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### Guide to the New D.C. Marriage and Divorce Law

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# Guide to the New D.C. Marriage and Divorce Law

By Harvey L. Zuckman

## I. Introduction and Background

The new District of Columbia Marriage and Divorce Act, D.C. Law 1-107, which became effective on April 7, 1977, is an uneven piece of reform legislation possessing certain advantages for the public and the legal profession but lacking a number of features considered essential to effective divorce reform by experts in the field. The irregularity of the legislation may be explained by the numerous attempts to reshape the original Council Bill No. 1-89 to meet objections voiced by segments of the Bar.

As originally introduced, the bill closely reflected the Uniform Marriage and Divorce Act promulgated by the National Conference of Commissioners on Uniform State Laws, and it was vigorously supported during the Council's public hearings by the District of Columbia's own NCCUSL member Benny L. Kass. These hearings produced little outright opposition to the NCCUSL approach to divorce reform, which largely eliminates the consideration of "fault" from divorce and the collateral matters of property division, support and child custody, and reduces the adversary aspects of divorce proceedings.

But behind the scenes, there was strong dissatisfaction with the original bill from practitioners because it did not mesh well with many substantive and technical aspects of family law practice

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in the District of Columbia. Interested members of the District of Columbia Bar and the Bar Association of the District of Columbia met with Councilman Arrington Dixon, the sponsor of the bill, and persuaded him that a different approach was needed. As a result of these and other meetings, Dixon wrote fellow councilmember David A. Clarke, chairperson of the Committee on the Judiciary and Criminal Law, in effect withdrawing the original bill. In a letter dated October 7, 1975, Dixon said, "I have come to the position that the Committee should consider reform of Chapter 1 of Title 30 and Chapter 9 of Title 16 of the [District of Columbia] Code through a process of amendment—a process of deletion and addition—rather than the wholesale repeal and redrafting of those titles as I originally proposed." This letter ended the attempt of a "grand design" divorce reform for the District based on the Uniform Marriage and Divorce Act.

To aid Dixon in the redrafting of Council Bill 1-89, the Family and Juvenile Law Division of the District of Columbia Bar and the Family Law Section of the Bar Association appointed a joint committee, headed by Marsha E. Swiss and John V. Long, to advance proposals for divorce reform. Simplified non-fault grounds for divorce and the abolition of illegitimacy are products of the joint committee's work which survived, but numerous other committee proposals were either rejected or modified by Clarke's committee, or on the floor of the City Council during several readings and amended readings of the bill. Unevenness of product and loss of focus were the inevitable consequences of that process.

## II. Section-by-Section Analysis of the Act

1. Section 101, amending D.C. Code §16-902 (1973). This section reduces the required residence period for filing a divorce petition from one year to six months prior to filing for divorce. In addition, members of the military are deemed to have met the residence requirement for divorce if they physically reside in the District of Columbia continuously while under military orders.

Comment: The reduced residence requirement coincides with the reduced period of voluntary separation as a ground for divorce provided by Section 102(a). While the legislative history sheds little light on the residence provision regarding servicemen, it is similar to one found in Section 302 of the Uniform Marriage and Divorce Act and is apparently designed to overcome the judicial resistance to permitting service personnel to qualify for divorce while stationed in a jurisdiction because of military orders. The section in effect creates a conclusive presumption of domicile in the District of Columbia.

2. Section 102, amending §§16-903, 904. This section eliminates all traditional "fault" grounds for absolute divorce and adopts a "no-fault" approach. Grounds for absolute divorce are (a) mutual, voluntary and continuous separation for six months and (b) involuntary and continuous separation for one year. Grounds for a bed and board separation decree are now (a) mutual, voluntary and continuous separation for six months; (b) involuntary and continuous separation for one year; (c) adultery; and (d) cruelty. For purposes

of both absolute divorce and bed and board separation, a voluntary or involuntary separation may be effected though the parties continue to reside under one roof.

