluntary within the statute,

The Wisconsin courts insist that an initial abandonment cannot be the basis for a voluntary separation. Furthermore, it has been held that not only must the separation be voluntary in its inception, but it must have continued to be voluntary for the statutory period.

2. Statutes which permit the granting of a divorce because the parties have lived separate and apart for a given period, but which make the action available only to the partner who was not at fault in causing the separation. The two statutes which fall into this group are Vermont and Wyoming. This is clearly a compromise between the breakdown and fault approaches but permits a divorce with a minimum of acrimonious testimony.

The Vermont statute (Vt. Stat. Ann. Ht. 15, §551(7) (1959) provides that an absolute divorce may be decreed when a married person has lived apart from his or her spouse for three consecutive years without fault on the part of the libelant and the court finds that resumption of marital relations is not reasonably probable. The Wyoming provision (Wyo. Stat. Ann. §20-47) (1959) requires a two-year separation, but divorce is not permitted if the separation has been induced or justified by cause chargeable in whole or material part to the party seeking divorce upon such grounds in the action. From the few cases interpreting these statutes, it would ap-

pear that the particular conduct need not itself be a ground for divorce, and the courts thus have considerable latitude for the exercise of discretion in denying divorce.

While the Vermont courts require the petitioner to allege and affirmatively establish that he had no part in causing the separation, the case in Wyoming is different. Fault becomes relevant only where it is specifically raised as a defense.

It is also possible for a court to read in the requirement that the petitioner be faultless, even though the applicable statute is not so qualified. Thus, the North Carolina courts by judicial fiat have held that if the separation was caused by willful abandonment, the abandoning spouse is precluded from bringing an action on the ground of living apart. Under statutes which specifically allow the court's discretion in the award of divorces based on separation, a requirement that the plaintiff be innocent could easily be interjected.

3. Statutes which make the fact of having lived separate and apart following a breakdown of the marriage the basis for divorce regardless of whether the parties agreed to separate and even though the fault of one of the spouses may have contributed or directly led to the separation. Statutes falling within this grouping are the most common and they most effectively minimize the role of fault in determining

whether a divorce should be granted. The group includes Alabama, Arizona, Idaho, Kentucky, Louisiana, New York, Nevada, North Carolina, Rhode Island, Texas, Virginia, Washington and Puerto Rico. Despite some variations, with the exception of Alabama's statute, all provide that (1) either spouse may bring the action for divorce; (2) the separation need not have been voluntary; (3) there must be a continuous separation of a specific duration immediately preceding the filing of the petition; and (4) traditional fault defenses are inapplicable. The Alabama statute (Ala. Code Tit. 34, §22) (1959) is exceptional in that it permits an action only by the wife, and only if her husband has failed to support her during the two-year separation period.

The Nevada (Nev. Rev. Stat. §125.010(9) (1963) and Rhode Island (R.I. Gen. Laws Ann. §15-5-3) (1957) statutes specifically provide the courts with discretion in the award of divorces based on separation, although neither sets forth particular guidelines for the exercise of such discretion.

The Nevada law provides that "where the husband and wife have lived separate and apart for three consecutive years without cohabitation the court may, in its discretion, grant an absolute decree of divorce at the suit of either party." Nevada courts do not regard considerations of relative fault as controlling. Accordingly, while the court may hear recriminatory evidence, it seems clear that the deter-

mining factor is the probability of reconciliation.

The Rhode Island statute, which dates from 1893, permits the court in its discretion to grant a divorce if the parties have lived separate and apart from each other for at least ten years. As in Nevada, Rhode Island decisions seem to turn on the presence or absence of the possibility of reconciliation.

North Carolina (N.C. Gen. Stat. §50-6) (Supp. 1965) has what appears to be a non-discretionary, non-fault separation statute. It permits an absolute divorce on the application of either party if and when the husband and wife have lived separate and apart for one year.

