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INCOMPATIBILITY AS A GROUND FOR DIVORCE

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A. *History*

"Incompatibility" is defined by the *Century Dictionary* as: "The quality or condition of being incompatible; incongruity; irreconcilableness," and by *Webster's New International Dictionary*: "Quality or state of being incompatible; inconsistency; incapable of harmonious combination; incongruous; as incompatible colors; incapable of harmonious association or acting in accord; disagreeing as incompatible persons." In *Pope's Legal Definitions* we find the following: "Incompatibility. The elements and qualities which create incompatibility between persons elude exact definition; so varied are the circumstances and so dependent is such a state of feeling upon education, habits of thought and perculiarities of character."

It is generally believed that incompatibility as a ground for divorce is of recent origin. During the early years of the 19th century, legislatures in several states of the United States indicated an intention to permit courts to grant divorces on grounds closely resembling incompatibility as we recognize it today.[1] In upholding the constitutionality of a divorce statute, in 1839, the Indiana court said:

> Like all discretionary power in Courts, it must be exercised in a sound and legal manner; it must not be governed by caprice or prejudice, or wild and visionary notions with regard to the marriage institution, but should be so directed as to conduce to domestic harmony, and the peace and morality of society. It must be conformable to the common sense and feeling of the community.[2]

The above statute was obviously broad enough in its scope, to authorize the court in its discretion to grant a divorce where the differences between the parties had become irreconcilable and had completely destroyed domestic peace and harmony. This statute has long ago been repealed.

In 1857, the Supreme Court of Iowa had before it for decision a divorce case[3] in which the court said:

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[1] As early as 1831, the Revised Code of Indiana, after enumerating specific grounds for divorce, enacted that the circuit courts shall have power to grant divorces "for any other cause, and in any other case, where the Court, in their discretion, shall consider it reasonable and proper that a divorce should be granted."

[2] Ritter v. Ritter, 5 Blackf. 81, 83 (Ind. 1839).

[3] Inskeep v. Inskeep, 5 Iowa 204 (1857). The second ground relied upon by the plaintiff for divorce was that "she and the said defendant cannot live in peace and harmony together, and that their welfare requires their separation."

> The Code (Sec. 1482) provides that a divorce from the bonds of matrimony may be decreed, when these things are made *fully apparent to the court.* And in considering the provision, we remark in the first place, that it must be made fully apparent to the court, not only that the parties cannot live in peace and happiness together, but also that their welfare requires their separation. As a general rule, it will doubtless be found, that if the parties to the marriage relation cannot continue therein in peace and happiness, their welfare would be promoted by a separation. . . . The court is to consider their moral, their social, and their mental well being. . . .
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> We also understand that this section of the Code does not have reference to the temporary peace and happiness of the parties, nor to their temporary welfare, but it was designed, by the legislature that the chancellor should have regard to their permanent—their general peace, happiness, and welfare. . . . And, again, a divorce is not to be decreed, for this cause, to the wrong-doer.[4]

The above closely outlines a divorce for incompatibility as recognized in a few jurisdictions today. One difference is that, today, courts do not hestitate to grant a divorce to the wrong-doer, where incompatibility is alleged. This statute has long been repealed.

In 1896, the Supreme Court of the State of Washington, considered a petition for divorce,[5] pursuant to the provisions of a statute which provided for a divorce on the application of either party for any other cause deemed sufficient, where the court "shall be satisfied that the parties can no longer live together."[6] Said the court:

> We do not think it was intended by the legislature that a divorce should be granted in every case wherein it should be found "that the parties can no longer live together;" and where, as here, their failure to live together is due to their own obstinacy and stubborness, we think a divorce should be denied. It is not the policy of the law that divorces should be granted merely because parties, "from unruly temper," or mutual wranglings, live unhappily together. In order to have relief, it is not required that the party complaining should be wholly without fault, for the law recognizes the weakness of human nature, and measures the conduct of the parties by the standard of common experience. But "where the parties to a divorce suit are in pari delicto, the conduct of each being a constant aggravation to further offense by the other, no divorce will be granted at the instance of either party."[7]

