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THE FAMILY CODE AND THE CHALLENGE OF THE SEVENTIES

Sol Goodsitt*

The Family Code, consisting of Chapters 245, 247, and 248 of Wisconsin Statutes, laid the foundation for a structure that blazed new trials in offering legal solutions to domestic relations problems.1

Because of modern social as well as legal trends in marriage and divorce, new approaches and expanded horizons are called for. The author suggests expansion of the Code to include two additional chapters, one dealing with "rights of married women," and another tentatively entitled, "Social and Economic Consequences of Dissolution of Marriage." The restructured Code would then consist of Chapters 245 to 249 inclusive.

Chapter 247, "Actions Affecting Marriage," is the mainstay for lawyers, commissioners and judges in the family law field. Its provisions, both substantive and procedural, have in the past adequately served as a modus operandi for the commencement, processing and termination of the actions therein described. Nevertheless, this chapter is in need of revision to meet changing conditions and modern trends in the years ahead. This article explores various suggestions and proposals for changing our outlook and our law relative to contemporary standards.

Amendments to Chapter 247

Since the enactment of Section 247.101,2 there has been an ambiguity involving the application of the doctrine of recrimination to a case in which plaintiff, guilty of adultery uncondoned, petitions for divorce or separation under Section 247.07(6) to (8).3 Section 247.104 pre-

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1 Under Chapter 352, Laws of 1969, a family Court Complex was created for counties of over 500,000 (Milwaukee) population, effective February 6, 1970.

2 Wis. Stat. § 247.101 (1969). Recrimination, when applicable; comparative rectitude. The equitable doctrine that the court shall not aid a wrongdoer is applicable to any party suing for divorce under § 247.07 (1) to (5), except that where it appears from the evidence that both parties have been guilty of misconduct sufficiently grave to constitute cause for divorce, the court may in its discretion grant a judgment of legal separation to the party whose equities on the whole are found to be superior.

3 Wis. Stat. § 247.07 (1969); (6) Whenever the husband and wife have voluntarily lived entirely separate for 5 years next preceding the commencement of the action, at the suit of either party. (7) Whenever the husband and wife, pursuant to a judgment of legal separation, have lived entirely apart for 5 years next preceding the commencement of the action a divorce may be granted at the suit of either party. (8) On the complaint of the wife, when the husband, being of sufficient ability, refuses or neglects to adequately provide for her.

4 Wis. Stat. § 247.10 (1969). Collusion; procurement; connivance; condonation; stipulation; property rights. No judgment of annulment, divorce or
cludes the granting of an absolute divorce or legal separation to one guilty of adultery not condoned, whereas Section 247.101 grants immunity from the doctrine of recrimination and comparative rectitude, if the grounds for divorce or legal separation are other than those specified in Section 247(1) to (5).\(^5\) The majority of family court judges within the jurisdiction of Milwaukee County, giving precedence to 247.101 over 247.10, have granted absolute divorces in these cases because 247.101 is the more recent pronouncement of legislative intent regarding the application of recrimination to Wisconsin divorce law. This ambiguity should be resolved by either the legislature or supreme court. If the legislature or the supreme court decides to uphold the immunity granted in Section 247.101, then the next logical step would be to eliminate the outmoded doctrine of recrimination altogether and substitute comparative rectitude.

In revising Section 247.07, and in particular Subsections (6) and (7), the New York approach should be examined. While modeling their code after that of Wisconsin, the New York experts in the field of family law adopted a two-year minimum of legal or voluntary separation as grounds for divorce. This is a vast improvement over Wisconsin's present five-year requirement. When one considers that the separation is followed by a mandatory one-year waiting period after judgment, a five-year separation requirement seems unduly harsh. In fact, the retention of the five-year provision has impelled the Wisconsin legislature to grant relief in the form of Section 247.07(8), which makes refusal or neglect of the husband to adequately provide for his wife a ground for divorce without reference to any minimum period of time.

No discussion of new concepts in family law can avoid meeting head-on the theory and practice of awarding alimony. The women's liberation movement, with its stress on emancipation and equality, may result in the denial of a \textit{prima facie} right to alimony. What greater

\(^5\) Wis. Stat. § 247.07 (1) to (5). (1) For adultery. (2) When either party, subsequent to the marriage, has been sentenced and committed to imprisonment for 3 years or more; and no pardon granted after a divorce for that cause shall restore the party sentenced to his or her conjugal rights. (3) For the wilful desertion of one party by the other for the term of one year next preceding the commencement of the action. (4) When the treatment of one spouse by the other has been cruel and inhuman, whether practiced by using personal violence or by any other means. (5) When the husband or wife shall have been a habitual drunkard for the space of one year immediately preceding the commencement of the action.
symbol of discrimination and inequality on the basis of sex alone than the almost sacrosanct "meal ticket" doctrine. If the feminist movement is to flourish, the advocates of the equal rights amendment to the Federal Constitution to prevail, the open-door policy of employment to both sexes to be implemented and the differences in rates of pay minimized or abolished, should the whole institution of alimony be immune to challenge and change? The term itself has become almost opprobrious, especially in the eyes of the divorced men's counterparts to the women's liberation groups, so that a substitute such as maintenance or support might be more generally acceptable. Such a substitution would tend to broaden alimony's application to both spouses and at the same time limit it to either one on the basis of need instead of tradition.

