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ABOLITION OF GUILT IN MARRIAGE DISSOLUTION: WISCONSIN'S ADOPTION OF NO-FAULT DIVORCE

INTRODUCTION

On February 1, 1978, Chapter 105 of the Wisconsin Laws of 1977 became effective. The act, which was modeled after the Uniform Marriage and Divorce Act,¹ revised most of Chapter 247 of the statutes. The most controversial of the new provisions, from both legislative and public points of view, is the one which establishes the "irretrievable breakdown of the marriage" as the sole ground for divorce.² In effect, this legislation added Wisconsin to the growing number of jurisdictions which have adopted "no-fault" divorce statutes. Wisconsin is one of eight states³ which have enacted the Uniform Act or modifications of this act; a number of other states have adopted other no-fault standards.

Wisconsin judges and legal practitioners will benefit from the guidance available from other no-fault jurisdictions when interpreting the new divorce laws. The purpose of this paper is to briefly review the development of no-fault legislation both nationally and in Wisconsin as well as to examine standards and guidelines on issues arising from such legislation. This examination should provide a better understanding of the implications of the adoption of the irretrievable breakdown test for future Wisconsin divorce actions.

BACKGROUND

Because society is very much concerned with the maintenance of marital relationships, such relationships are made

1. See 9 UNIFORM LAWS ANNOTATED 459 (master ed. 1973). As initially approved by the National Conference of Commissioners on Uniform Laws, the act did not provide guidelines on how to determine if the marriage was irretrievably broken and for this reason the American Bar Association rejected it in 1971. The Uniform Marriage Act was finally approved in 1974 by the A.B.A.'s Family Law Section even though the irretrievable breakdown concept remained controversial. The Legislative Response to Divorce: A Survey of No-Fault Divorce, Informational Bulletin 76-IB-5 (May 1976) [hereinafter cited as *The Legislative Response*]. See also UNIFORM MARRIAGE AND DIVORCE ACT § 305.

2. 1977 Wis. Laws ch. 105, § 23.

3. Arkansas, Colorado, Georgia, Kentucky, Montana, New Jersey and Washington have also passed marriage and divorce acts similar or identical to the Uniform Act. HANDBOOK OF THE NATIONAL CONFERENCE OF THE COMMISSION ON UNIFORM STATE LAW (1976).

subject to regulation and control by the state.⁴ Thus, a state's legislature is responsible for prescribing the procedures for marriage and divorce.⁵ Moreover, because of this interest, the state is considered a third party in divorce proceedings.⁶

State laws governing the marital relationship have traditionally attempted to foster and protect the relationship, to make it a permanent and public institution, and to prevent separation.⁷ This policy is evidenced by legislative enactments which make it difficult to end a marriage for trivial or inconsequential reasons,⁸ and require satisfactory proof of specific grounds as prerequisites to divorce.⁹ Once a marital relationship is formed, the law has traditionally stepped in to hold the parties to its various obligations and responsibilities.¹⁰

Modern concepts of public policy have shifted away from the traditional emphasis on preventing marital breakdowns. The prior strict approach to divorce, where the state was responsible for guarding marital relationships,¹¹ has been slowly eroded. Today, because both the husband and wife can usually function in society separately and independently, the interest of the state in the continuance of the marriage is perceived to be small.¹² Public policy does not encourage keeping two people together once the legitimate objects of matrimony have ceased to exist.¹³ Dissolution of the marriage is not contrary to public policy if the marriage has so deteriorated that there is little hope of reconciliation.¹⁴

In Wisconsin the right to obtain a divorce is purely statutory¹⁵ and the state has a right to fix, regulate and control it as to every person within its jurisdiction.¹⁶ Given this approach, together with the public policy declarations in the Family

4. *Bounds v. Bounds*, 135 Md. 220, 108 A. 870 (1919).

5. *Trask v. Trask*, 381 N.Y.S.2d 584, 85 Misc. 2d 980 (1976).

6. *Reville v. Reville*, 370 A.2d 249 (Me. 1977).

7. *Hill v. Hill*, 23 Cal. 2d 82, 142 P.2d 417 (1943).

8. *Welling v. Welling*, 144 Ind. App. 182, 245 N.E.2d 173 (1969).

9. *Graham v. Graham*, 44 Ill. App. 3d 519, 358 N.E.2d 308 (1976).

10. *Maynard v. Hill*, 125 U.S. 190 (1888).

11. *McGowan v. McGowan*, 15 Ill. App. 3d 913, 305 N.E.2d 261 (1973).

12. *Volid v. Volid*, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972).

13. *In re Marriage of Frank*, 542 P.2d 845 (Colo. 1975).

14. *Glickman v. Collins*, 13 Cal. App. 3d 852, 533 P.2d 204 (1975).

15. *Zachman v. Zachman*, 9 Wis. 2d 335, 101 N.W.2d 55 (1960); *Halmu v. Halmu*, 247 Wis. 124, 19 N.W.2d 317 (1945); *Dovi v. Dovi*, 245 Wis. 50, 13 N.W.2d 585 (1944).

16. *Cook v. Cook*, 56 Wis. 195, 14 N.W. 33 (1882).