The Washington statute construed above, was undoubtedly broad enough to permit a divorce on grounds closely resembling incompatibility, as we have it today. However, in 1896, the Washington court

[4] *Id.* at 212.
[5] Colvin v. Colvin, 15 Wash. 490, 46 Pac. 1029 (1896).
[6] 2 HILLS CODE §764(7).
[7] Colvin v. Colvin, *supra* note 5, at 492, 46 Pac. at 1030.

was not quite ready to go all the way, and by construction read into the statute obstacles probably not contemplated by the legislature. This statute was repealed in 1921.

Incompatibility as a ground for divorce, existed in Denmark during the 18th century.[8] In Denmark, after 1790, divorce became more frequent, and was given on new grounds, among which was irremediable disharmony in the common life.

Prior to their acquisition by the United States in 1917, the Virgin Islands, as a part of Denmark, were subject to Danish law. Incompatibility of temperment was one of the grounds for divorce recognized in the Virgin Islands in the Code of Laws of the Municipality of St. Thomas and St. John, as originally enacted by the Colonial Council of the Municipality in 1921,[9] and it was carried over into the Divorce Law enacted by the Legislative Assembly in 1944.

Thus, it will be seen that incompatibility as the ground for divorce is recognized today, and having its beginning in Danish law, was first introduced into the United States in the Virgin Islands, which became a United States Possession by purchase from Denmark. In 1933, New Mexico adopted incompatibility as a ground for divorce,[10] followed by Alaska in 1935,[11] and Oklahoma in 1953.[12] As a result, during the first half of the 20th century we find four American jurisdictions, in borrowing from Danish law, adopting as a ground for divorce essentially what may well have been intended by the legislatures of Indiana, Illinois, Iowa and Washington during the 19th century.

B. *In Actual Application*

In 1952, the United States Court of Appeals, Third Circuit, considered a case from the Virgin Islands,[13] wherein the plaintiff sought a divorce on the ground of incompatibility of temperament. Said the court:

> We conclude that while incompatibility of temperament in the Virgin Islands Divorce Law does not refer to those petty quarrels and minor bickerings which are but the evidence of that frailty which all humanity is heir to, it unquestionably does refer to conflicts in personalities and dispositions so deep as to be irreconcilable and to render it impossible for the parties to continue a normal marital relationship with each other. To use the ancient Danish phrase, the disharmony of the spouses in their common life must be so deep and intense as to be irremediable. It is the legal recognition of the proposition long established in the earlier Danish law of the Islands that if the

[8] Burch v. Burch, 195 F. 2d 799, 805 (3d Cir. 1952).
[9] CODE ST. THOM., ST. JOHN tit. III, ch. 44, §7(8).
[10] Laws of N.M. 1933, ch. 54, at 71.
[11] Sess. Laws of Alaska 1935, ch. 54, at 120.
[12] OKLA. STAT. ANN. tit. 12, §1271 (1953).
[13] Burch v. Burch, *supra* note 8.

> parties are so mismated that their marriage has in fact ended as the result of their hopeless disagreement and discord the courts should be empowered to terminate it as a matter of law.
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> As we have already pointed out, incompatibility of temperament necessarily involves both parties so that in a very real sense the incompatible temperament of each party has deprived the other of a normal marital relationship.[14]

Burch v. Burch,[15] although of relatively recent origin, having been decided in 1952, has acquired the status of a leading case. Where incompatibility is relied upon as a ground for divorce, most likely, it will be found that courts in New Mexico, Oklahoma and Alaska, will cite it as authority to support their views. Such being the case, let us see what standards, if any, the case supplies for measuring incompatibility. The standards are in general terms. There is nothing as concrete as the requirement in case of cruelty, that there must be "reasonable apprehension of grievous bodily harm or death."