Grounds for annulment are now (a) bigamy; (b) insanity of either spouse at the time of the marriage unless there has been voluntary cohabitation after discovery of the insanity; (c) fraud or coercion in procuring the marriage; (d) inability of a party to engage in sexual intercourse at the time of the marriage without the knowledge of the other party, and continued incapacity after the marriage; (e) non-age, but in such cases only at the suit of the party who had not attained legal age at the time of the marriage and only if there has not been affirmation of the marriage by cohabitation after legal age is attained.

Comment: This section avoids the definitional pitfall of other no-fault divorce statutes by making voluntary or involuntary separation for a specified period of time the only basis for absolute divorce. The Superior Court will not have to wrestle with the question of whether there are "irreconcilable differences" and "irremediable breakdown" of the marriage. Time apart is the only major question. Curiously, the fault grounds of adultery and cruelty are retained for divorce *a mensa*.

The Council, in permitting separation while the parties reside under the same roof, has clarified existing local case law on the subject. As the report of the Council's Committee on the Judiciary and Criminal Law (dated June 24, 1976) states, "This provision is meant to stabilize into statutory form a doctrine derived from court interpretation that the terms 'separate and apart' means 'separate lives but not separate roofs'. The 'separate lives' standard has developed a very narrow meaning in the case law, allowing very little social intercourse between the parties, so that living under 'separate roofs' was practically necessitated. . . . Under this subsection [(c)] parties who separate from bed and board clearly may live in the same dwelling in order to meet the separation grounds mentioned in subsections (2) and (b) of this section." Report, p. 12.

With the exception of the fraud ground, the bases for annulment provided in this section are quite common. Traditionally, the only fraud that would justify annulment was that going to the "essence" of the marriage contract, i.e., sexual intercourse and reproduction.



The broad language of the fraud ground, taken from the earlier Code provisions, would permit District of Columbia courts to take the more modern view that any fraud actually inducing the marriage, such as a false promise by a woman to set the prospective husband up in business, is ground for annulment. But the question is still open in the District as to what exactly constitutes fraud justifying annulment.

3. Section 103, amending §16-905. This section permits the court to enlarge its decree of legal separation to an absolute divorce upon the application of the spouse originally awarded the decree if the court finds that (a) no reconciliation has taken place and none is probable; and (b) the separation has continued voluntarily and without interruption for at least one year.

Comment: As a result of this section the court now has the power not only to revoke decrees of divorce from bed and board upon the joint application of the parties, but to move in the opposite direction to transform such decrees into absolute divorce upon the application of the spouse who initially obtained the separation decree.

4. Section 104, amending §16-907. This section provides definitions concerning the status of children. The terms "legitimate" or "legitimated" are defined to mean that the parent-child relationship exists for all rights, privileges, duties and obligations under District law. The term "born out of wedlock" means only that a child has been born to parents who, at the time of its birth, were not married to each other. The term "born in wedlock" means only that a child has been born to parents who, at the time of its birth, were married to each other.

Comment: This definitional section relates to the substantive provisions of Section 105.

5. Section 105, amending §16-908. This section purportedly abolishes the status of illegitimacy in the District of Columbia by stating: "A child born in wedlock or born out of wedlock is the legitimate child of its father and mother and is the legitimate relative of its father's and mother's relative by blood or adoption."

Comment: This section must be read in conjunction with Section 22 of the Anti-Sex Discriminatory Language Act (D.C. Law 1-97), amending Section 19-316. That section provides that "illegitimate children" and the issue of "illegitimate children" are capable of taking real and personal estates by inheritance from either parent or from others "as if born in lawful wedlock" (if parentage is established) and parents and the respective heirs may inherit from "such children." This section of the Anti-Sex Discriminatory Language Act suggests that it is going to be difficult to eliminate the term "illegitimate" if not the status itself.