Code,¹⁷ it is not surprising that post-Code decisions of the Wisconsin Supreme Court have emphasized traditional theory with the state as the guardian of marital relationships. For example, this traditional family law approach was clearly articulated in *Heffernan v. Heffernan*¹⁸ where the court reminded trial courts that it is the policy of this state to promote the stability and the best interests of marriage and the family and that this public interest must be taken into account in divorce actions.¹⁹

FAULT APPROACH

The evolution of fault as a prerequisite to dissolution of marriage is rooted in medieval concepts of marriage which favored total abolition of divorce.²⁰ Judeo-Christian religions looked at marriage as a permanently binding union witnessed by God which no man could put "asunder."²¹ A reintroduction of divorce was later necessitated, however, by the general dissatisfaction with a divorceless society which soon became apparent. Nevertheless, post-medieval divorce laws could not shed religious values which had previously prevented their enactment, and the idea that a spouse must sin against the marriage as a prerequisite to divorce arose. This concept of marital sin/fault is the foundation of traditional divorce laws which require a wrongful act or, more commonly, "grounds" for divorce.²²

17. WIS. STAT. § 245.001(2) (1975) provides:

INTENT. It is the intent of chs. 245 to 248 to promote the stability and best interests of marriage and the family. Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always. The seriousness of marriage makes adequate premarital counseling and education for family living highly desirable and courses thereon are urged upon all persons contemplating marriage. The impairment or dissolution of the marriage relation generally results in injury to the public wholly apart from the effect upon the parties immediately concerned.

18. 27 Wis. 2d 307, 134 N.W.2d 439 (1965).

19. *Id.* at 313, 134 N.W.2d at 442. See also WIS. STAT. § 245.001(2) (1975).

20. Bodenheimer, *Reflections on the Future of Grounds for Divorce*, 8 J. FAM. L. 179, 186 (1968) [hereinafter cited as Bodenheimer]. This rigid approach was traced to later Roman society in which any semblance of ordered family life had disappeared. This breakdown was witnessed by Stoic philosophers and the early Christians. In turn, they condemned these conditions and reacted by bringing about complete abolition of divorce in the Middle Ages. *Id.*

21. Mark 10:9.

22. See Bodenheimer, *supra* note 20.

The concept of fault finding easily lent itself to codification and, as a result, the law regulating divorce became strictly statutory. A court could grant only such relief as the statutes prescribed.²³ This meant that courts simply had no power to grant divorce on grounds other than those listed in the statutes.²⁴ Each state's legislature had the exclusive right and power to regulate, control and prescribe the conditions for divorce which would apply to persons within its territorial limits. An obvious and highly criticized result of such a system was forum shopping, as individuals sought the jurisdiction with the least stringent prerequisites for obtaining a divorce.

Wisconsin has not had the reputation of being an "easy divorce state." The legislature had clearly stated its belief in the undesirability of divorce²⁵ and, through its interpretation of the law, the Wisconsin Supreme Court had demonstrated a firm commitment to the fault concept.²⁶ The state's enumerated fault grounds were fairly typical: adultery, impotency, imprisonment of either party for three years or more, desertion, cruel and inhuman treatment, habitual drunkenness, non-support and commitment to a mental institution.²⁷ Nevertheless, as early as 1866, the state had provided an inroad into the fault concept by allowing divorce "whenever the husband and wife shall have voluntarily lived entirely separate for the space of five years."²⁸ Wisconsin was, in fact, one of the first states to enact such a no-fault ground. In 1971, the required period of separation was shortened to one year.²⁹

FAULT WITH FAULT

A major criticism of fault-based divorce is that because it is strictly statutory, if the state has not provided a ground which applies in a given case, the parties must try to manufacture one or go forum shopping for an amenable jurisdiction.³⁰ If "technical grounds cannot be found or manufactured, the

23. *Hirchert v. Hirchert*, 243 Wis. 519, 11 N.W.2d 157 (1943).

24. *Hagen v. Hagen*, 205 Va. 791, 139 S.E.2d 821 (1965); *Cahill v. Cahill*, 26 Wis. 2d 173, 131 N.W.2d 842 (1965).

25. See note 17 *supra*.

26. See note 18 *supra*.

27. Wis. STAT. § 247.07 (1975).

28. 1866 Wis. Laws ch. 37.

29. 1971 Wis. Laws ch. 220.

30. See generally Washington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966).

parties may both live in abject misery, in an arrangement neither may want but which must be continued, at least in name, by legislative fiat."³¹ Judges have particular difficulty with fault finding since they must fix the blame and decide which party is more deserving of divorce.³² The breakdown of the marriage is rarely the fault of one spouse; more often, it is the result of a complex interaction between two or more personalities.³³ Moreover, finding a spouse guilty of a fault necessarily influences property division and alimony awards,³⁴ because the natural inclination of any person is to penalize the "guilty" party and compensate the "wronged" one. A finding of fault can also materially affect child custody determinations by prejudicing the case of the "guilty" spouse.³⁵

Perhaps the most frustrating and bewildering aspect of guilt-based divorce is the assertion of defenses. To better understand the dilemma it is necessary to keep in mind that originally only an innocent, fault-free spouse could bring an action for divorce. This innocent spouse requirement led to one of the most unrealistic defenses ever devised by legislators, recrimination. Recrimination in effect denied divorce where both spouses were guilty of marital misconduct.³⁶ The illogical and undersirable result of this doctrine was that such spouses had to continue living together or to live apart without divorce.