Despite the apparent intent of the North Carolina legislature, the courts have circumscribed the statute's application in two ways. First, the courts deny a divorced based on separation to a husband who abandoned his wife. They have justified this on a policy ground that, since abandonment is a criminal offense, a man should not be allowed to obtain a divorce by his own criminal acts. Secondly, there is a judge-made requirement that the separation be by mutual consent. This restriction was recently developed in a decision which seems silently to overrule a line of cases holding that the separation need only be voluntary on the part of one of the parties. O'Brien v. O'Brien, 146 S.E. 2d 500 (N.C. 1966).

The most recent separation statute is that of Virginia (Va. Code Ann. §20-91 (a) (Supp. 1961). The statute provides for divorce at the suit of either spouse after the parties have lived separate and apart without cohabitation for two years. In 1962 there was added a statement that "a plea of res adjudicata or of recrimination shall not be a bar to either party obtaining a divorce on this ground."

In some test cases the Virginia courts have determined that the statute would apply retroactively and the husband who abandoned his wife was not barred from obtaining a divorce because of his fault.

Section 170(6) of the New York Domestic Relations law provides that living separate and apart for two or more years after the filing of a separation agreement may be a ground for divorce by a party who has substantially performed all the terms and conditions of such an agreement. A trivial or technical violation or non-performance does not preclude seeking a divorce on this ground.

This section requires a unique formality. Both the original agreement or the memorandum filed in lieu thereof must be subscribed and acknowledged in the form required to entitle a deed to be recorded. It is doubtful that any real good is achieved by this formal requirement and the result will probably be increased costs for processing a divorce case.

Section 170(5) of the New York Domestic Relations Law, it may be noted in passing, is a so-called conversion ground, which by its literal language permits either party to a separation decree who has substantially complied with such decree, after two years to convert such decree into one for absolute divorce. The constitutionality of Section 170(5) recently was sustained by the New York Court of Appeals in Gleason v. Gleason, decided January 23, 1970, by a 5-2 decision. The court held that it made no difference that a "guilty" husband sought the conversion of his wife's 1954 separation decree into an absolute divorce and that the wife was thereby deprived of claimed inheritance rights.

In 1968 a Canadian National Divorce Act went into effect. Section 4 permits a divorce if the husband and wife are living separate and apart at the time of the petition on the ground that there has been a permanent breakdown of their marriage by reason of illness or disability or refusal to consummate the marriage and the spouses have been living separate and apart. The separation must be for a period of not less than three years or by reason of the respondent's desertion of the petitioner for a period of not less than five years. Where any of the above circumstances are established it is presumed that a breakdown has occurred.

However, such divorces may be barred because of collusion or, at the discretion of the court, because of con-

donation or connivance, and such divorces are to be refused if there is any prospect of reconciliation or if granting the divorce would prejudicially affect the making of reasonable arrangements for the maintenance of children or would be unduly harsh or unjust to either spouse. Where granted the decree becomes final after three months.

Section 4 of the Canadian statute is in addition to Section 3 which lists the traditional fault grounds of adultery, sodomy, bestiality, rape or homosexual act and physical or mental cruelty.

One oddity is that the deserting spouse may sue after living separate and apart for three years, whereas the deserted spouse must wait five years. Moreover, the Canadian divorce law restricts its separation ground so that it is impractical and probably will be rarely used. The three year period in Canada as well as a number of other states and countries is too long and divorce litigants thus will be induced to use other grounds. Also, the limitations on Section 4 confer upon the court a judicial discretion which could be so exercised as to perpetuate the fault concept of divorce.

One of the major battles for divorce reform was waged in England. The Law Commission and Parliament rejected the proposed irreparable breakdown of marriage test and instead recommended and enacted more traditional grounds, and a non-fault ground based upon separation subject to appropri-

ate safeguards. Under this legislation, either party, after two years or more of separation, can obtain a divorce if the other consents or does not object. After the expiration of a longer period (five years) either party can obtain a divorce even if the other objects. The safeguards include a bar against commencing an action for divorce within three years of the date of marriage, and the power to continue the case for reconciliation efforts and to refuse a decree if attempts to deceive the court are made by the petitioner. Additional safeguards include a provision to ensure that respondent's decision to consent to, or not to oppose, a divorce has been freely made with full knowledge of the consequences. As with the Canadian divorce law, the provisions are unrealistic in that the restrictions imposed made the non-fault grounds non-functional.