While it is clear from the legislative history of the Marriage and Divorce Act that Section 105 is prospective in its effect insofar as pending litigation is concerned, it is less clear whether persons born out of wedlock prior to the effective date of the legislation are legitimated by the section.

6. Section 106, amending §16-909. This section establishes the manner of proving the biological relationship of mother and child and father and child. For the mother, giving birth establishes the relationship. For the father, a rebuttable presumption of parenthood arises if (a) he and the child's mother are or have been married and the child is born during the marriage, or within 300 days after marital cohabitation has terminated; or (b) prior to the child's birth, he and the child's mother have attempted to marry in apparent compliance with the law and the child is born during the attempted marriage or within 300 days after its termination; or (c) after the child's birth, he and the child's mother marry or attempt to marry and he has acknowledged the child to be his. If questioned, the presumption of paternity may be tried and determined by the Superior Court. The adoptive parent-adopted child relationship is conclusively established by proof of adoption.

Comment: Consistent with the idea of equality of the sexes, this section provides the bases for determining the parental relationship of both males and

females. The factual bases for the determination of paternity are clear cut and should be relatively easy to establish in a court of law.

Section 106, with Sections 104 and 105, effectively replace D.C. Code §§16-907-909 which provide only for legitimation of the issue of divorced or annulled marriages. The new code provisions extend legitimation to all offspring. See Report, pp. 24-25.

7. Section 107, amending Section 16-910. This section expressly states the distinction between separate property of the spouses and their marital property and indicates how marital or non-separate property is to be divided upon absolute divorce or annulment. Non-separate property, however held, is to be divided in a manner that is "equitable, just and reasonable." The court must consider all relevant factors including (a) duration of the marriage; (b) prior marriages; (c) age and health; (d) occupation; (e) amount and sources of income; (f) vocational skills and employability; (g) assets, debts and needs of the parties; (h) needs of any minor children; (i) whether the distribution is in lieu of or in addition to maintenance; and (j) opportunity for future acquisition of assets and income.

In addition, the court, in making the division, must also consider each party's contribution to the "acquisition, preservation, appreciation, dissipation or depreciation in value" of the marital property. Finally, each party's contribution as a homemaker or to the family unit must be taken into consideration.

Comment: This section parallels in many respects Section 307 of the Uniform Marriage and Divorce Act and the comment thereto may be helpful in understanding the ramifications of the present legislation.

8. Section 108, amending §16-911. This section adds garnishment of wages and assignments of income to the existing attachment power in order to enforce orders for alimony *pendente lite* and suit money; obliges stakeholders such as employers to honor garnishments, assignments and attachments, and protects employees from discharge or other sanctions upon application of these enforcement devices against employers.

The section also completely revamps the existing law on child custody during proceedings for divorce or annulment, by establishing the "best interest of the child" test as the basis for awarding temporary custody. The relevant fac-

tors to be considered in determining the best interest of the child include (but are not limited to): (a) the wishes of the child where practicable; (b) the wishes of the child's parents; (c) the interaction and interrelationship of the child with parents, siblings and any other person who may emotionally or psychologically affect the child's best interest; (d) the child's adjustment to his or her home, school and community and (e) the mental and physical health of all individuals involved.

Comment: The provisions relating to the enforcement of court orders awarding alimony *pendente lite* and suit money are straightforward and should strengthen such orders. The addition of wage garnishment to the enforcement arsenal permits beneficiaries of orders for alimony and suit money to take advantage of the Federal Social Services Amendments of 1974 (P.L. 93-647) which now allow garnishment of wages of federal employees. Prior to the 1974 Act, the federal government refused to honor writs of garnishment or attachment on the ground of sovereign immunity. New regulations of the Civil Service Commission instructing federal agencies and military branches on how to handle garnishment for court ordered alimony and child support will soon go into effect, easing the problems of enforcement. Moreover, the District of Columbia Council may soon enact parallel legislation covering District of Columbia municipal employees.