Although Wisconsin initially recognized recrimination,³⁷ this defense was abolished in 1971 and replaced with the doctrine of comparative rectitude.³⁸ Under the latter doctrine, trial courts had discretion to grant a divorce to a party who was not blameless if on the whole that party's equities appeared superior.³⁹ Other traditional defenses necessitated by a fault theory of divorce were collusion, connivance and condonation.⁴⁰ These

31. Goldstein & Gitter, *On Abolition of Grounds for Divorce: A Model Statute and Commentary*, 3 FAM. L.Q. 75, 80 (1969).

32. *Id.* at 79.

33. *Id.*

34. See, e.g., *Helden v. Helden*, 7 Wis. 276, 303 (1858) (where the court ruled that a woman who has been guilty of adultery is not entitled to support out of the husband's estate).

35. *Vogel v. Vogel*, 259 Wis. 373, 48 N.W.2d 501 (1951).

36. *Couch, Toward a More Realistic Divorce Law*, 43 TUL. L. REV. 243, 255 (1968-1969).

37. *Bahr v. Bahr*, 272 Wis. 323, 75 N.W.2d 301 (1956).

38. 1971 Wis. Laws ch. 220.

39. WIS. STAT. § 247.101 (1975).

40. WIS. STAT. § 247.10 (1975).

defenses, along with comparative rectitude, were abolished with Wisconsin's enactment of the new no-fault legislation.⁴¹

NO-FAULT TRENDS

As previously noted, many jurisdictions with traditional divorce laws included as grounds for divorce, certain grounds which were not fault-based. Typical grounds not based on fault are insanity,⁴² voluntary separation⁴³ and incompatibility.⁴⁴ The ground of incompatibility resembles the irretrievable breakdown ground since its use in some jurisdictions does not require proof of matrimonial misconduct and either party can secure a divorce without alleging or proving that the other was responsible for the incompatibility. All that is necessary is that a plaintiff establish an existing state of incompatibility.⁴⁵ Incompatibility has never been a ground for divorce under Wisconsin law.

The first explicit acceptance of no-fault divorce was California's enactment of a comprehensive no-fault divorce statute in 1968.⁴⁶ That legislation was the end product of legislative and judicial response to a 1952 California Supreme Court decision, *DeBurgh v. DeBurgh*,⁴⁷ which discussed the problems of administering a fault-based system. In *DeBurgh*, where a divorce had been denied at the trial court level because of the recrimination defense, the California court identified considerations which should govern in divorce actions where fault had been demonstrated on both sides.⁴⁸ The ultimate problem with *DeBurgh* was that these considerations did not come into play until the fault of both spouses had been proven. Nevertheless, the holding is still noteworthy in that it presaged the shift in focus from the causes of marital breakdown to the fact of the breakdown itself.

41. 1977 Wis. Laws ch. 105, § 18.

42. See, e.g., WIS. STAT. § 247.07(9) (1975).

43. See, e.g., WIS. STAT. § 247.07(6) (1975).

44. Generally defined as a deep and irreconcilable conflict in the personalities or temperament of the parties making it impossible for them to continue a normal marital relationship. E.g., *Inskip v. Inskip*, 5 Iowa 204 (1857).

45. *Bassett v. Bassett*, 56 N.M. 739, 250 P.2d 487 (1952).

46. CAL. CIV. CODE §§ 4500-4540 (West 1970).

47. 250 P.2d 598 (1952).

48. The wife had filed for divorce on the ground of extreme cruelty and the husband cross-complained on the same ground. At the trial court, both were found guilty and each was denied divorce on the ground of recrimination. *Id.* at 605-06.

NO-FAULT IN WISCONSIN

Wisconsin's interest in no-fault divorce surfaced in the 1971 legislative session where some of the requirements for obtaining divorce were eased.⁴⁹ Then in the 1975 session, several bills were introduced relating to divorce, child custody and alimony; however, none of these bills progressed beyond its house of origin.⁵⁰

In January 1977, Assembly Bill 100, which proposed the adoption of a no-fault divorce law patterned after the Uniform Marriage and Divorce Act, was introduced.⁵¹ The bill's proponents contended that it would make divorce more humane and afford more economic protection to women and children; its opponents argued strongly that it would make a mockery of marriage and would lead to a breakdown of family life in Wisconsin.⁵²

After extended discussion and parliamentary maneuvering, Assembly Bill 100 was subsequently approved and went into effect on February 1, 1978.⁵³ The law established the irretrievable breakdown of the marriage⁵⁴ as the sole ground for divorce in the state.

49. For example, the minimum period of voluntary separation needed to obtain a divorce was shortened from five years to one year; the two year residency requirement was reduced to 6 months and involuntary commitment was added as a ground for divorce. 1971 Wis. Laws ch. 220.

50. Wis. A.B. 642, 995, 1246 (1975 sess.); Wis. S.B. 22, 23, 181 (1975 sess.). See The Legislative Response, *supra* note 1, at 7.

51. It was patterned after Wis. A.B. 995 (1975 sess.).

52. Milwaukee Sentinel, July 15, 1977, § 1, at 5, col. 1.

53. 1977 Wis. Laws ch. 105.