In Australia, a married couple may separate by agreement and in five years either may petition for divorce. The court, however, has discretion with regard to granting a decree and there must be no likelihood of cohabitation being resumed. The case of Main v. Main, 78 C.L.R. 636 (1949), further held that parties could not be considered to be living separate and apart while living under the same roof. New Zealand's separation ground is analagous to Australia's, but under Section 37(1) an absolute bar to the separation ground is imposed if the court feels that to grant a divorce would

be harsh or repressive to the respondent or contrary to the public interest.

CONSTRUCTIVE LIVING APART?

The question as to whether or not a husband or wife, who live under the same roof but have no marital relations, can be said to be living separate and apart has been passed on by a few courts. The District of Columbia held that a man and wife, who occupied separate bedrooms in the same house and had no social life together and did not speak, were living separate and apart. Hawkins v. Hawkins, 191 F. 2d 344 (App. D.C. 1951).

However, the Alabama court, under a similar factual situation, held that there was no living separate and apart. The court said that the statute contemplated a complete cessation of all marital duties. Rogers v. Rogers, 63 So. 2d 807 (Ala. 1953). Idaho, Louisiana, Rhode Island and North Carolina follow this ruling.

If an analogy is made to the constructive desertion cases, including those of New Jersey, a court may find that there is a living apart when there is a cessation of marital relations even though due to economic circumstances they continue to live under the same roof. Whether it is better to limit the ground to situations where the parties do not live

in the same home or to have no hard and fast rule but direct inquiry into all the circumstances in order to determine whether in fact the marriage is dead, is a question of public policy.

TIME PERIOD

The legislative concept embodied in the duration of living apart is that when conduct of parties in living apart over a long lapse of time without cohabitation has made it probable that they cannot live together in happiness, the best interests of the parties and state will be promoted by a divorce.

If the time period required is too long, the statute will not be used by spouses who can sue at home on other grounds or as well avail themselves of migratory divorce. A one or two year statute, however, appears to give ample time for the spouses to consider whether or not a reconciliation might be possible. It is not so long as to discourage its use, and it cannot be said to promote hasty or easy divorce. There are also certain tax advantages when the period is less than two years.

In looking at the annotations to several statutes, there appears to be a correlation between the length of the period and the frequency of its use.

A mere lapse of time during which the spouses do not live together or even see each other will not necessarily give rise to a divorce. The fact that the parties were apart for a two or three year period may be attributable to such factors as military service, requirements of employment, incarceration, or even physical or mental illness requiring prolonged hospitalization. These circumstances by no means indicate a breakdown in the marriage. But if the marriage did break down, the coincidence that this occurred at the beginning of or during a period of military duty or employment does not toll the separation period. The principal problem is one of proof of the time when the breakdown occurred, which may be established by such factors as the wife's departure from the designated family home, a specific letter of intention by one of the parties, or the execution of a separation agreement between them.

ALIMONY UNDER SEPARATION STATUTES

Since the concept of fault is prominent in the determination of alimony, the separation ground presents certain problems. With the exception of the insanity ground, the approach frequently involves a choice between letting the parties reach their own financial agreements or litigating the question of fault separately for alimony purposes.

This approach becomes necessary where fault is the criterion for granting alimony, as is often the case. Many statutes which provide that a court may make the requisite financial arrangements on dissolution of the marriage after considering the position of the parties and all the circumstances, have been judicially construed to mean that alimony should not be awarded to a party at fault. In recent years increasing weight has been accorded to such other factors as the needs of the parties and their private estates and earning capacities. Elimination of fault as a consideration in the granting of divorce should make it easier for further refinement of this approach.