Burch v. Burch[16] tells us that the conflict in personalities and dispositions must be so deep as to be irreconcilable and to render it impossible for the parties to continue a normal marital relationship. The question immediately arises, what acts of the parties will be held to establish such conditions? The case is not of much aid in answering this question. Nor, in fact, are later cases elsewhere. The determination of whether or not incompatibility exists is generally left to the discretion of the trial judge, and can easily lead to a lack of uniformity in decisions. Judge X, a teetotaler, may consider the fact that a husband taking a few drinks with the boys, where the wife abhors strong drink in any form or degree, even in moderation, causes a conflict in personalities so deep as to be irreconcilable. On the other hand, Judge Y, who delights in an occasional highball, most likely will consider the circumstances to be merely a petty quarrel and minor bickering, which do not qualify as incompatibility justifying divorce. Courts will render a real service if, in the future, they make a conscious effort in the cases to establish standards as to what conduct amounts to incompatability, and what falls short of that ground.

The *Burch* case tells us that incompatibility must necessarily involve both parties. "If there is a clash of personalities, both must clash."[17] The court takes the position that even though one of the spouses may be largely responsible for the acts creating the incompatibility in the other, nevertheless it is inconceivable that one partner's temperament can be compatible with the other, if the other is incompatible with him or her. In effect the court says that if John feels in-

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[14] *Id.* at 806-807, 811.
[15] Note 8 *supra.*
[16] *Ibid.*
[17] *Id.* at 808.

compatible with Mary, it must follow as a necessary consequence that Mary must be incompatible with John. Such is not necessarily true.

The courts of New Mexico, are in agreement with *Burch* case as to what constitutes incompatibility. In the case of *Poteet v. Poteet*,[18] the court indicated that irreconcilableness of the parties is an important factor to be considered in determining whether to grant a divorce on the ground of incompatibility. In *Bassett v. Bassett*,[19] the court said:

> . . . one ground of divorce, and that most commonly used, is "incompatibility." Either spouse may bring a divorce in New Mexico on the ground of incompatibility and may secure a divorce upon such grounds without allowing or proving that the defendant is in any way guilty of any misconduct or is responsible for, or that his conduct or actions created such state of incompatibility. . . . That is, it is not incumbent upon the plaintiff who brings the divorce proceeding upon the ground of incompatibility to show any misconduct or guilt against the defendant but it is only incumbent upon the plaintiff to establish by the evidence that a state of incompatibility exists regardless of whether it is anyone's or no one's fault.[20]

Obviously, the rule set forth above is in conflict with the doctrine that there can be no divorce where the defendant is free from fault, as applicable where the grounds relied upon are other than incompatibility. Courts in New Mexico, as do those in the Virgin Islands, obviously subscribe to the doctrine that, where one spouse feels incompatible as to the other, such other is as a matter of law incompatible as to his or her partner, even though such spouse may entertain no feelings of incompatibility whatever towards the other.

Likewise, Alaskan courts follow the principles set forth in *Burch v. Burch*.[21]

In Oklahoma today, the principles of the *Burch* case prevail. However, Oklahoma courts encountered more difficulty than those of New Mexico and Alaska in reaching this conclusion. In 1956, three years after incompatibility became a ground for divorce,[22] the Supreme Court of Oklahoma decided the case of *Chappell v. Chappell*.[23] The court said:

> . . . when incompatibility is the grounds for a divorce. . . . It should not be grounds for divorce where only one of the parties to a marriage is incompatible. Incompatibility is a two way proposition and should not be applicable where the party seeking the divorce is the only one who is incompatible. Our statute did not intend to mean that anyone could obtain a divorce on this ground merely because a divorce was desired. In all such cases

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[18] 45 N.M. 214, 114 P. 2d 91 (1941).
[19] 56 N.M. 739, 250 P. 2d 487 (1952).
[20] *Id.* at 747, 250 P. 2d at 495.
[21] Note 8 *supra.*
[22] Note 12 *supra.*
[23] 298 P. 2d 768, 58 A.L.R. 2d 1214 (Okla. 1956).