54. 1977 Wis. Laws ch. 105, § 23 (to be codified as Wis. STAT. § 247.12(2)) provides:

IRRETRIEVABLE BREAKDOWN. (a) If both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken, or if the parties have voluntarily lived apart continuously for 12 months or more immediately prior to commencement of the action and one party has so stated, the court, after hearing, shall make a finding that the marriage is irretrievably broken.

(b) If the parties have not voluntarily lived apart for at least 12 months immediately prior to commencement of the action and if only one party has stated under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to filing the petition and the prospect of reconciliation.

1. If the court finds no reasonable prospect of reconciliation, it shall make a finding that the marriage is irretrievably broken; or

2. If the court finds that there is a reasonable prospect of reconciliation, it shall continue the matter for further hearing not fewer than 30 nor more than 60 days later, or as soon thereafter as the matter may be reached on the court's calendar, and may suggest to the parties that they seek counseling. The court,

WHAT IS NO-FAULT?

The essence of a no-fault law is the abandonment of the concept of fault or marital guilt as a determinative factor in divorce proceedings.⁵⁵ Assignment of blame is irrelevant and is replaced by a search for the realities of the marital situation.⁵⁶ In a no-fault proceeding there is a shift in focus from actions of the individual parties to the viability of the marriage itself.⁵⁷ While the language employed in no-fault statutes varies according to jurisdiction, all define marital breakdown as a ground for marital dissolution. In some jurisdictions a party must establish the fact of marital breakdown; in others the establishment of irreconcilable differences or of a period of separation is *prima facie* proof of such a breakdown. Some states have chosen to establish the no-fault action as an option to lawsuits filed on traditional grounds, while others have abandoned fault-based divorce altogether.

The central issue involved in interpreting no-fault statutes is the definition of the dissolution of the relationship necessary to establish grounds for divorce. Wisconsin incorporates both a *per se* and a subjective test of irretrievable breakdown in its statute. In Wisconsin irretrievable breakdown is an irrebuttable presumption where both parties have so stated under oath or affirmation, or, where the parties have voluntarily lived apart continuously for twelve months or more immediately prior to the commencement of the action and one party has so stated.⁵⁸ In cases where neither of these two conditions are met, the determination of irretrievable breakdown is left to the courts after a consideration of all relevant factors. In such instances the court may adjourn the hearing for up to sixty days and may order counseling.⁵⁹

The decisions and statutes of other jurisdictions will be particularly helpful to Wisconsin practitioners and judges when the *per se* grounds of section 247.12(2)(a) are not available. For example, the Iowa test for marital breakdown provides that:

at the request of either party or on its own motion, may order counseling. At the adjourned hearing, if either party states under oath or affirmation that the marriage is irretrievably broken, the court shall make a finding whether the marriage is irretrievably broken.

55. *In re Fink's Marriage*, 54 Cal. App. 3d 357, 126 Cal. Rptr. 626 (1976).

56. *Dickson v. Dickson*, 238 Ga. 672, 235 S.E.2d 479 (1977).

57. *Mattson v. Mattson*, 376 A.2d 473 (Me. 1977).

58. 1977 Wis. Laws ch. 105, § 23.

59. *Id.*

A decree dissolving the marriage may be entered when the court is satisfied from the evidence presented that there has been a breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.⁶⁰

The Maine and Nebraska courts, interpreting irreconcilable differences language, have stressed the gravity and completeness of the deterioration required. Differences cannot be trivial or minor, but must be of such a degree as to make living together intolerable to the point that the breakdown of the marriage can be legally implied.⁶¹ Proving inability to live together does not require the presentation in court of the ugly and sordid details of either party's conduct.⁶² A mere refusal to cohabitate with no chance for reconciliation is sufficient.⁶³

In Florida, a more inclusive test has been formulated. *Ryan v. Ryan*⁶⁴ held that a marriage is irretrievably broken if, for whatever reason or cause, no matter whose fault, a relationship is for all intents and purposes finished, no longer viable and a hollow sham beyond hope of reconciliation or repair.⁶⁵ The New York court, in *Christian v. Christian*,⁶⁶ stressed that it is the actual, physical separation rather than the separation agreement or decree that constitutes the basis for no-fault divorce—legal action is simply intended as evidence that the separation is in fact authentic and final.

Some courts have stressed a more subjective test of irreconcilability which looks to the reasonable belief of the petitioner concerning the differences alleged.⁶⁷ If a court uses a subjective test, however, it cannot apply any predetermined criteria to the perceived differences. Rather, it must consider the state of mind of the parties toward the relationship.⁶⁸ When using a

60. IOWA CODE ANN. § 598.17 (West 1970). This is the same test applied by the California courts in their interpretation of irreconcilable differences. *In re Walton's Marriage*, 28 Cal. App. 3d 108, 104 Cal. Rptr. 472 (1972).

61. See *Mattson v. Mattson*, 376 A.2d 473 (Me. 1977); *Mathias v. Mathias*, 194 Neb. 598, 234 N.W.2d 212 (1975).

62. *Baxla v. Baxla*, 522 S.W.2d 736 (Tex. Civ. App. 1975).