CONVERSION GROUND

There are some thirteen jurisdictions where judicial separation may be converted into absolute divorce after a stipulated period. These jurisdictions are Alabama, Colorado, Connecticut, District of Columbia, Hawaii, Louisiana, Minnesota, New York, North Dakota, Tennessee, Utah, Virginia and Wisconsin. Also Belgium, France and Monaco. In each instance, either the plaintiff or the defendant in the judicial separation action may convert the decree into a final divorce except that only the innocent party may do so in the District of Columbia and Hawaii. This latter approach is no more than

a two-step fault divorce process. Moreover, in some states, such as North Dakota, the conversion is discretionary with the court, and in New York it must be shown that the petitioner has substantially complied with all prior orders. But in a more basic sense such statutes remain fault-oriented whenever one of the spouses must establish a fault ground before even a limited divorce or separation decree will be granted.

A number of states take into consideration the time following a decree of separation, separate maintenance or limited divorce in computing the separation period. In other states, however, the judicial decree must be obtained before a separation can constitute a ground for divorce.

The Alabama statute (Ala. Code Tit. 34 §22 (1) (1959) vests the court with the power to award a divorce in favor of either party after the spouses have lived apart for four years following either a divorce from bed and board or a decree of separate maintenance; recriminatory defenses are not permitted. In Colorado (Colo. Rev. Stat. Ann §46-1-11) (1963) and Utah (Utah Code Ann. §30-3-1(8) (Supp. 1965) the parties must have ceased to cohabit for at least three years pursuant to a decree of separation. Minnesota provides that a divorce may be granted if the parties have been separated for a period of two years following a decree of separate maintenance or five years following a limited divorce. (Minn.

State. Ann. §518.06(8) (Supp. 1964).

In Louisiana (La. Rev. Stat. Ann. §9:302) (1965) the spouse who obtains a divorce from bed and board may sue a year later for absolute divorce if there has been no reconciliation; if that spouse fails to bring the action within one year and sixty days from the judgment for separation, the other may do so.

North Dakota (N.D. Cent. Code §14-06-05) (1960) courts may in their discretion award a divorce if the parties have lived apart for four years following a legal separation and reconciliation is impossible. The courts have indicated that generally divorce will be granted when, absent special circumstances, reconciliation of the parties appears improbable. They, also, will not regard the original fault of one party as determinative.

Wisconsin (Wis. Stat. Ann. §247.07(6) (Supp. 1965) which also permits divorce based on the voluntary separation of the parties without legal intervention, provides that when the spouses have lived entirely apart for five years pursuant to a judgment of legal separation a divorce may be granted at the suit of either.

In Connecticut (Conn. Gen. Stat. Ann. §46-30) (1960) either party may petition for an absolute divorce at any time after the entry of a legal separation. Although no specific separation period is required the courts have discretion to

award a divorce if they find that the parties have not resumed marital relations since the entry of the decree of legal separation.

Tennessee (Tenn. Code Ann. §36-802) Supp. 1965) will grant an absolute divorce to either party after two years of living apart following a decree of separation from bed and board or separate maintenance. The statute is discretionary and also provides that the court is not barred from granting an absolute divorce on the usual fault grounds earlier than two years after the first decree.

In Virginia (Va. Code Ann. §20-121) (1960), the courts have discretion to merge a decree for divorce from bed and board into an absolute divorce on the petition of either party after one year where desertion or cruelty is the ground for divorce. The court must be satisfied that there has been no reconciliation and that none is probable, and that the parties have lived separately since the initial divorce decree. The beginning of the time of the living apart is fixed by the date of the first decree. In order to be sure that the marriage is dead, it may be that such a statute should provide that the living apart must have been continuous and uninterrupted for the stipulated period.

The Divorce Reform Law was enacted in New York in 1966 but it did not become effective until 1967. The major changes were the addition of new grounds to supplement the

ground of adultery and a failure to provide defenses to the new grounds. One of the new grounds was living separate and apart for two years or more pursuant to a decree of separation or a written separation agreement filed with the court.

This provision is based on the policy that if a reconciliation has not been effected within two years following a judicial separation, it is conclusive that the parties are irreconcilable. Section 170(5) is available to either spouse, even the one who was the defendant in the judicial separation action, if he has met the condition of supplying "satisfactory proof" that he has substantially performed the terms and conditions of the separation decree. However, where a wife obtains a separation decree, and the husband fails to comply with an order concerning alimony or child support, or violates the terms of his visitation rights, he may not sue for divorce on this ground. In Gleason v. Gleason, decided January 23, 1970, the constitutionality of section 170(5) and its retroactive application in favor of a "guilty" husband was sustained.