The provisions relating to child custody are patterned on Sections 402 and 403 of the Uniform Marriage and Divorce Act and the comments to these sections provided by the drafters will be of interest in attempting to understand the District's provisions. One sentence included in the UMDA but missing from the local version is "the court shall not consider conduct of a proposed custodian that does not affect his relationship to the child." The absence of this provision implies that Superior Court judges may continue to consider fault of the parties in custody adjudications. In particular cases such consideration may be inconsistent with the best interest of the child.

Section 16-911 is also amended by Section 14 of the Anti-Sex Discriminatory Language Act to insure equal treatment of the sexes regarding enforcement of temporary orders and temporary custody.

9. The Marriage and Divorce Act

does not amend §16-912, relating to the award of permanent alimony, or §16-913, relating to the award of alimony to a wife upon the grant of divorce to a husband.

Comment: The failure to modernize these provisions permits fault to continue to play a significant part in the award of permanent alimony.

These sections are amended by Sections 15 and 16 of the Anti-Sex Discriminatory Language Act to insure equality of the sexes in the award of permanent alimony.

10. Section 109, amending §16-914. The original section of the Code, providing for retention of Superior Court jurisdiction following awards of permanent alimony and custody, is amended by Section 109 to require notice of a custody proceeding to the child's parents, guardian or other custodian and to permit intervention in the custody proceeding by any interested party.

In addition, Section 109 adopts the same "best interest of the child" test and the determinative criteria therefor, as set forth in Section 108.

Comment: This section is based upon provisions in Sections 401-03 of the UMDA. The drafters' comments to those sections of the UMDA should be consulted in determining the meaning of Section 109.

Section 16-914 is also amended by Section 17 of the Anti-Sex Discriminatory Language Act to include the words "with respect to matters of custody and visitation, the race, color, national origin, political affiliation, sex, or sexual orientation, in and of itself, of a party shall not be a conclusive consideration." It would seem, then, that even the homosexuality of a parent, by itself, should not affect his or her right to custody or visitation.

11. The Marriage and Divorce Act does not amend §16-915, providing for restoration of a woman's maiden name at the discretion of the court; §16-916, providing for support and maintenance of wives, former wives and minor children; or §16-917, requiring the joinder of co-respondents.

Comment: Given the no-fault thrust of Section 102(a) of the new act eliminating all fault grounds for absolute divorce it is surprising, to say the least, that §16-917 was not repealed.

Sections 16-915 and 16-916 are amended by Sections 18 and 19, respectively, of the Anti-Sex Discriminatory Language Act to insure equal treatment of the sexes as to name changes

and support maintenance.

12. Section 110, amending §16-918. This section eliminates the requirement that in all uncontested divorce actions the court must appoint counsel to represent the defendant regardless of whether he or she wishes to be represented. However, the section makes clear that where the court deems it necessary or proper, it may appoint counsel to represent the defendant in any action brought under Chapter 9 of Title 16 of the Code and may also appoint counsel to represent the child's interests in such actions.

The section also provides for the automatic termination of the appearance of counsel in any action under Chapter 9. Automatic termination for the purpose of service of any motion, process or any other pleading occurs upon completion of the case in a judgment, adjudication, decree or final order when the time allowed for appeal expires. If notice of appeal is entered, termination of the appearance occurs upon the date of final disposition of the appeal. However, the court may suspend termination of the appearance on its own motion or on the motion of any party to the case prior to the expiration of the time designated for appeal.

Comment: Section 110 eliminates one of the most annoying features of the District's divorce law—mandatory appointment of defense counsel in uncontested divorce actions. This requirement simply added to the cost of divorce in many cases without any real justification, and left the Bar vulnerable to the charge that it was a device insisted upon by its members to line their pockets. Very often, however, appointed defense counsel realized little or no financial gain from such appointments because of the indigency of the parties. The elimination of the mandatory appointment provision should be beneficial to both the consumer of legal services and the practitioner.