63. *Harwell v. Harwell*, 233 Ga. 89, 209 S.E.2d 625 (1974).

64. 277 So. 2d 266 (Fla. 1973).

65. *Id.* at 271.

66. 42 N.Y.2d 63, 365 N.E.2d 849, 396 N.Y.S.2d 817 (1977).

67. See *Dunn v. Dunn*, 511 P.2d 427 (Or. App. 1973).

68. *Woodruff v. Woodruff*, 320 A.2d 661 (N.H. 1974). See also *Desrochers v. Desrochers*, 347 A.2d 150 (N.H. 1975).

subjective test, a court cannot look for observable acts or occurrences in the relationship, nor for causes of deterioration. Rather, it must determine whether, because of the basic unsuitability of the spouses and their states of mind toward the marriage itself, the marriage is in fact ended.⁶⁹ Both parties testifying that, simply and realistically, it is no longer possible for them to live together as husband and wife constitutes the simplest proof of irretrievable breakdown.⁷⁰

ATTACKS ON NO-FAULT

As previously noted, divorce is neither a constitutional right nor a necessity to survival. Rather, it is a creature of statute and thus, the plenary power to prescribe the conditions to its attainment is vested in the state.⁷¹ The constitutionality of no-fault divorce statutes has been challenged in a number of instances. So far, however, these challenges have met with little or no success. Still, they must be noted in anticipation of similar attacks in Wisconsin.

Both the United States⁷² and Wisconsin⁷³ Constitutions protect an individual's right to contract. No-fault divorce statutes have been challenged as impairing contractual rights. Some states have cut off this potential issue by recognizing that a marriage contract is not a contract within the meaning of the contract clause in the state's constitution.⁷⁴ But even where the marriage obligation is treated as a traditional contractual obligation, no-fault statutes have been found not to be an improper impairment of such obligation.⁷⁵ Family laws which promote the public interest are considered to be a legitimate exercise of the police power of the state and are thus constitutional when they are not palpably unreasonable.⁷⁶ Wisconsin recognizes the contractual nature of a marriage relationship⁷⁷ and also recognizes the state's right to control it by reasonable and appropri-

69. *Riley v. Riley*, 271 So. 2d 181 (Fla. App. 1972).

70. *Adams v. Adams*, 238 Ga. 326, 232 S.E.2d 919 (1977).

71. *Sosna v. Iowa*, 360 F. Supp. 1182 (N.D. Iowa 1973).

72. U.S. CONST. art. 1, § 10, cl. 1.

73. WIS. CONST. art. 1, § 12.

74. See *In re Marriage of Frank*, 542 P.2d 845 (Colo. 1975); see also *In re Marriage of Walton*, 28 Cal. App. 3d 108, 104 Cal. Rptr. 472 (1972).

75. See *Lindsley v. Lindsley*, 374 A.2d 311 (Me. 1977). See also *Ryan v. Ryan*, 277 So. 2d 266 (Fla. 1973).

76. *Corder v. Corder*, 546 S.W.2d 798, 804 (Mo. App. 1977).

77. WIS. STAT. § 245.01 (1975).

ate regulations,⁷⁸ so the decisions holding no-fault statutes to be reasonable regulation are important precedent. In a number of states, it also has been argued that no-fault statutes, being vague and indefinite, violate the respective due process⁷⁹ clauses of the state and federal constitutions. The Georgia court in *Dickson v. Dickson*⁸⁰ held that a no-fault provision concerning an irretrievably broken marriage did not violate due process on the alleged claim of being too vague and indefinite because the statutory language was capable of definition and application. In *In re Cosgrove's Marriage*,⁸¹ the California court rejected a similar claim noting that the new grounds for divorce were no more vague than earlier grounds. Wisconsin's "irretrievable breakdown" language may also invite attacks based on statutory vagueness but all precedent suggests that such attacks will be futile. As the Maine court in *Mattson v. Mattson* concluded, a lack of definiteness is often desirable in divorce statutes in that such language allows a court to provide individual attention to each case.⁸²

Claims based on deprivation of vested rights have also been rejected. In *In re Walton's Marriage*,⁸³ the California court found that granting a husband's petition for dissolution of marriage based on a no-fault statute did not unconstitutionally deprive the wife of her vested interest in her married status. In *Corder v. Corder*,⁸⁴ the Missouri court upheld the property distribution provision of the no-fault statute. That court found that whatever divestment took place complied with the requirements of due process where the property was to be divided in such proportions as the court deemed just after considering all the relevant factors.⁸⁵

One final area of attack against no-fault statutes is that a no-fault statute necessarily impedes the discretion of the court since a court is denied the narration of all the details of the breakdown. However, in Missouri, no-fault provisions have been found not to be an encroachment on the judiciary⁸⁶ and

78. *Boehmer v. Kalk*, 155 Wis. 156, 144 N.W. 182 (1913).

79. U.S. CONST. amend. XIV.

80. 238 Ga. 672, 235 S.E.2d 479 (1977).

81. 27 Cal. App. 3d 424, 103 Cal. Rptr. 733 (1972).

82. 376 A.2d 473, 475-76 (Me. 1977).

83. 28 Cal. App. 3d 108, 104 Cal. Rptr. 472 (1972).