In most cases, the former husband remarries. Usually he is financially unable to support two families. The court has continuing jurisdiction over the parties, under Section 247.25,\(^6\) to alter or revise the judgment concerning maintenance. If the court should determine, many years after the divorce, that the wife requires an increase in her allowance, the rule of reason dictates that it would be unfair to reopen the divorce judgment and thrust an even greater financial burden on the former husband and his present family. Perhaps the community is morally obligated and financially better able to assume such increase.

Complete removal of alimony or its equivalent from the stockpile of bills of the remarried male is the goal of every property settlement and division of estate. Such a provision "in lieu of alimony" should be made whenever possible. This would set reasonable limitations, both dollar-wise and time-wise, on the husband's liability and free the wife to augment her income without fear of reduction in alimony.

Further consideration of the women's liberation attitude raises even deeper questions regarding alimony as presently implemented. Traditionally, alimony deems the husband sole payor and the wife sole payee. If removal of all discrimination between men and women is to be accomplished, a re-evaluation of present practices in awarding alimony is necessary. The broadening of women's employment opportunities and the increasing of their net earnings will put them in a position to assume the new role of payor. Such a position would be perfectly justified, especially where the husband has encountered sickness, accident, or financial reverses. It is true that some leaders of the liberation movement are aware of its possible damage to long held notions of who pays and who receives in divorce, but it is doubtful that the followers

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\(^6\) Wis. Stat. § 247.25 (1969). Revision of judgment. The court may from time to time afterwards, on the petition of either of the parties and upon notice to the family court commissioner, revise and alter such judgment concerning the care, custody, maintenance and education of any of the children, and make a new judgment concerning the same as the circumstances of the parents and the benefit of the children shall require.
have been similarly foresighted. In any event, the die is now cast, and the momentum the movement has generated for a re-evaluation of all aspects of marriage and its dissolution will inexorably affect the respective rights and duties, financial and otherwise, of the marriage partners toward each other. It should not be assumed that the doctrine of alimony, support or maintenance will emerge unscathed from the tumult nor that it should.

One way in which a more realistic approach to the financial problems created by divorce can be achieved is through modification of Section 247.26. The monetary obligations of the husband include not only alimony but possible child support, house mortgage and other lien payments, outstanding debts as of the date of commencement of the action, and contribution to his wife's attorney's fees, in addition to his own. To these outlays arising out of the dissolution, must be added the man's personal living expenses until remarriage. If he remarries, and he usually does, he is confronted with the almost insurmountable burden of maintaining two families, either wholly or partially. If he is under order of judgment to support children, the man is required under Section 245.10 to seek permission to remarry at which time both he and his fiancee are admonished that the obligation to support the child or children of the prior marriage will be superior to any incurred as a result of the subsequent marriage. Nevertheless, we must recognize that for the average wage earner, who remarries, it is a constant struggle to meet the child support obligations of his prior marriage, let alone alimony for the former spouse, and such other financial commitments of the new undertaking as will inevitably arise.

Because so many men are unable to meet these multiple financial responsibilities, enforcement of court orders has become a difficult task. The success of any enforcement project requires a realistic approach to the problem of harmonizing the man's financial obligations with his present and potential income. In order to concentrate on child support, and to avoid arrearages, findings of contempt and penalties the burden

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7 Wis. Stat. § 247.26 (1969). Alimony, property division. Upon every judgment of divorce or legal separation for any cause excepting that of adultery committed by the wife, the court may, subject to § 247.20, further adjudge to the wife such alimony out of the property or income of the husband, for her support and maintenance, and such allowance for the support, maintenance and education of the minor children committed to her care and custody as it deems just and reasonable. The court may also finally divide and distribute the estate, both real and personal, of the husband, and so much of the estate of the wife as has been derived from the husband, between the parties and divest and transfer the title of any thereof accordingly, after having given due regard to the legal and equitable rights of each party, the ability of the husband, the special estate of the wife, the character and situation of the parties and all the circumstances of the case; but no such final division shall impair the power of the court in respect to revision of allowances for minor children under § 247.25. A certified copy of such judgment which affects title to real estate shall be recorded in the office of the register of deeds of the county in which the lands so affected are situated.
of alimony or its equivalent must be minimized. On a long range basis, both parties stand to benefit from equalizing responsibility in monetary outlay so that it is not excessively burdensome to one nor unduly generous to the other. The parties generally are or should be capable of caring for themselves. The revised Section 247.26 should require, whenever possible, a property settlement and division of estate in lieu of alimony with the twin objectives of setting reasonable limitations on the husband's liability and freeing the wife to augment her income.