there must be some conduct creating incompatibility on the part of the defendant.[24]

This doctrine is diametrically opposed to principles enunciated in *Burch* and followed in the Virgin Islands, New Mexico and Alaska. The Oklahoma court permitted the rule of *Chappell* to stand for only three years. In 1959, in the case of *Rakestraw v. Rakestraw*,[25] the court said:

> There is little evidence in the record to explain, or indicate in what way, if any, defendant contributed to the regrettable and 'scrambled' domestic situation in which the parties involved and their innocent children now find themselves. Without describing this in detail, it is sufficient to say that plaintiff appears to be largely, if not entirely, responsible for it. . . . Despite any inference defense counsel draws from previous expressions of this court to the effect that one spouse may be incompatible without the other spouse also being incompatible and contributing to the state of incompatibility existing between them (see Chappell v. Chappell, Okl. 298 P. 2d 768, 771, 58 A.L.R. 2d 1214), we think there can be no dissent to the statement . . . that: 'Incompatibility is a two way proposition. . . . Applicable alike to the general subject of incompatibility are the statements of the Court in Burch v. Burch, 3 Cir., 195 F. 2d 799, 808, with reference to 'incompatibility of temperament,' as follows: 'While one spouse may have a more normal temperament than the other and the overt acts evidencing incompatibility may come largely from the other spouse, it is inconceivable that a husband's temperament can be compatible with that of his wife if hers is incompatible with his. If there is a clash of personalities both must clash.'[26]

Thus, Oklahoma capitulated to the doctrine of the *Burch v. Burch* case.

We have discussed rules applicable to those jurisdictions where incompatibility is a statutory ground for divorce. A close reading of cases in other jurisdictions will reveal that in reality incompatibility is available as a ground for divorce, under a different name. For example, in Pennsylvania, a divorce may be granted for "indignities to the person." In the case of *Dearth v. Dearth*,[27] in describing the conduct which may constitute "indignities to the person," the Pennsylvania court said:

> The course of conduct amounting to such indignities as would justify a divorce is apparently incapable of specific or of exact definition. Each case must necessarily depend upon its own facts . . . It is well settled, however, that it is not with isolated ocurrences that the law concerns itself in determining whether a divorce should be granted upon this ground, but only with in-

[24] *Id.* at 771.
[25] 345 P. 2d 888 (Okla. 1959).
[26] *Id.* at 890.
[27] 141 Pa. Super. 344, 15 A. 2d 37 (1940).

> dignities so repeated and continuous as to constitute a course of conduct which renders the complaining party's condition intolerable and life itself a burden. Such indignities we have frequently said may consist of vulgarity, unmerited reproach, habitual contumely, studied neglect, intentional incivility, manifest disdain, abusive language, malignant ridicule, and every other plain manifestation of settled hate and estrangement; but slight or irregular acts of misconduct are not sufficient. . . .[28]

There can be little doubt that in every case of incompatibility filed in the Virgin Islands, New Mexico, Alaska, or Oklahoma, the plaintiff has relied upon one or more of the "indignities to the person" set forth above to prove incompatibility. Also, it may be said that the existence of one or more of the indignities listed above may well cause one or more marital partners to conclude that conflicts in their personalities exist which are so deep as to be irremediable, and to render it impossible to continue a normal marital relation. May it be said that in fact "incompatibility" exists as a ground for divorce in Pennsylvania, under the name of "indignities to the person"?

Let us review the Utah case of *Hendricks v. Hendricks*.[29] This case concludes that where the marriage is hopelessly on the rocks and the marriage relationship has become so intolerable that both would be happier if they were free to go their separate ways, no good purpose, either social, moral, ethical or legal, could be served by refusing to grant a divorce and settle the property rights of the parties. These ideas were repeated in the case of *Wilson v. Wilson*.[30] In the *Hendricks* case, the court used the reasoning enumerated above in refusing to apply the doctrine of "recrimination," where the parties were in equal fault. Instead, the doctrine of "comparative rectitude," was applied, and a divorce granted to the party least at fault, upon the existence of circumstances which would be held to be incompatibility in jurisdictions recognizing such ground for divorce.

