Recent Developments in American Divorce Legislation

Harvey L. Zuckman

_The Catholic University of America, Columbus School of Law_

Follow this and additional works at: https://scholarship.law.edu/scholar

Part of the Family Law Commons

Recommended Citation
Harvey L. Zuckman, Recent Developments in American Divorce Legislation, 35 JURIST 6 (1975).

This Article is brought to you for free and open access by the Faculty Scholarship at CUA Law Scholarship Repository. It has been accepted for inclusion in Scholarly Articles and Other Contributions by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
RECENT DEVELOPMENTS IN AMERICAN DIVORCE LEGISLATION

HARVEY L. ZUCKMAN
The Catholic University of America

The "no fault divorce" revolution continues apace. Since publication of Professor Fox's and my survey of non fault divorce legislation in the Journal of Family Law in the summer of 1973,¹ seven more states have amended their divorce laws to provide in some way for non fault divorce.² Today more than forty states are in the non fault column.

I. TYPES OF NON FAULT DIVORCE LEGISLATION

The new legislation is of two basic kinds. The first is what I choose to call the "add-on" type. This legislation simply adds to the pre-existing fault grounds for divorce a non fault ground such as the spouses living separate and apart on a voluntary or involuntary basis for a specific period of time or "irreconcilable differences" between the spouses leading to "irremediable breakdown." A recent example of this approach is Maine's new ground permitting divorce when "the marital differences are irreconcilable and the marriage has broken down."³ Maine, of course, retains the old fault standbys of adultery, cruelty, and desertion.

The more revisionist type of non fault divorce legislation sweeps away the old fault grounds entirely. Two states which have very recently embraced this approach are Hawaii⁴ and Washington.⁵ For essentially historical reasons, the western states seem more inclined to engage in sweeping divorce reform than do those east of the

²I use the term "non fault divorce" to mean divorce under any existing legislation which provides at least one ground for divorce which doesn't require a showing of marital misconduct on the part of the respondent spouse. More popularly, the term "no fault divorce" refers to a particular scheme of recent legislation in a handful of states which completely eliminates all fault grounds for divorce and eliminates fault from the collateral proceedings alimony, child support, property division and, to a large extent, child custody.
Mississippi River. And the most famous example of revisionist legislation comes from California, the first state to enact such legislation.\(^6\)

The California statutory scheme abolishes the adversary styled caption such as *Mary Doe v. John Doe* and requires instead a caption such as "*In re the marriage of John and Mary Doe*".\(^7\) It also substitutes the term "dissolution" for divorce. This may seem like a small thing, but it symbolizes the intent of the California legislature to reduce the adversary factor in the proceeding and to compel the courts, lawyers, and parties involved to think along the lines of partnership dissolution and to reduce the emotional connotations associated with the word "divorce."

The California legislation reaches to the heart of the revisionist philosophy of divorce by recognizing as the only grounds for divorce (1) "irreconcilable differences, which have caused the irremediable breakdown of the marriage" and (2) "incurable insanity."\(^8\) The legislature indicated its resolve to keep fault out of the proceedings by adding the following section.

In any pleadings or proceedings for legal separation or dissolution of marriage under this part . . . evidence of specific acts of misconduct shall be improper and inadmissible, except where child custody is in issue and such evidence is relevant to that issue, or at the hearing where it is determined by the court to be necessary to establish the existence of irreconcilable differences.\(^9\)

In addition, other sections of this legislation rule out proof of fault with regard to property division, alimony, and child support.

Once a California court determines that a marriage over which it has jurisdiction involves irreconcilable differences and that these differences have caused irremediable breakdown of the marriage, it will immediately issue an interlocutory divorce decree; but, as the term implies, the decree does not become final until six months after service of the summons and complaint.\(^10\) In contrast, most other non-fault states impose a waiting or "cooling off" period at the outset to insure that the parties are not acting prematurely.\(^11\)

A substantial number of states besides California have to date engaged in sweeping reform of their divorce laws. These include Colorado, Florida, Hawaii, Iowa, Kentucky, Michigan, Nebraska, Oregon and Washington. In fact, according to a survey of modern divorce published in the February 10 issue of Business Week, of the populous states, only Illinois, Massachusetts, and Pennsylvania have not adopted some form of non fault divorce legislation.¹²