84. 546 S.W.2d 798 (Mo. App. 1977).

85. *Id.* at 804.

86. *Corder v. Corder*, 546 S.W.2d 798 (Mo. App. 1977).

the New Hampshire court has ruled that dissolution of marriage under a no-fault process remains a judicial, rather than a ministerial, determination.⁸⁷ However, a Colorado court has ruled that it is an impermissible judicial amendment to enunciate goals of marriage which must be either lost or beyond accomplishment as prerequisites to classification of a relationship as irretrievably broken.⁸⁸

PROOF AND DEFENSES

Observable occurrences in the marriage relationship and the causes of the condition of the relationship are not particularly relevant to the question which one court defined as whether it is now time to give the marriage a decent burial.⁸⁹ Proof of fault has generally been held inadmissible in no-fault divorce actions since the fault concept has been eliminated by enactment of no-fault statutes.⁹⁰ Such evidence of fault has been held inadmissible on the issue of property settlement, alimony and support since the concept of rewarding the innocent party and punishing the guilty one has been abolished.⁹¹ One exception to the rule of inadmissibility of evidence of fault has developed in California where evidence of specific acts of misconduct is admissible when a child's custody is at issue and such evidence is relevant to that issue.⁹²

In most no-fault states, including Wisconsin, defenses to divorce have been judicially or legislatively eliminated. While the Wisconsin no-fault statute eliminates the former defenses,⁹³ in some instances, the court is still required to weigh the evidence supplied by both parties. If the allegation of irretrievable breakdown is denied by one spouse and the required period of separation has not been met, Wisconsin's new no-fault law specifically provides that "the court shall consider all relevant factors, including the circumstances that gave rise to fil-

87. *Woodruff v. Woodruff*, 320 A.2d 661 (N.H. 1974).

88. *In re Marriage of Baier*, 561 P.2d 20 (Colo. App. 1977).

89. *Cooper v. Cooper*, 57 Ala. App. 674, 331 So. 2d 689 (1976).

90. *In re Marriage of Williams*, 199 N.W.2d 339 (Iowa 1972).

91. See generally *Rosan v. Rosan*, 24 Cal. App. 3d 885, 101 Cal. Rptr. 295 (1972); *Juick v. Juick*, 21 Cal. App. 3d 421, 98 Cal. Rptr. 324 (1971); *In re Marriage of Williams*, 199 N.W.2d 339 (Iowa 1972); see also text accompanying notes 34-35 *supra*.

92. *McKim v. McKim*, 6 Cal. App. 3d 673, 100 Cal. Rptr. 140 (1972); *In re Marriage of Walton*, 28 Cal. App. 3d 108, 104 Cal. Rptr. 472 (1972); cf. text accompanying notes 120-23 *infra* for the factors examined in Wisconsin in a child custody determination.

93. See text accompanying notes 36-41 *supra*.

ing the petition and the prospect of reconciliation."⁹⁴ One court has stated that when one party denies a claim that the marriage is irretrievably broken, in effect, a no-fault statute becomes a modified no-fault law since the trial court must necessarily make a finding on all the relevant factors.⁹⁵

APPLYING NO-FAULT: RETROACTIVITY

A primary concern in any jurisdiction adopting no-fault divorce is its effect on pending litigation and procedural motions. The Wisconsin law specifically provides that it applies "to all actions affecting marriage, and to all actions for modification or enforcement of previously entered orders in actions affecting marriage, which are commenced on and after the effective date of this act."⁹⁶ Wisconsin follows the general rule that no-fault divorce statutes do not apply retroactively.⁹⁷

Given the general specificity of the statutes, the issue of whether a no-fault statute operates prospectively or retrospectively has been seldom litigated. In *McKim v. McKim*,⁹⁸ the court held that a new no-fault statute was applicable to pending divorce actions but only by operation of the statute and its implementing rules. Similar statutes have been held applicable to appeals sustained after the effective date in Nebraska and Florida.⁹⁹ In Iowa and Florida new statutes have been held inapplicable in actions tried and decided before the effective date in the absence of an agreement otherwise by the parties.¹⁰⁰ Finally, the Oregon statute has been found not to apply to actions filed before, but tried after, its effective date.¹⁰¹

94. 1977 Wis. Laws ch. 105, § 23.

95. See *In re Marriage of Capstick*, 547 S.W.2d 522 (Mo. App. 1977); see also *In re Marriage of Mitchell*, 545 S.W.2d 313 (Mo. App. 1976) (where the court held that the Divorce Reform Act was not a true no-fault type of legislation).

96. 1977 Wis. Laws ch. 105, § 62.

97. *Morgan v. Morgan*, 507 P.2d 409 (Or. App. 1973).

98. 6 Cal. App. 3d 673, 100 Cal. Rptr. 140 (1972).

99. *Lienemann v. Lienemann*, 189 Neb. 626, 204 N.W.2d 170 (1973); see also *Melin v. Melin*, 265 So. 2d 414 (Fla. App. 1972); *Willis v. Willis*, 254 So. 2d 59 (Fla. App. 1971).

100. See generally *Taplin v. Taplin*, 341 So. 2d 1064 (Fla. App. 1977); *Wilson v. Wilson*, 197 N.W.2d 589 (Iowa 1972); *In re Neff*, 193 N.W.2d 82 (Iowa 1971).