In other jurisdictions, courts sometimes lean over backwards to hold that profane and obscene language on the part of one spouse against the other, or against the wishes of the other, is cruelty within the meaning of the existing statute.[31] Actually, these courts are merely reading into the word "cruelty," that which is incompatibility in the Virgin Islands, New Mexico, Alaska and Oklahoma.

By the same token, courts in some jurisdictions go to great length to stretch the words "mental cruelty" to include within their meaning the elements of incompatibility. Indifference, neglect, contempt, nag-

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[28] *Id.* at 348, 15 A. 2d at 41.
[29] 257 P. 2d 366 (1956).
[30] 5 Utah 2d 79, 296 P. 2d 977 (1956).
[31] Mosher v. Mosher, 16 N.D. 269, 113 N.W. 99, 12 L.R.A. (n.s.) 820, 125 Am. St. Rep. 654 (1907); Wirthman v. Wirthman, 225 Mo. App. 692, 39 S.W. 2d 404 (1931); Jacintho v. Jacintho, 32 Hawaii 907 (1934); Koehler v. Koehler, 137 Ark. 302, 209 S.W. 283 (1919).

ging, acts showing aversion to a spouse, the habitual occurrence of which serve as a basis for establishing incompatibility, where such ground for divorce is recognized, are in other jurisdictions recognized as grounds for divorce, under the guise of "mental cruelty."[32]

In the case of *Morris v. Morris*,[33] the Georgia court said:

> Mental anguish, wounded feelings, constantly aggravated by repeated insults and neglect, are as bad as actual bruises of the person; and that which produces the one, is not more cruel than that which causes the other.

In *Wilkinson v. Wilkinson*,[34] the trial court said:

> From the days of Socrates and Xantippe, men and women have known what is meant by nagging, although philology cannot define it or legal chemistry resolve it into its elements. Humor cannot soften or wit divert it. Prayers avail nothing, and threats are idle. Soft words but increase its velocity, and harsh ones its violence. Darkness has for it no terrors, and the long hours of the night draw no drapery of the couch around it. The chamber where love and peace should dwell becomes an inferno, driving the poor man to the saloon, the rich one to the club, and both to the arms of the harlot. It takes the sparkle out of the wine of life, and turns at night into ashes the fruits of the labor of the day.[35]

The learned Georgia judges have merely said above that nagging is mental cruelty justifying divorce. Under similar circumstances, judges in the Virgin Islands, New Mexico, Alaska and Oklahoma say nagging breeds such incompatibility as to be a ground for divorce. The circumstances complained of are the same, the results are the same; the only difference is that, in Georgia, nagging is labeled mental cruelty, and in Oklahoma, incompatibility. Numerous other cases could be cited, but it is believed that we have discussed a sufficient number to support the earlier statement that where incompatibility as a ground for divorce is not authorized by statute, it nevertheless exists under other labels, such as "indignities to the person," "cruelty," "mental cruelty," or what have you.

C. *Recrimination and Comparative Rectitude as Defenses*

In most jurisdictions within the United States, it is well settled that where both spouses are guilty of acts which are grounds for divorce, under the doctrine of recrimination, the court should deny a divorce to either. This is merely an application of the equitable rule that one who

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[32] Hooe v. Hooe, 122 Ky. 590, 92 S.W. 317, 5 L.R.A. (n.s.) 729, 13 Ann. Cas. 214 (1906); Sabot v. Sabot, 97 Wash. 395, 166 Pac. 624 (1917); Brown v. Brown, 130 Neb. 487, 265 N.W. 556 (1936); Zuerrer v. Zuerrer, 238 Iowa 402, 27 N.W. 2d 260 (1947); Thompson v. Thompson, 227 Minn. 256, 35 N.W. 2d 289 (1948).