II. PROBLEMS PRESENTED BY THE TWO TYPES OF LEGISLATION

There are problems presented by both approaches. The single biggest problem presented by the "add on" approach is that it leaves intact the entire fault system with respect to the collateral issues arising out of a non fault divorce, i.e., alimony, property division, child support and custody. In most "add on" states, a husband would be free to make allegations of adultery against his wife when she seeks temporary or permanent alimony even when she is seeking a divorce on the ground of voluntary separation for the required period. Often the matters collateral to the divorce are more important to the parties than the divorce decree itself. If the fault system has generated sufficient evils to move the legislatures to provide an alternate non fault ground for divorce, why then should they not also eliminate fault as a criterion throughout the entire proceeding unless it has some special relevance as it might in child custody? The "add on" approach certainly encourages doctrinal inconsistency regarding the availability of evidence of fault.

The main fault I find with regard to the more revisionist legislation is its haphazard regard for the establishment by local governmental units of effective counseling and conciliation services.¹³ For instance Colorado provides no conciliation mechanism but simply advises the courts that they may continue a proceeding for not less than 30 or more than 60 days and "may suggest to the parties that they seek counseling."¹⁴ Nebraska requires, prior to any decree of dissolution, that "every reasonable effort to effect reconciliation has been made." This statute provides for a referral, at the discretion of the court, to a conciliation court in those counties with such courts or to independent counselors where

¹²Business Week 84 (Feb. 10, 1975).
¹³A portion of this text material was presented in somewhat different form in Zuckman and Fox, The Ferment in Divorce Legislation in Volume 12 of the Journal of Family Law. The author gratefully acknowledges the permission of the Journal of Family Law to utilize this material here.
¹⁴Colo. Rev. Stat. §46-1-10(2) (c) (Supp. 1971).
no conciliation court exists. Oregon permits each jurisdiction to establish a conciliation service and, if established, the court may refer couples to the service. But the statute is positively detrimental to society's interest in providing an effective means of reconciliation by requiring that conciliation be terminated and the dissolution proceeding resume if there has been no reconciliation within 45 days.

Few of the more reform minded jurisdictions have required either conciliation or counseling before allowing non fault divorces. And no revisionist jurisdiction of which I am aware has ever required the establishment of family court systems or counseling and conciliation services by its political subdivisions.

The reason for the almost casual attitude of the state legislatures toward "salvage operations" is obvious—they cost money. If counseling or conciliation is to be mandated there will be a large percentage of parties who will not be able to pay any or all of the costs of such services. Funds will have to come from the local public treasury and, if family courts are required, where will the counties or other subdivisions find the resources to pay the salaries of the large numbers of family specialists who are required to staff such courts?

We at this conference, particularly, should be concerned about this failure of modern divorce legislation to come to grips with the possibilities which may exist in any given case to effect reconciliation and to provide the parties with a real opportunity to achieve a decent modus vivendi between themselves. The possibilities for reconciliation do exist in abundance as indicated by the California experience.

At the time Professor Fox and I wrote our article on "The Ferment in Divorce Legislation" California clearly had established the most elaborate conciliation system in the United States. While the legislature in its landmark Family Law Act of 1969 establishing California's comprehensive non-fault divorce system did not require, again because of financial considerations, the counties to set up conciliation courts, it did give greater impetus to their establishment in localities in which they did not already exist. And they seem reasonably successful.

The Los Angeles Conciliation Court, established in 1939, had by 1971 received a total of 72,692 petitions for conciliation. In the

court's annual report for 1971, it indicates that it received 4,688 petitions in that year (including 2,934 mandatorily filed as part of non-fault dissolution proceedings under the Family Law Act). During that same year, the court indicates that 1,291 cases resulted in reconciliation. From these figures, it is at least arguable that the court saved a sizeable number of marriages which might have gone under without counseling. The California experience tells us that more can and must be done by state and local governments to make counseling and conciliation services available to any married couple that can profit from them. One of the great recent nondevelopments in American divorce law has been in this area, at a time when major changes are taking place in related areas of family law.