Custody and Visitation

It is, of course, the minor children with whom the law and its agencies are most concerned. The experience of Family Court Commissioners in representing the state and the public interest in default proceedings and in presiding over pre-trial and post-judgment motions is that the parties to the action are prone to minimize the adverse effects of the separation and to be unrealistic in anticipating problems of custody and visitation. There is a need for an infusion of fresh concepts and innovative legal and sociological approaches. There is a duty and responsibility to take affirmative steps to help children to avoid trouble, to cement and smooth the relationship between child and custodian, and between child and visiting parent, and generally to assist in arriving at meaningful solutions to the highly personal and emotion charged problems of dissolution of a family.

Our present Family Code does not give the court enough flexibility in determining proper age limits for support, custody, and visitation. A proposal to reduce the mandatory support, custody and visitation requirements from twenty-one to eighteen is worthy of consideration. Boys and girls reach physical maturity much earlier than their parents' generation, thanks to the higher health and nutritional standards of the nation. Eighteen-year-olds are subject to military draft, pay taxes, may marry under certain circumstances, enter into contracts for necessities, vote, go to college or enter the employment market. Is it not actually a vote of "no confidence" to place young adults under an umbrella of protection that for the most part they neither need nor desire? By lowering our sights and narrowing the area of concern, our efforts could be concentrated on children up to and including seventeen, with jurisdiction reserved for children eighteen and over in cases of necessity. Holding open custody and visitation at age eighteen, except for unusual circumstances, would improve the character of the relationship between parents and child although financial support from one or both need not be ruled out.

If a child is handicapped, retarded or is in college, or is for any reason incapable of self-sufficiency, cutting off support at age twenty-one seems to be too harsh for universal application, the case of O'Neill v.
O'Neill, notwithstanding. In some instances when one or both of the parents is financially able to sustain the burden beyond age twenty-one they should be subject to mandatory orders to continue support.

Proposed Section 249

The author plots an uncharted course in proposing the adoption of an additional section to the Family Code to be entitled "Dissolution of Marriage—Its Social and Economic Consequences—Pre-Trial and Post Judgment Relief—Aids to Enforcement of Orders."

The intent of the Family Code, to promote the stability and best interest of marriage and the family is found at the beginning of Section 245 and is a reminder to applicants for a marriage license. Failure of the marriage and the breakup of the family unit, resulting in a judgment of divorce, legal separation or annulment, brings suffering, deprivation and want to parties and offspring with widespread repercussions to our social fabric and body politic. Counseling and education, public and private financial aid and other resources, including community organizations, professionals and volunteers, must all be marshaled and channeled toward meeting the problems caused by the dissolution of family.

It is the author's belief that as a direct result of the high incidence of divorce, certain economic and social conditions have arisen, among which are the following:

1. A tremendous cost in dollars, both public and private, of establishing and maintaining the apparatus of legislative, executive and judicial branches, on all levels, to administer the business of obtaining, enforcing and modifying a judgment of divorce, legal separation or annulment and the motions incidental thereto;

2. A deprivation of economic benefits to parties and children;

3. Social stigma and isolation of the spouse and children resulting from the breakup, with the attendant problems of maintenance of separate households, and emotional problems and adjustments to step-parents and stepchildren;

8 O'Neill v. O'Neill, 17 Wis. 2d 406, 117 N.W.2d 267 (1962) held that even where a child is physically incapacitated and continues to reside with his mother a court may not require the divorced husband-father to contribute to his support.

9 Wis. Stat. § 245.001 (2) (1969) 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.
(4) Public Welfare for members of broken homes involving outlays of ten million dollars annually in state funds to support families which have become indigent due to marital disruption, and an equal amount from the Milwaukee County Department of Public Welfare because of the arrearages of husbands and fathers in alimony and support payments.

(5) A high correlation between juvenile delinquency and broken homes.

(6) A higher rate of criminal violations among divorced and separated adults.

The present Family Code does not make adequate provision for means by which to effect reconciliation of estranged couples, nor the means to aid couples and their children in their adjustment to separation. Also inadequate are the present tools of the court for executing and enforcing orders and judgments. The legislature, demonstrating its cognizance of these shortcomings, created the State Council for Home and Family.\(^\text{10}\) This council, consisting of legislators and their appointees, is primarily fact finding in nature. It issues a semi-annual report to the legislative council, the legislature, the governor and the supreme court. One of its intended functions is to bring about a decrease in the number of divorces in the state through implementation of its recommendations.

In order to give the courts more effective weapons with which to combat the problems of family disorganization the author recommends the following provisions be made in his proposed chapter 249.

Under proposed Chapter 249, this writer suggests that there be created a Milwaukee regional branch of the State Council for Home and Family, the functions of which would be:

(1) To provide pre-marital and post-judgment counseling for the parties involved in dissolution;

(2) To aid reconciliation of couples during the one-year waiting period following judgment;

(3) To coordinate action taken by the Department of Family Conciliation and the Department of Public Welfare;

(4) To cooperate with the Office of Economic Opportunity, the Social Security Administration, and the Department of Health, Education, and Welfare in establishing a money-management clinic, which would counsel the economically disadvantaged in such areas as deceptive practices, comparative shopping, consumer credit, and installment buying; and

(5) To assist the economically disadvantaged in applying for aid under the various public assistance programs offered, in order to maximize the amounts of benefits available.