[33] 202 Ga. 431, 43 S.E. 2d 639 (1947).

[34] 159 Ga. 332, 125 S.E. 856 (1924).

[35] *Id.* at 335, 125 S.E. at 859.

invokes the aid of a court must come into court with a clear conscience and clean hands. In some jurisdictions, the doctrine of recrimination is modified to become the doctrine of comparative rectitude under which, where both parties are guilty of acts which are grounds for divorce, the divorce will be granted to the one least at fault.

In the case of *Chavez v. Chavez*,[36] decided by the New Mexico court in 1935, in a case where some ground other than incompatibility was relied upon for divorce, the court held that it is the imperative duty of the Chancellor to deny a divorce upon a showing of recrimination.

In 1946, the same court, in the case of *Pavletich v. Pavletich*,[37] wherein incompatibility was the ground relied upon, and where there was a showing of recrimination, overruled *Chavez v. Chavez* insofar as that case held it to be the imperative duty of the Chancellor to deny a divorce upon a showing of recrimination.

In 1950, in the case of *Clark v. Clark*,[38] the New Mexico court re-examined its decision in the *Pavletich* case, and modified the rule of that case in deciding that where plaintiff seeks a divorce on the ground of incompatibility, it is discretionary with the court, after hearing the evidence establishing a recriminatory offense or offenses rather than incompatibility, whether he will or will not grant the divorce. Where incompatibility is relied upon as the ground for divorce, incompatibility may not be pleaded by way of recrimination.

Prior to the *Clark* case, in 1950, the doctrine of comparative rectitude had no place in New Mexico, where incompatibility was relied upon. Since the *Clark* case, the court, in exercising its discretion where incompatibility is alleged, and both parties are guilty of acts which are grounds for divorce other than incompatibility, may grant a divorce to the spouse least at fault.

In the case of *Burch v. Burch*, the court considered whether recrimination or comparative rectitude were recognized as defenses in divorce actions in the Virgin Islands, where incompatibility was the ground alleged. It was held that recrimination is not a bar to divorce except where expressly authorized by statute. The codes which the Colonial Council of the Municipality in the Virgin Islands adopted in 1920 and 1921,[40] authorize the defense of recrimination where a plaintiff, seeking a divorce on the ground of adultery, is shown to have also committed adultery. In no other case is recrimination a defense. The doctrine of comparative rectitude is not recognized in the Virgin Islands.[41]

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[36] 39 N.M. 480, 50 P. 2d 264, 101 A.L.R. 635 (1935).
[37] 50 N.M. 224, 174 P. 2d 826 (1946).
[38] 54 N.M. 364, 225 P. 2d 147, 21 A.L.R. 2d 1263 (1950).
[39] Burch v. Burch, *supra* note 8.
[40] Note 9 *supra*, §10.
[41] Note 8 *supra*.

In Alaska, the defense of recrimination is recognized only where plaintiff sues for divorce on the ground of adultery, and defendant shows the plaintiff to be also guilty of adultery.[42] Thus, where incompatibility is the ground relied upon, recrimination is no defense. The doctrine of comparative rectitude has no application in Alaska.

In Oklahoma, a statute provides as follows: "That the parties appear to be in equal wrong shall not be a basis for refusing to grant a divorce, but if a divorce is granted in such circumstances, it shall be granted to both parties."[43] In construing this statute, the Supreme Court of Oklahoma has said:

> . . . we see in our Statute's 1955 amendment directing that where parties in equal wrong are divorced, the divorce be granted to both, no proscription against a divorce being granted, in like manner, where the parties' 'wrong' is not 'equal,' or where one may be more at fault than the other. We therefore hold that there is no reason why that cannot be done in this jurisdiction. . . .[44]

Thus, it will be seen that, in Oklahoma, by statute, it is discretionary with the court whether or not to apply the doctrine of recrimination. The only restriction upon the court's discretion is that, if a divorce be granted, it must be granted to both parties. The same discretion will permit the court to apply the doctrine of comparative rectitude in an appropriate case.