III. The Short-Term Effects of Recent Non-Fault Divorce Legislation

In the course of our study Professor Fox and I observed some interesting short term effects of the operation of recent non-fault divorce legislation. These include speedy and more cost-efficient dissolution proceedings, reduction in migratory divorce, the rise of "do-it-yourself" divorce, and the end to any cathartic function which the airing of recriminatory divorces might provide.

Again, taking California as the example because of its longer experience with sweeping divorce reform, dissolution proceedings have become very streamlined and business-like. The entire court process in cases in which prior property settlement and custody agreements have been entered into may take no more than ten minutes, and judges have been known to handle twenty or more dissolutions in a day. Then, too, the judges have noted a change in the tenor of the proceedings. As one San Diego Superior Court judge put it, "Instead of screaming and name calling, we have a business proposition that goes off fairly simple" [sic]. But from the divorcing couple's perspective something may be lost. One newly divorced woman interviewed immediately after her court proceeding said that it was all too impersonal and cold blooded. "I wanted a chance to tell the judge how hard I tried to make our marriage succeed, and the anguish I went through before filing for divorce." Of course, under

---

18Ibid at 36 (Table I).
20Id.
21Id.
California's new approach such discussion is irrelevant and she didn't get the chance.

One unmixed blessing flowing from non fault divorce is the decrease in "quickie" or migratory divorces. Liberalized divorce at home lessens the temptation to journey to a foreign jurisdiction for such relief. This has proved to be the case in California where, prior to the 1969 reform, a substantial number of Californians journeyed to Nevada to lie under oath about their true domicile and to be rewarded with relatively quick (but not cheap) divorces. But in 1970 the number of Nevada divorce decrees dropped approximately 15 percent. One Nevada legislator estimated that the new California legislation was costing his state one million dollars a year. This decrease in Nevada's divorce mill operations was confirmed in our own correspondence with Nevada family law practitioners. And with the recent enactment of relatively uncomplicated non fault divorce procedures in Oregon and Washington there is reason to

22In the interest of fairness it should be noted that subornation of perjury by the parties, perjury itself by corroborating witnesses, and questionable ethical conduct by counsel in divorce litigation were prevalent everywhere under the old fault system of divorce. This was so because very often the divorcing couple had no legal ground for divorce. Their marriage had broken down because of economic, sociological, and psychological reasons but the law did not recognize this reality. Rather, it insisted on ascribing blame for the marital failure in concrete terms such as adultery, desertion, or cruelty on one or the other of the spouses. This meant that if the petitioning spouse in an uncontested case were to obtain the divorce, he or she, with the aid of counsel, would have to fabricate a legal ground.

At this point a kind of Gresham's Law of Divorce Grounds took hold. The petitioning spouse, usually the wife, would choose the least hurtful ground available in her jurisdiction, which often would be mental cruelty. The wife would allege in her complaint and testify at trial that her husband was cruel to her in that he criticized and humiliated her in front of friends and family and was cold to her and indifferent to her needs. Then a friend of the petitioning spouse who was willing to support this fairy tale would testify to having witnessed specific acts of cruelty which, of course, never occurred. Counsel knew what was going on and probably felt very uneasy about it, and the judge was not oblivious either for he saw the same charade played out in his courtroom several times a day. Everyone involved in the process was diminished by it. The fault divorce system was a classic example of the divergence of law in theory and law in practice. Under this system more than ninety percent of the cases may have contained at least some elements of the hypocrisy just described. The process continues in jurisdictions, such as Illinois, which have not adopted some form of non fault divorce. See J. Epstein, Divorced in America 121-130 (E. P. Dutton 1974). See also Clark, Divorce Policy and Divorce Reform, 42 U. Colo. L. Rev. 403, 407 (1971); Rheinstein, The Law of Divorce and the Problem of Marriage Stability, 9 Vand. L. Rev. 633, 634 (1956); Walker, Beyond Fault: An Examination of Patterns of Behavior in Response to Present Divorce Laws, 10. J. Fam. L. 267 (1971).

23N.Y. Times, supra.
think that Nevada's and Idaho's tawdry divorce mill operations will contract even more.