In addition, this writer suggests that proposed Chapter 249 establish publicly-funded credit unions which could extend long-term, low-interest loans to the economically disadvantaged for purposes of liquidating alimony and support arrearages. Under present law, credit unions cannot offer checking services, issue credit cards, write third-party checks for the direct payment of depositors' bills, or arrange point-of-purchase credit. Proposed Chapter 249 would grant to publicly-funded credit unions the right to engage in such practices.

Also to be included in the proposed legislation is a provision for the creation of an economic assistance office, which would be delegated the duties of:

1. Providing employment opportunities for divorced parents and for children who are the products of broken homes;
2. Providing access to child-care centers for employable mothers;
3. Providing economic assistance to those who are unemployed as a result of accident, illness, layoff, or strike;
4. Providing housing for those who are unable to locate adequate quarters; and
5. Coordinating the needs of persons affected by divorce with assistance available from such agencies as The Legal Aid Society of Milwaukee, Milwaukee Legal Services of the Office of Economic Opportunity, Milwaukee County General Hospital, St. Vincent de Paul Rehabilitation Center, Matt Talbot Lodge, Inc., Milwaukee Council on Alcoholism, and Veterans' Administration Center.

Further, this writer proposes re-activation of The Family Court Advisory Board of Milwaukee County. This Board, which could conveniently be officed at the proposed State Council regional headquarters, would consist of chairman, two vice-chairmen, secretary, assistant secretary, and thirty-two board members who represent a cross-section of knowledgeable citizenry in the community.

This writer, finally, suggests that, through the cooperative efforts of the State Council, the Family Court Advisory Board, and the Family Law Sections of both the State and Milwaukee Bar Associations, there be conducted a public relations campaign to increase public interest in the problems facing our Family Courts and to encourage stability of marriage and the family.

Before being issued a license to marry, it should be mandatory that people satisfactorily complete a course designed to acquaint the novice with the ways and variances of the opposite sex and make known the responsibilities and hazards of the new role being assumed. Such instruction might be offered by the church or be available in schools or from qualified tutors authorized to issue certificates to be required by marriage license clerks. It must be expected that some will go to another state to avoid such conditions. When Wassermann tests were
first ordered some temporary migration did take place, and when a waiting period was legislated into the matrimonial procedure, it happened again. But Wisconsin is accustomed to being first in social legislation. There is nothing wrong with the present practice of trying to re-cement crumbling marriages through reconciliation procedures but the emphasis should be on prevention of marital discord.

The State Council for Home and Family

The State Council for Home and Family makes optimum use of the state's talent in the fields of law, family legislation, religion and social welfare. The membership is further testimony to the conscientious dedication of state leadership in these fields. The Council numbers seventeen members, four of whom are legislators. Judges, lawyers, clergymen and other experts in family life serve with them without remuneration. Their meetings, held at least four times a year, cover a broad range of subjects relevant to the problems of home and family. Much of the Council's work involves the study of laws relating to marriage, actions affecting marriage and the support of children and other dependents. The Council examines the causes of family disintegration and the need for future programs, activities, services and facilities to promote a family unity. It is also charged by statute with the investigation of the effect of divorce on public welfare costs and the examination of Supreme Court decisions affecting family stability. For the in-depth study of many of the problems, the Council also calls upon the services of its consulting committees, which include the (1) Committee on Family Life Education and Marriage Counseling, the (2) Committee on Enforcement of support in Divorce Judgments and the (3) Committee on the Economic Aspects of Divorce. The Council has devoted much of its time and effort toward the study of legislation in Wisconsin and surrounding states. Its subsequent sponsorship or endorsement of bills is designed to remedy some of the ills in state family legislation.

As a further source of information and guidance, the Council organized the Consulting Committee on Family Life which has met ten times since early 1966. Its members are some of the state's most dedicated leaders in education, religion and the social services.

The committee has sought the organization of County Councils. These councils could promote homemaking, family finance and family life education on a local level. The idea was one of the proposals of 1969 Senate Bill 176, sponsored by the Council. The bill proposed increasing the waiting period for a marriage license from five to thirty days except upon cause shown; requiring Clerks of Court to report monthly rather than yearly on matters affecting marriage; and requiring a guardian ad litem for minor children of parents in process of getting a divorce (Bill 176 failed of passage at the special session due to lack of time).
The committee on Family Life also favors establishment of a state family life center which would coordinate all agencies working in the family services field. Such an organization could serve as a catalyst to better define the purpose and goals of the separate groups and bring more efficiency and accomplishment to these units.

In its concern for student conduct in the state's colleges and universities, the committee recommended that student groups be urged to formulate and establish guidelines of social and moral conduct, self-regulation and sexual responsibility. It also urged the adoption of regulations prohibiting the use of habit forming drugs, and adopted a resolution based on these recommendations which was presented to interested groups on Madison and Milwaukee Campuses.