101. See generally *Morgan v. Morgan*, 507 P.2d 409 (Or. App. 1973).

OTHER MAJOR REVISIONS IN WISCONSIN DIVORCE LAW:

Annulment

Essentially, an annulment is a judicial declaration stating that no valid marriage ever took place or no marriage relationship ever existed. This is to be distinguished from a divorce action which severs an existing marriage. The reasons given to effectuate the annulment must necessarily have been in existence at the time the marriage took place. As in divorce, a court's jurisdiction in an annulment proceeding is statutory.¹⁰² The Wisconsin Supreme Court has allowed an annulment only if there existed specific statutory grounds authorizing its granting. Prior decisions left no room for judicial discretion at the trial court level. Where statutory grounds for annulment existed, the court was required to grant it. This was the situation in *Eliot v. Eliot*.¹⁰³

The statute imposes no other or further restriction upon the right of action than the one above mentioned. . . . It is fair to assume that, had the Legislature intended other restrictions upon the right of action, it would have expressed the same in statute In our opinion it is not permissible for the court to interpolate conditions and exceptions and restrictions upon the right of action, not expressed therein, and which would thwart the plain legislative intention on the subject.¹⁰⁴

The prior annulment laws were codified in section 247.02 of the Wisconsin Statutes.¹⁰⁵ This section was repealed by the new law and replaced with newly created section 247.03¹⁰⁶ which adopted the Uniform Act's¹⁰⁷ grounds for annulment. Section 247.03(1) provides that an annulment may be granted if a party lacks "capacity to consent to the marriage at the time . . . [it] was solemnized, either because of age, . . . mental incapacity or infirmity or . . . influence of alcohol, drugs, . . . or . . . was induced to enter into a marriage by force or duress, or by fraud." Subsection (2) authorizes an annulment if one of the spouses was unable to consummate the marriage by sexual

102. *Kuehne v. Kuehne*, 185 Wis. 195, 201 N.W. 506 (1924).

103. 81 Wis. 295, 51 N.W. 81 (1892).

104. *Id.* at 299, 51 N.W. at 82.

105. WIS. STAT. § 247.02 (1975).

106. 1977 Wis. Laws ch. 105, § 9.

107. UNIFORM MARRIAGE AND DIVORCE ACT § 208; see also note 1 *supra*.

intercourse, as long as the other party did not know of the incapacity at the time of the ceremony. Subsection (3) invalidates a marriage if "a party was 16 or 17 years of age and did not have consent of his or her parent or guardian or judicial approval, or a party was under 16 years of age." Finally, subsection (4) provides for a right to annulment where there was a legal prohibition of the marriage.

Counseling

The recreated section 247.081 continues to require that family court commissioners provide counseling for marriage assessment, divorce and separation. Petitioners are required to attend counseling sessions if they bring actions for divorce or legal separation; respondents are also required to participate in the sessions if they are personally served within the state. Counseling is to be made available on a voluntary basis for parties to annulment proceedings.¹⁰⁸

Property Division and Maintenance Payments

Apart from adopting the no-fault standard, it is in the areas of property division and alimony payments that the new law most radically differs from prior case law. Moreover, in both of these instances, chapter 105 is significantly more precise than the earlier statutes.

The new law, section 247.27, contains a strict requirement for full disclosure of each party's assets.¹⁰⁹ Such disclosure, on forms supplied by the court, may be made jointly or individually. In order to facilitate disclosure, federal and state income tax returns from two prior years are to be made available upon motion of either party or at the initiative of the court. While the court is required to order disclosure of two years' returns upon motion of either party, it is also within the court's discretion to order production of such returns for longer periods of time. The disclosure provisions are enforced by two techniques. Intentional or negligent failure to disclose assets having a value equal or greater than \$500 may result in the imposition of a constructive trust on these assets. Upon petition of the aggrieved party, the court is required to create such a trust for the benefit of the parties and their minor or dependent children. Additionally, if either party fails to file the disclosure

108. 1977 Wis. Laws ch. 105, § 15.

109. *Id.* § 45.

statements, the court may accept the other party's statement of assets as accurate.

In keeping with a no-fault rationale, under the new law the initial presumption in property division¹¹⁰ is that all property not inherited is to be equally divided. Such a division, however, can be altered upon a consideration of certain listed factors. Prior Wisconsin case law had held property division to be an area within the sole discretion of the trial court¹¹¹ but an early Wisconsin case, *Gauger v. Gauger*, which termed a one-third allowance to the wife as "liberal" was often cited as the starting point of property divisions.¹¹² As late as 1951 the court again cited *Gauger's* statement which noted the maximum allowed for the wife as one-half the property but the minimum to be something less than one-third of the estates.¹¹³ In 1970, however, in *Lacey v. Lacey*¹¹⁴ the court stressed the concept of marriage as a partnership and set forth factors which should be considered in property settlements; these factors demonstrated the court's growing awareness of women's contribution to marriages. These factors, which serve as the foundation of the list in chapter 105, were incorporated into the Wisconsin Statutes in 1973.¹¹⁵ The 1977 statute,¹¹⁶ however, is even more sensitive

110. *Id.* § 41.