Perhaps because more conservative divorce reform is found in the Eastern one-third of the United States, the 24-hour mills of Haiti and Santo Domingo unfortunately continue to flourish. I'm sure that many of you have seen the newspaper advertisements of the Haitian Travel Agency promising a complete overnight travel package of transportation, hotel room, meals, and divorce for one low price. *The Washington Post* once condemned this business in an editorial which concluded by saying, "something is wrong when people who have $400 and a plane ticket can get quickie divorces and those who don't can't. No-fault divorce would be a step not only toward reality and rationality, but also toward equality." It should be noted, however, that the Post still accepts the ads.

Something is also wrong when uncontested non fault divorces with no complications involving property or children cost upward from $350 in California and other places. The formal minimum fee schedules of some organized bars, which are now under judicial scrutiny, and the more informal and discreet gentlemen's agreements elsewhere, discriminate against the middle class. The poor may receive free legal services. In California, some members of the middle class are striking back at the legal profession and its fee schedules. "Do-it-yourself" divorce is catching on. Because the court forms are so easy to fill out and court procedures so streamlined, many Californians are availing themselves of the option to file for dissolution in proper person.

A 1972 radio report stated that the clerk of the San Diego Superior Court had estimated that fifteen percent of the approximately 12,000 annual filings for dissolution are now of the do-it-yourself variety. The same report indicated that the proper or self representation rate in Los Angeles County had reached approximately eight percent. The do-it-yourselfer can get a final decree in an uncontested case for under fifty dollars, which includes the $44.00 filing fee. Needless to say, the established bar is less than overjoyed by this development and is spending time and money to discourage it.

---


21A The Supreme Court of the United States struck down a Virginia minimum fee schedule in a decision handed down June 16, 1975. —Editors.


IV. THE LONG TERM EFFECTS OF RECENT NON FAULT DIVORCE LEGISLATION ON OUR FAMILY LIFE AND OUR SOCIETY

Thus far, I have avoided discussing the effect on the divorce rate of recent non-fault divorce legislation. The reason for this is that while some short-term effect can be noted, too little time has passed since the advent of California's pioneering legislation and the boom in divorce reform which it set off to gauge the fundamental effects on family life of non-fault divorce. At this point I want to place the short-term effect on the divorce rate in perspective and to call attention to the trend of the divorce rate beginning well before 1969.

At the outset, I should say that Professor Fox and I assumed that the divorce rate would jump dramatically for a short period of time in each jurisdiction after adoption of non-fault or other reform divorce legislation. Our assumption was only partly correct. What actually seems to have occurred in the four jurisdictions for which we were able to obtain data was that the increase in the divorce rate was dependent on the kind of divorce legislation which preceded reform. In the previously highly restrictive jurisdictions of New York and New Jersey the rate more than doubled in a short period of time. But it should be noted that one of the factors in the increase was that many more New Yorkers and New Jerseyans were getting their divorces at home or terminating marriages which had long since ceased to exist. On the other hand, in California, which had less restrictive divorce laws, the divorce rate jumped sharply for only the first few months of 1970 after the new dissolution legislation went into effect. The next year a five percent decrease in the rate was registered. And Florida, which had a relatively liberal fault divorce system prior to its adoption of sweeping non-fault divorce legislation, experienced only a very slight increase in its divorce rate during the first months of the new law's operation.

I really think these short-term statistics tell us little or nothing about the effect, if any, non-fault divorce legislation will have on family life. If we are going to argue statistics, then I believe we have