Another bill, which is also a result of committee recommendation, would raise the marriage age for girls without parental consent from eighteen to twenty-one and also fix the minimum age for marriage at eighteen. (This measure failed passage.)

The matter of enforcement of support in divorce judgments is analyzed in the report of its consulting committee, in the Second Biennial Report of the Council. It recognizes that one of the state's seemingly unsolvable problems has been the conversion of an order to pay support monies into "bread and butter" on the table. Support orders are intended to place the responsibility for the family on the wage earner, rather than the State. The report attributes the fact that the state now assumes the support responsibilities for hundreds of families to inadequate enforcement and statutory shortcomings and reminds us that the Council has tried since its organization to attack the problem.

As a result of committee study and recommendation the Council sponsored Senate Joint Resolution 9, passed in 1967 urging Congress to allow the release of social security numbers for the purpose of tracing parents who are delinquent in support of minor children. Another measure, Senate Joint Resolution 16, passed in 1969 sought strengthening of federal law to make information available directly to county law enforcement officials primarily concerned with enforcement of family support. Both resolutions further called for making child abandonment a federal misdemeanor.

In another action, the committee recommended broadening wage assignment legislation for child support, to prohibit an employer from using any assignment of this type as a basis for discharge or disciplinary action against an employee, by the introduction of Senate Bill 495 on May 1, 1969. This amendment won legislative approval and is incorporated in the revised Section 247.232 Wisconsin Statutes "Wage Assignment by Family Court Commissioner."

Enforcement of alimony and support payments in Milwaukee County family court actions is being buttressed by the current "Fugitive Father
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residents has been subject to judicial scrutiny beginning with *Estate of Ferguson*, which held that the phrase "or elsewhere" in the original subdivision (4) was not a sufficiently clear manifestation of legislative intent and therefore was without extra-territorial effect. As an outgrowth of this decision the statutory provision of 245.10 was amended by Chapter 48, Laws of Wisconsin, effective December 31, 1965, to read: "This section shall have *extraterritorial effect* outside the state and Sections 245.04 (1) and (2) are applicable hereto. Any marriage contracted without compliance with this section, where such compliance is required shall be void, whether entered in this state or elsewhere." It is noted that the crucial change lies in the addition of the simple phrase "extraterritorial effect." On the basis of the decision in *State of Wisconsin v. Dexter H. Mueller,* we believe the high court not only upheld the extra-territorial effect of the criminal sanctions of Section 245.10, but likewise upheld the extra-territorial effect of its remarriage permission provisions, particularly, the highly controversial sub-

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12 Wisconsin law is necessary to determine the extraterritorial effect of the remarriage permission provisions. The high court upheld the extra-territorial effect of the criminal sanctions of Section 245.10, as well as the remarriage permission provisions. The crucial change lies in the addition of the simple phrase "extraterritorial effect." On the basis of the decision in *State of Wisconsin v. Dexter H. Mueller,* the high court not only upheld the extra-territorial effect of the criminal sanctions of Section 245.10, but likewise upheld the extra-territorial effect of its remarriage permission provisions, particularly, the highly controversial sub-

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25 Wis. 2d 75, 130 N.W.2d 300 (1964). See also *Korś v. Korś,* 38 Wis. 2d 413, 157 N.W.2d 691 (1967).
division (4). In *Mueller, supra*, a criminal complaint had been lodged in Dane County Court against the defendant alleging that on or about January 31, 1966, defendant, a Wisconsin resident, entered into a marriage in Illinois, contrary to and in violation of Section 245.10 (4), having been denied permission to remarry by the Dane County Court. On appeal from an order of the Circuit Court for Dane County dismissing the criminal complaint on the ground that the statute upon which the charge was founded was an unconstitutional effort to give extra-territorial effect to the criminal laws of Wisconsin, the Supreme Court reversed. Justice Wilkie's decision held that the state can constitutionally impose criminal penalties for failure to comply with the statutory requirement of court permission before marriage *within or without* the state. The court distinguished the pre-amendment cases, and stated, "We are of the opinion that sec. 245.10, Stats. and the penalty section, 245.30 (1) (f)." are valid legislative acts."

The enforcement of section 245.10 (4) and its essential prerequisite are circumscribed in *Hunter v. Hunter.* In setting aside a finding of contempt against the support paying husband for having married outside the state without permission contrary to the statute, the Supreme Court differentiated between a mere recital of statutory language in the judgment of divorce, in effect explaining its terms and presumptively binding the defendant thereto, and the divorce court specifically ordering or adjudging in the judgment that he could not marry without such permission. In the absence of such specific prohibition in the judgment, the court held that the trial court had no basis for entering its contempt order. The distinction appears to split hairs but is easily observed by the exercise of a careful drafting of findings of fact and conclusions of law and judgment.