The automatic termination of appearance provisions should also provide needed guidelines regarding the duration of an attorney's representation in divorce, annulment, separation, alimony and custody proceedings.

13. Section 111, adding new §16-923. Section 111 abolishes the common law "heartbalm" actions for breach of promise, alienation of affection and criminal conversation.

Comment: These outmoded common law actions, fashioned by male judges

to deal with the emotions and chastity of females, were long overdue for elimination.

14. Sections 112-115, amending §16-2345, 21-104, 30-110, 30-116 and 30-320. These sections provide for the (a) elimination from amended birth certificates of the fact that parentage has been established by judicial process or by acknowledgement; (b) amendment of § 21-104 to add marriage as a basis for the termination of a natural or appointive guardianship; (c) amendment of § 30-110 to eliminate designation of skin color in applications for marriage certificate; (d) repeal of § 30-116, which legitimized formal or informal marriages and offspring of such marriages between "colored" persons united prior to July 26, 1866; and (e) amendment of § 30-320 by striking the words "under oath," thus permitting acknowledgment of paternity without the need for formal oath taking.

Comment: The changes provided here are for the most part designed to modernize antiquated and racially offensive provisions of the District of Columbia Code.

15. Section 201, amending § 13-340. This section permits service by publication on certain nonresident or absent defendants by posting the order of publication in the Clerk's Office of the Family Division, Superior Court of the District of Columbia, when the plaintiff is unable to pay the cost of publishing the requisite notice in the print media without substantial hardship.

Comment: This amendment shows concern for the plight of indigents in domestic relations litigation as well as for their constitutional rights. Cf. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

16. Section 202, amending § 15-712. This section permits indigent plaintiffs and defendants to petition the District of Columbia Superior Court in any non-criminal action or proceeding to waive the prepayment of fees and court costs or the posting of security therefor and empowers Superior Court judges to waive such fees, costs or security.

The section also establishes a presumption of indigency for those who receive public assistance under the District of Columbia Aid to Families with Dependent Children Program or the General Public Assistance Program or who receive assistance under Title XVI of the Social Security Act (the Supplemental Security Income Program).

Comment: This section clarifies existing law on the waiver of fees, costs and security for indigents and provides needed standards for determining indigency.

### III. Assessment of the Act

As noted at the outset the new act is very uneven and on some points is even philosophically inconsistent, e.g., permitting retention of co-respondents as defendants in divorce cases where adultery is charged at the same time fault is eliminated as a basis for absolute divorce. And even though fault is eliminated for absolute divorce, it is not eliminated as a factor in bed and board divorce, alimony, support and child custody. Again, while specific criteria for the division of marital property and the award of custody are set down, no such criteria are provided for the award of temporary or permanent alimony or support.

It should not be overlooked, however, that the act contains a number of praiseworthy features, including no-fault absolute divorce with easily enforceable standards, enlightened criteria for the division of marital property and the award of custody, the attempted abolition of the status of illegitimacy, the development of rational bases for presuming paternity, the abolition of mandatory appointment of defense counsel in all uncontested cases, the abolition of the antique "heartbalm" actions and the strong recognition of indigents' rights in domestic relations proceedings. These are achievements of which the drafters may be understandably proud.

The act is, in short, a "half-way house" between the fault oriented, moralistic and often irrational domestic relations law of the past, and the modern realism of partnership dissolution embodied in such functional legislative schemes as the Uniform Marriage and Divorce Act, the new California Family Law Act and the new Iowa no-fault divorce act. But it must be conceded that our new act will probably function tolerably until that segment of the Bar interested in family law is prepared to accept a master scheme of legislation like the Uniform Marriage and Divorce Act, which has a definite point of view and is drafted so that each section is consistent with the central philosophy of eliminating fault and adversariness from the divorce process. ■