The most common practice in European countries is the conversion of the separation or divorce from bed and board decree into an absolute divorce, after a specified period.

In Denmark, a legal separation granted by an administrative authority may be converted into an absolute divorce

2 1/2 years after the decree of separation, or 18 months thereafter, provided the spouses agree. Half of the divorces granted in Denmark are conversions. In Sweden, a separation may be granted on the motion of both spouses and converted, after 1 year, into a divorce. In Norway, the period is two years, but if the divorce is requested by both spouses, the time is reduced to 1 year.

In the Netherlands (Netherlands Civil Code Art. 291), a separation can be requested by mutual agreement of the spouses any time after two years from the date of the marriage, and it can be converted into an absolute divorce after five years if there has been no reconciliation. During the conversion proceedings the court must attempt a reconciliation.

In Switzerland (Swiss Curicode. Art. 142,147), divorce is permitted without a finding of fault on the part of either of the spouses, but the judge in lieu of divorce may order a separation from one to three years if he believes there is a chance of reconciliation and after such period, or after three years if no period was fixed by the court, either spouse may request a divorce.

In Turkey (Turkey Civil Code Arts. 138-143), the period of time is similar to that of Switzerland after which conversion may be sought.

In France, Belgium and Monaco, a divorce from bed

and board is not permitted by the consent of the parties, but only for specified grounds involving fault on the part of the defendant spouse. These separations may be converted into an absolute divorce on petition of either party at the expiration of three years.

OTHER MODIFICATIONS OF THE FAULT CONCEPT

Divorce to Both Parties - In at least twelve American jurisdictions, a divorce court may grant a divorce to both parties. In California, Florida, Idaho, Kansas, Illinois, Oklahoma and the Virgin Islands, the courts have granted a divorce to each of the spouses where it was found that the misconduct of each amounted to a ground for divorce under the state law, and where recrimination was held to be no bar to a divorce in the specific state. Such result was reached by judicial decision without the aid of a specific statute. In Minnesota, Oklahoma, Washington and Oregon, statutes provide that a divorce may be granted to both parties.

There are many things which militate against the automatic application by the courts of the defense of recrimination. Frequently, divorces are uncontested. In many cases neither spouse is innocent and yet by agreement, one of them defaults to ensure a divorce. Thus, a strict recrimination rule fails in its purposes of denying relief to the

guilty. Moreover, it exerts a corrupting influence on the negotiations that precede the entry of such a default. The spouse who more desperately seeks an end to a hopeless union is penalized by the ability of the other spouse to prevent a divorce through the assertion of a recriminatory defense, and the more unscrupulous partner may obtain substantial financial concessions thereby.

Incompatibility - Today five states, Alaska, Delaware, Nevada, New Mexico, Oklahoma, and the Virgin Islands (as well as Chihuahua, Mexico) make incompatibility a ground for divorce. The Delaware statute (13 Del. C. §1522 (12) is the most recent. In New Mexico (N.M. Stat. Ann. §22-7-1(8) (1954), and Oklahoma (Okla. Stat. Ann. Tit. 12 §1271(7) (1961), the ground is listed as incompatibility, while Alaska (Alaska Stat. §09.55.110(3) (1962) and the Virgin Islands (V.I. Code Tit. 16, §104(a) 8) (1964) refer to incompatibility of temperament. A judicial gloss has done much to intrude the concept of fault as at least one consideration in determining whether a divorce should be granted.

The most celebrated case is Burch v. Burch, 195 F. 2d 799 (3rd Cir. 1952). It pointed out that the ground does not refer to petty quarrels and minor bickerings but to conflicts in personalities and dispositions so deep as to be irreconcilable and to render it impossible for the parties to continue a normal marital relationship with each other.

Incompatibility statutes, however, are based upon a legal recognition of the proposition that if the parties are so mismated that their marriage has in fact ended as a result of their hopeless disagreement and discord the courts should be empowered to terminate it as a matter of law.