**Rights of Married Women**

In our proposed restructuring of the code from its present chapters 245, 247, and 248 to 245, 246, 247, 248 and the proposed 249, we alluded only briefly to Section 246, "Rights of Married Women." The fragmentary nature of its provisions affords untold opportunity for embellishment and expansion. If this chapter were to be incorporated in the code as a compendium of women's rights as they are affected by marriage, its dissolution and the social and economic consequences thereof, then some of the rational goals of the liberationists might well meet with legislative sanction.

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13 *Wis. 2d 387, 171 N.W.2d 414 (1969).*

14 *Wis. STAT. § 245.30 (1). The following shall be fined not less than $200 nor more than $1,000, or imprisoned not more than one year, or both: (f) Penalty for obtaining license without permission of court. Any person who obtains a marriage license contrary to or in violation of § 245.10, whether such license is obtained by misrepresentation or otherwise, or whether such marriage is entered into in this state or elsewhere.*

15 *Wis. 2d 618, 172 N.W.2d 167 (1969).*
A nonpartisan agency, and an arm of the state government, the Governor's Commission on the Status of Women, urged changes in divorce and family planning laws in its Third Major Report entitled, "Wisconsin Women," July, 1969. Its introduction, which was the letter of transmittal to Governor Knowles, sets forth the four fields of concern: (1) Family Law and Policy, (2) Health and Welfare, (3) Social Insurance and Taxes, and (4) Labor Legislation. It explains that "within these areas we have reviewed existing Wisconsin law and policy and have made recommendations for changes which in our judgment would deal more fairly and equitably with women and men, would facilitate the assumption of greater responsibility on the part of all our citizens, and would more nearly correspond to the realities of life today. It is impossible to fail to note that many of the recommendations in this report are not new. They have been included in our two previous major reports and in several instances have been before the legislature at least once. While Wisconsin led the nation in 1961 in enacting the first law prohibiting sex-based discrimination, it has lagged in the implementation of many current recommendations."

The Commission holds that both men and women are entitled to equal rights in all aspects of life including marriage; that equal rights based upon marriage as a full partnership are essential ingredients for a stable family and will be reflected in the mental health, aspirations, and values of the children. We are informed that there are several patterns of family living found in Wisconsin, i.e., approximately one third of the married women who live with their husbands are working and contributing to the maintenance of the home; many other married women work at some time during their married lives while others spend their married lives in child rearing and homemaking. Wisconsin law should reflect these varied patterns of family life and operate fairly for both spouses in dealing with property rights, divorce, and the rights of children. To achieve these goals, the Commission recommends the following changes in state laws:

(1) Property rights of marriage partners—ownership—Each spouse during marriage should have a legally defined, substantial right in the earnings of the other and in the real and personal property acquired through these earnings and their management. In Wisconsin and in others of the 42 common-law states, each spouse owns and manages his own income and property, a system which does not recognize contributions to the family made by the wife who works only in the home and consequently does not have the opportunity to earn and acquire property in her own right. The adoption of the principles of communally held ownership would thus recognize the contribution of the wife not employed outside the home.

It is difficult to grasp just what is being proposed. It is a misnomer
to designate Wisconsin as one of the 42 so-called common-law states, inasmuch as it is a code state from its very inception, taking the New York State Code as its model for its legal structure in 1848. Do the authors contend that the working wife will be better off if she must divide her paycheck? Most married couples vest title to both real and personal property in joint tenancy, with right to survivorship, although individual ownership of either is permitted, with the wife, of course, having dower provided by Section 861.03[16] and other property rights provided by Section 861.41.[17] Community property is recognized as a principle of marital law in a number of states, California being the most prominent example. However, in that state material changes in division of community property as well as alimony awards are expected to follow California’s liberalization and simplification of its divorce law effective on January 1, 1970. The Commission also recommends:

(2) Division of property upon divorce: “Property accumulated during marriage should be equally divided between husband and wife at the time of divorce, but it should be subject to alteration at the discretion of the court in consideration of unusual contributions not necessarily financial, made by either or both of the spouses. Some factors to be considered are the economic dependency and age of the spouses at the time of divorce and the duration of the marriage.

Section 247.26 enumerates seven items to which the trial court must give due regard in dividing the estate of the parties, although the weight and effect to be given to each is not spelled out. In addition, the Supreme Court in Wagner v. Wagner,[18] admonished the trial courts to give consideration to the following in making a division of the estate of the husband’s property and that of the wife’s derived from the husband: (a) Conduct which caused the divorce; (b) Age and health of the parties, (c) The ability to earn; and (d) Manner of acquisition of the property. It also must be remembered that the wife’s contribution to the estate must be subtracted, and then the balance is divided equitably.[19]

While one third of the estate to the wife was considered a reliable standard, as far back as 1914, the ratio first appearing in Gauger v. Gauger,[20] it was only a starting point to be increased or decreased according to special circumstances. It was further stated in the case of Yasulus v. Yasulus,[21] that the division of estate is peculiarly within the discretion of the trial court. More recently in Lacey v. Lacey,[22] the Supreme Court overruled the rule of thumb Gauger formula. Speaking