27 N.Y. Times, Jan. 4, 1970, §1 at col. 4; N.Y. Times, Feb. 6, 1972, §1 at 75, col. 7.
28 Hogoboom, The California Family Law Act of 1970, 18 Months Experience, 27 Mo. Bar J. 584, 588 (1971). Judge Hogoboom, a trial judge in the California Family Court system, indicates that dissolution filings in Los Angeles County for the first full year of the law's operation increased 8.8 percent, but this filing increase was roughly the same as the overall increase in other civil and criminal filings. Id.
to look at the course of divorce in the United States over a much longer period. In 1940, the divorce rate was 2.0 percent per 1000 population. Using 1940 as the base year, it is possible to see a relatively steady increase in the divorce rate of the United States through 1972. In 1950, the divorce rate nationwide was 2.6 percent per 1000 population. It did drop to 2.2 in 1960, but by 1970 it had made a quantum jump to 3.5. The tentative figures for 1974 indicate a divorce rate of 4.6 per 1000 persons, a 4.5 percent increase in the rate over the previous year. And according to HEW, 1974 represented the twelfth straight year in which the divorce rate had increased. The big leap in the divorce rate occurred in the decade of the sixties when relatively few states had non fault divorce grounds and only one had engaged in sweeping non fault reform. The boom in non fault divorce did not even begin until the California statute went into effect on January 1, 1970. Concededly, non fault divorce legislation may have played some part in the increasing divorce rate of the last four years, but it can’t explain the apparent major erosion in family stability experienced in the decade of the sixties.

The theme originally proposed for this conference was "Do 'No Fault' and 'No Father' Equal 'No Family'?" To my way of thinking, a more realistic question might be "Do 'No Father,' 'No Mother,' and 'No Family' Equal 'No Fault'?" What seems to have happened in the decade of the sixties and the early seventies is the acceleration of forces generated by political, economic and social democracy which are inimical to stable family life. As Joseph Epstein in his brilliant book Divorced in America points out, the patriarchal system of organization of society is dying and with it the idea of the "head man" of the family. The husband and father who under that system knew his responsibilities and expected the rewards of ease and comfort from his wife and children can no longer expect to be catered to in the home. He now feels the responsibilities of family life but receives fewer emoluments in return. Epstein writes, "[T]he terms of the marital transaction have undergone a radical change, and men have come increasingly to think of themselves as getting short shrift in the bargain. Their wives, it is now generally understood, are free to range the field of possibility, searching for

301974 Statistical Abstract of the United States 66 (Table No. 93).
31Id.
33Id.
fulfillment wherever they think they may find it, while they, still stuck with the old terms of the marriage transaction, continue to be lashed to the yoke of earning a living. It is at this point that, from the male point of view, marriage comes to seem in almost every respect a burden and a limitation." 35 Exit the father.

What about the wife and mother? Just as our democratic egalitarian society diminished the male role of the family, it elevated the possibilities and expectations of the female. Other options in life opened for her. As Dr. Jessie Bernard has detailed in *The Future of Marriage*, the permanent exclusive marriage contract, which was *never* a great bargain for the woman to begin with, became less so with the rise of democracy and the possibility of divorce. Now the contract doesn’t even assure her real security in exchange for her loss of freedom. According to Dr. Bernard, what the average wife is left with is a very bad bargain indeed, and one that the young women of the sixties and seventies are increasingly less willing to accept. Thanks to our ideas of democracy and egalitarianism, opportunities for their personal development outside the standard marriage contract now are possible. Exit the wife.

What is the concept of family if not the sharing of responsibilities and acting in the best interests of all members of the unit? Whether it be love, altruism, or enlightened self interest, family members’ lives are shaped by concern for the lives of the other members. But as Epstein notes in his book, the destruction of patriarchy and the loss of religious faith which accompanied it have opened up all sorts of possibilities for self-centered pursuit by men and women and with this pursuit less regard for the family unit. Self development becomes the banner under which we march in the last quarter of the twentieth century. Says Epstein:

> [W]e are all possibilists now—unanchored and adrift in the sea of the possible. . . . Switch jobs, change cities, drop a wife and pick up another, give group sex a fling, . . . drugs a go—things have got to get better. Affluence and psychological liberation have made nearly everything possible; not the sky, but only human anatomy is the limit, and yet nothing any longer seems quite good enough.36

Exit the family, “adrift in the Sea of Possibility.”

It seems to me then that with the accelerating forces of spousal discontent, self centrism, and expanding personal possibilities

35 Id. at 88-89.
36 Id. at 97.
attacking the nuclear family from all sides, the pressure for mass produced business-like divorce undoubtedly increases. Thus, while concededly the very existence of divorce historically has contributed to the acceleration of the antifamilial forces I have just mentioned, I would still argue that the existence of non fault divorce is probably more an effect of the late twentieth century erosion of the family unit than a present or potential cause of it.