111. *Horel v. Horel*, 260 Wis. 336, 50 N.W.2d 673 (1952).

112. 157 Wis. 630, 147 N.W. 1075 (1914).

113. *Hansen v. Hansen*, 259 Wis. 485, 49 N.W.2d 434 (1951).

114. 45 Wis. 2d 375, 173 N.W.2d 142 (1970).

115. WIS. STAT. § 247.26 (1973).

116. Factors listed in 1977 Wis. Laws ch. 105, § 41 (to be codified as WIS. STAT. § 247.255) include:

- (1) The length of the marriage.
- (2) The property brought to the marriage by each party.
- (3) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
- (4) The age and physical and emotional health of the parties.
- (5) The contribution by one party to the education, training or increased earning power of the other.
- (6) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.
- (7) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having custody of any children.
- (8) The amount and duration of an order under s. 247.26 granting maintenance payments to either party, any order for periodic family support payments under s. 247.261 and whether the property division is in lieu of such payments.

to women's issues and requires the court to consider such factors as "each party's contribution in homemaking and child care services," the "contribution by one party to the education, training or increased earning power of the other" and "absence from the job market" prior to making a property division. Moreover, the new statute's greater precision which requires the court to consider other economic circumstances of the parties such as their pension benefits and the tax consequences of the division to each, should benefit both parties.

The new statute has replaced the term "alimony" with that of "maintenance payments." Maintenance payments¹¹⁷ can be granted for any necessary length of time and are based on the amount of help a needy spouse requires to become self-supporting. Here also the new law lists factors that must be considered prior to determination of the payment amount.¹¹⁸ It

(9) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.

(10) The tax consequences to each party.

(11) Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.

(12) Such other factors as the court may in each individual case determine to be relevant.

117. 1977 Wis. Laws ch. 105, § 42.

118. Factors listed in 1977 Wis. Laws ch. 105, § 42 (to be codified as WIS. STAT. § 247.26) include:

(a) The length of the marriage.

(b) The age and physical and emotional health of the parties.

(c) The distribution of property made under s. 247.255.

(d) The educational level of each party at the time of marriage and at the time the action is commenced.

(e) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.

(f) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.

(g) The tax consequences to each party.

(h) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.

should be noted that the new section 247.26 does not abolish fault searching in the setting of maintenance payments as is explicitly done in the property division section. Notwithstanding the omission, it appears that case law from other jurisdictions would not support admission of evidence of fault for this purpose.¹¹⁹

Child Custody and Support

Section 247.24 has been created to regulate child custody determinations¹²⁰ and factors affecting these have also been listed. Factors listed in the child custody statute¹²¹ can be seen as elaborations of the "best interest" test of the old statute. Following Wisconsin case law,¹²² the wishes of the child as to placement are one consideration in the placement decision. Significantly, for the first time, Wisconsin law now allows a court to award joint custody to both parents if the parties agree and if it is in the best interest of the child. The statute also allows the consolidation of maintenance and child support payments into one payment called "family support" to assure that the tax benefits of the rule of *Lester* will be available.¹²³

Wage Assignments

Finally, the new law provides for a wage assignment which becomes effective on the application of the receiving spouse if child support and maintenance payments are not being made.

(i) Such other factors as the court may in each individual case determine to be relevant.

119. See text accompanying note 91 *supra*.

120. 1977 Wis. Laws ch. 105, § 36.

121. Factors listed in 1977 Wis. Laws ch. 105, § 37 (to be codified as Wis. STAT. § 247.24 (1m)) include:

- (a) The wishes of the child's parent or parents as to custody;
- (b) The interaction and interrelationship of the child with his or her parent or parents, siblings and any other person who may significantly affect the child's best interest;
- (c) The child's adjustment to the home, school, religion and community;
- (d) The mental and physical health of the parties, the minor children and other persons living in a proposed custodial household;
- (e) The availability of public or private child care services; and
- (f) Such other factors as the court may in each individual case determine to be relevant.

122. See, e.g., *Seelandt v. Seelandt*, 25 Wis. 2d 73, 128 N.W.2d 66 (1964); *Edwards v. Edwards*, 270 Wis. 48, 70 N.W.2d 22 (1955).

123. *Commissioner v. Lester*, 366 U.S. 299 (1961) (permitted one party to deduct from gross income periodic payments payable for the support of the spouse and minor children which did not fix the specific amounts payable for the children's support).

Wage assignments can also be applicable to orders from actions affecting marriage which were commenced under the old law, upon application of the person receiving payments.¹²⁴

CONCLUSION

No-fault divorce has been a reality in Wisconsin for a few short months and it is still too early to make a thorough evaluation of it merits. Yet the jurisdictions that have been operating under similar no-fault laws appear to be satisfied with them and much of the earlier criticism of the concept has subsided. In general, no-fault divorce has been accomplishing what the legislatures hoped it would. At this juncture there is little basis for speculation that the underlying purposes of chapter 105 will not be similarly realized in Wisconsin.

BLAISE DI PRONIO

124. 1977 Wis. Laws ch. 105, § 44. It should be noted that the Milwaukee County Corporation Counsel has issued an opinion, contrary to the apparent intent of the statute, indicating that ordering of wage assignment is discretionary rather than mandatory even where the statutory requirements are met.