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[16] Wis. Stat. § 861.03 effective April 1, 1971
[20] 157 Wis. 630, 147 N.W. 1075 (1914).
[21] 6 Wis. 2d 249, 94 N.W.2d 649 (1959).
for the majority, Justice Robert W. Hansen also reviewed the relevant factors heretofore considered in the intervening two generations and introduced new ones. Such concepts as shared enterprise or joint undertaking, full-time homemaker-housewife contribution, in addition to the essential elements mentioned in the Wagner case, supra. The conclusion derived from the Lacey decision is that the one third rule of thumb is no longer applicable but the responsibility and flexibility of dividing the estate is a discretionary power of the trial court to be exercised in light of the prior mentioned elements. The broad range of considerations enunciated in statute and case law in Wisconsin offer greater protection and assurance to both spouses of a fair and equitable disposition of their property than the extremely limited criteria suggested by the Commission as a reform.

(3) Alimony for self-supporting persons. Alimony as continued support for an ex-spouse capable of self-support should be eliminated, providing there is sufficient property to divide under the preceding proposal to insure against hardship during a period of adjustment and until re-education and/or employment. In any case, alimony should not be awarded as a means of redressing wrongs imposed by either spouse upon the other nor as a compensation for damage.

(4) Alimony for dependent persons. Alimony in the absence of suitable property division should: recognize contributions by a spouse not financially compensated in some other way; provide recompense for loss of earning capacity suffered by either spouse; recognize continuing responsibility for a specified period toward a spouse in financial need. This period may be relative to duration of marriage and/or the time necessary for a financially dependent person to become self-supporting, if possible; provide sufficient funds for dependent spouse to further his or her education or job training leading to employment at a level consistent with potential.

The recommendation confuses an allowance for maintenance with a division of estate when it speaks of eliminating alimony providing there is sufficient property. In most divorce or separation cases there is little if any property to divide—the liabilities frequently exceed the assets. Current wages of one or both of the partners are almost the sole tangible asset and since most families live on a paycheck to paycheck basis, they accumulate very little in the form of worldly goods except those articles purchased on time payments which invariably tend to become millstones especially in periods of adversity such as sickness, strikes or business recession. The award of alimony as a means of redressing wrongs or as compensation for damages has not been the practice in this state. Alimony is predicated on the legal duty of a husband to support his wife, recognized in the statutes and court decisions.\(^\text{23}\) It is in the nature

\(^{23}\) Salinkovs Salinko 177 Wis. 475, 188 N.W. 606 (1922).
of a maintenance award, based upon need and ability to pay. Support for dependent persons is a bedrock of family law. As to the efficacy of the four specific recommendations the first two are puzzling as to their meaning and intent. Items three and four reflect long standing application of present alimony law and practice with the additional features of funds for the dependent spouse for education and job training, without distinction as to whether the recipient be husband or wife, and for as long as may be necessary for the dependent to become self-supporting. Permitting either the husband or wife to be recipient of support or payor, as the case may be, is constructive and worthy of study.

The Governor’s Committee also made the following statement relative to grounds for divorce. “Divorce grounds should be made uniform throughout the United States, thus eliminating the inconsistency of obtaining a divorce in one state which is not recognized as valid in another. This uniformity would also discourage the practice of establishing temporary residence in one state with liberal divorce laws to obtain a quickie divorce. Divorce laws specifying various grounds should be repealed, with the standard decree to be based upon the sole criterion of ‘irreconcilable differences.’ Laws and judicial opinion regarding divisions of property should reflect considerations other than ‘who is to blame for the marital breakdown.’ Eliminating ‘showing of fault’ would cancel the doctrine of (1) condonation and (2) recrimination—the countercharge by the defendant in a divorce of wrongdoing in the part of the plaintiff as a defense against the divorce.”

“Aside from the establishment of ‘irreconcilable differences’ or any of the now existing grounds, a couple should be able to obtain a divorce decree by living apart for one year by mutual consent. Nor should there be any difference in the waiting period when suing for divorce between the deserter and the deserted, but child support should be provided in this as in all other instances.”

The notion that uniform divorce grounds and laws generally on a national basis would automatically solve the most irksome problems is highly impractical and probably unattainable. The several states are sovereign entities, highly jealous of their respective prerogatives and diverse ideologies, based upon sectional, economic, religious and ethnic differences. Even if such a goal were within reach, it would not be a cure-all for it would mean sacrifice of cherished principles and practices such as are contained in our own Family Code for the sake of an elusive uniformity. That the “quickie” divorce violates both the letter and spirit of our Code and constitutes one of the most flagrant examples of permissiveness in our society is undeniable. Wisconsin discourages the resort to that panacea by its residents by express prohibition in sections 247.21 and 247.22, Statutes. In the former, “No person domiciled in this state shall go into another state, territory or country for the pur-
pose of obtaining a judgment of annulment, divorce, or legal separation for a cause which occurred while the parties resided in this state, or for a cause which is not ground for annulment, divorce or legal separation under the laws of this state and a judgment so obtained shall be of no effect in this state," is a \textit{prima facie} declaration of intent. In the latter, subsection (1) provides: "A divorce obtained in another jurisdiction shall be of no force and effect in this state, if both parties to the marriage were domiciled in this state at the time the proceeding for the divorce was commenced," and (2), describes the nature of the proof considered \textit{prima facie} evidence that a person obtaining a divorce in another jurisdiction was domiciled in this state. On the other hand, both sections recognize constitutional and U.S. Supreme Court sanction of foreign decrees, comity of states and the Uniform Divorce Recognition Act, as they may apply generally to judgments of dissolution of marriage rendered by a court of competent jurisdiction.