Irreconcilable Differences - In the choice between complete recodification of divorce law or more gradual reform, the latter has been favored by most states. However, California, Title 3, Section 4506, accepted the irretrievable breakdown of marriage proposal rather than the alternative of adding no fault grounds to traditional grounds as other states have done. The California Governor's Commission Report of 1966 justified abandonment of the fault issue and the substitution of the requirement that there be a finding that the marriage had irreparably failed, on the basis that the traditional grounds were merely symptoms of a sick marriage.

The new law became effective January 1, 1970, and its Title 3 refers to the "dissolution of marriage" rather than divorce. Section 4500 provides that a marriage may be terminated by death or a divorce dissolving the marriage. Section 4501 states that the effect of a decree is to restore the parties to "the state of unmarried persons," and section 4502 permits incidental relief such as alimony, child support, and custody orders. The caption of the petition is to be

"in re the marriage of _____ and _____."

In those counties of California which have a conciliation court (service), the petitioner must file a questionnaire concurrently with his petition, which is confidential, and the defendant who files a responsive pleading also must file a completed questionnaire. Questions for the questionnaire are not specified but subject to the approval of the Judicial Council. See section 4505. The following are the grounds set forth in section 4506:

"4506. A court may decree a dissolution of the marriage or legal separation on either of the following grounds, which shall be pleaded generally:

(1) Irreconcilable differences, which have caused the irremedial breakdown of the marriage.

(2) Incurable insanity."

"Irreconcilable differences" are defined in section 4507 as "those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved." This is the sole statutory guideline for court discretion. However, presumably in the fourteen (as of September 1969) counties in California having a conciliation court (service), the questionnaires may provide data on the family which affords some basis for determining "irreconcilable differences." The majority of California counties will have no such help

for the exercise of judicial discretion. Considering the amorphous statutory language, it is unfortunate that the questionnaire requirement was limited to the relatively few counties having conciliation courts, although it should be noted that such includes the most populous areas, such as Los Angeles and San Francisco.

Under section 4508, if from evidence produced at the hearing and answers to the questionnaire the court concludes that there are irreconcilable differences and an irremedial breakdown, it may order dissolution or a legal separation. If it appears that there is a "reasonable probability of reconciliation" there may be a stay of up to 30 days, but at any time after such period either party may move for dissolution or legal separation and the court may enter its judgment decreeing dissolution or separation. However, in order to decree legal separation, both parties must consent unless one had not made an appearance and the petition is one for legal separation. Moreover, a judgment decreeing legal separation is not a bar to a later divorce decree upon petition of either party. Pleadings shall not include evidence of specific acts of misconduct, except where child custody is in issue, or where necessary to establish irreconcilable differences. See section 4509.

A mild effort is made by section 4511 to preclude imposition on the court. That section provides that "No de-

cree of dissolution can be granted upon the default of one of the parties or upon the statement or finding of fact made by a referee; but the court must, in addition . . . require proof of the grounds alleged, and such proof, if not taken before the court, shall be by affidavit or declaration under penalty of perjury."

Other provisions of the new law substitute an interlocutory judgment in lieu of the former "cooling off" period, with the result that a final decree or dissolution cannot be rendered until six months have expired from the date of service of summons and complaint or date of appearance of the respondent. Decree of final dissolution is at the motion of either party or by the court on its own motion. See section 4514. Ex parte and restraining orders may be issued pending any proceedings. See section 4518. The prior residency requirement is six months in the state and three months in the county in which the matrimonial proceeding is brought. Section 4530. For purposes of divorce, the wife may establish her own domicile of choice. Section 4531.

Such are the pertinent provisions of the new California law. The main criticism of the statutory scheme is that the ultimate issue (ground) is not justiciable, insufficient statutory guidelines are provided, and that it does not adequately safeguard the public concern over the stability of marriage. Impetuous divorce may be encouraged where

there are so few if any brakes on obtaining dissolution. If all California counties had a conciliation service that screened all divorce cases and protected the interests of children, the new law would have greater appeal.