D. *Remarks*

We may safely assume that in no jurisdiction, did the legislative body in adopting incompatibility as a ground for divorce, intend that this ground should be used to make possible trial marriages. No further authority for this statement is needed than the fact that states which have made incompatibility a ground for divorce, as do other states, announce that it is the public policy of these states to encourage the permanency of marriage, and to discourage divorce. However, a close reading of cases wherein divorces have actually been granted on the ground of incompatibility, may lead one to wonder if in fact all that is required to secure a dissolution of the marriage on the ground of incompatibility is to show that one spouse has in fact grown tired of the other. How do some judges view this ground? Justice Hudspeth, of the Supreme Court of New Mexico, in his concurring opinion in the case of *Chavez v. Chavez,*[45] referring to incompatibility as a ground for divorce said: "When the Legislature wrote this additional ground of divorce into our law, they intended to afford a remedy for a spouse incompatible with his or her mate, and that too without regard to the

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[42] Comp. Laws of Terr. of Alaska 1913, tit. XIII, Code of Civ. Proc. §1302.
[43] OKLA. STAT. ANN. tit. 12, §1275.
[44] Rakestraw v. Rakestraw, *supra* note 25, at 890.
[45] Note 36 *supra.*

wishes of the other spouse, or the fact that the other spouse might have a ground for divorce."[46]

An invaluable contribution can be made to the permanency of the marital relation, if judges will carefully examine the trend to consider petty quarrels and minor bickerings as showing incompatibility justifying divorce, and confine divorces on the ground of incompatibility only to those cases where, to use the ancient Danish phrase, "the disharmony of the spouses in their common life is so deep and intense as to be irremediable."

For many years, reasonable apprehension of serious impairment of health, grievous bodily harm, or death, has been applied as a standard in determining whether acts alleged as cruelty are of sufficient gravity as to justify divorce. Is there any real obstacle in the way of applying the same standards to acts relied upon to establish incompatibility? Statutes making cruelty a ground for divorce generally do not define the term. The standard above mentioned generally arises from court construction of the cruelty statutes. By the same token, statutes making incompatibility a ground for divorce, do not define the term. There is no reason why courts in construing these statutes may not read into them the same standards, if they truly wish to make effective the public policy of the state to encourage the permanency of the marital relation, and discourage divorce.

In those states wherein incompatibility has been adopted as a ground for divorce, the legislatures may well consider abolishing all other grounds, without depriving anyone of a divorce now available in those states. After all, what is the net result of showing cruelty which places one in reasonable apprehension of grievous bodily harm? It is simple to show that the parties are in fact incompatible. Also, what does a plaintiff really prove when she successfully convinces the court that the defendant husband is guilty of gross neglect of marital duties? She in fact proves that she is incompatible with her husband. Where insanity of the other spouse is successfully established as the ground for divorce, in reality it is established that the successful plaintiff is incompatible with the insane defendant. Should incompatibility remain as the only ground for divorce, as suggested, untold time and effort would be saved lawyers and courts, both trial and appellate, of arguing the other grounds thus eliminated. It is respectfully recommended that legislatures in states where incompatibility exists as a ground for divorce give serious consideration to adopting the above suggestion.

It is also suggested that in those states where incompatibility has not yet been adopted as a ground for divorce that legislatures refrain from so amending existing statutes. In these states, with the possible exception of New York, any husband or wife who truly, and without

[46] *Id.* at 268.

subterfuge and perjury, are subjected to conditions making further cohabitation as husband and wife inadvisable, can secure a divorce on grounds already available. To add incompatibility to existing grounds is but the first step in the direction of making even more insecure the already existing insecurity of the marital relation prevalent throughout our society.