To resolve apparent inconsistencies in statutory provisions as well as an answer to the often repeated query, "is a Nevada or Mexican divorce valid," we turn to two Wisconsin Supreme Court decisions: \textit{Hartenstein v. Hartenstein},\textsuperscript{24} and \textit{Estate of Gibson}.\textsuperscript{25} In the first, the Court upheld a Nevada divorce involving two Wisconsin residents where the plaintiff wife appeared in person and by her attorney, and the defendant husband appeared generally by his attorney. In the second, under a different set of facts wherein the plaintiff husband, a resident of Missouri obtained a Mexican divorce against the defendant wife, a Wisconsin resident, by personal service in a town where the parties had lived for several years, the divorce decree was held to be invalid. Family Court Commissioner Joseph Syman in his article "Wisconsin and Foreign Court Jurisdiction over Divorce," published in the Milwaukee Bar Association Gavel, issue of June, 1963, treats the subject exhaustively based on the \textit{Hartenstein} decision. The facts, the pleadings, the issues and the contentions of not only the parties to the divorce but those of the husband's successor wife who was named as party defendant in the action to vacate the judgment, served as the foundation for an in-depth analysis of the decision written by Justice Currie. Weighty considerations leading to the decision and its rationale include domicile, full faith and credit, \textit{res judicata}, collateral attack, fraud and coercion, the distinction between intrinsic and extrinsic fraud, and finally, the relationship between U.S. Supreme Court decisions and certain provisions of the Uniform Divorce Recognition Act and their applicability to the instant case. The ruling in \textit{Gibson}, which denied the validity of a Mexican divorce, relies on some of the principles enumerated in \textit{Hartenstein}, but in addition, on those factors peculiar to its distinguish-

\textsuperscript{24} 18 Wis. 2d 505, 118 N.W.2d 881 (1963).
\textsuperscript{25} 7 Wis. 2d 506, 96 N.W.2d 859 (1959).
ing features, principally that both spouses were not domiciled in Wisconsin, and that the divorce granting jurisdiction was a foreign country instead of a state. Whereas, the Nevada divorce was upheld largely because of the full faith and credit and immunity from collateral attack doctrines, the Mexican divorce was upset chiefly on domicile and the conflict-of-law rules of the domiciliary state. Surely, no rule of thumb can be conveniently devised to justify advising the impatient Wisconsin spouse to purchase a plane ticket to Las Vegas or Tiajuana, nor to calm his understandable fears about the validity of a judgment so obtained, fait accompli. Not only must the individual case of a foreign divorce stand or fall on its own peculiar set of circumstances, but discretion dictates a policy of extreme caution, if not a presumption of invalidity in view of the almost insurmountable barriers posed by Wisconsin's statutory prohibition and judicial selectivity.

The endorsement of the "irreconcilable differences" or non-fault theory is not surprising in view of the growing number of adherents to this modern trend in matrimonial severance. We shall limit our comment at this juncture to a reminder that the doctrine is in its infancy and conclusions should not be hastily drawn. However, statistics show an increase of almost one hundred percent in the number of actions filed for dissolution in the first four months since the California amendment became effective on January 1, 1970, and thus shows the possible effects of the provision. The results are diametrically opposed to the intent of our Code to preserve and stabilize the family, and lessen, not enlarge, the incidence of dissolution.

The recommendation of reducing the period of voluntary separation from five years to one year is, in our opinion, in the right direction but too drastic a step forward. Although we favor a moderate reduction, two or three years appeals to us as a reasonable compromise. Professional marriage counseling should be made more available to every couple before and during marriage. An expanded program could be an effective agent in preventing family breakdown and divorce. The idea is plausible but its implementation by choice and use of the particular method, its cost, availability and sponsorship will require a considerable contribution of time, effort, and money.

The Commission further urges that there should be no distinction between boys and girls in age of majority or age to marry, just as there is no distinction in voting age. We agree, this being in conformity with the recommendation of the State Council for a minimum age 18 and parental consent requirements for both young men and women between 18 and 21. But we cannot agree with the Commission's Statement on custody.

"When a marriage is dissolved, the custody of the children should be determined according to their best interests, and neither parent
should have a superior right to custody. There is also great need for the enactment of a National Uniform Child Custody Jurisdiction Act. In today's mobile society the removal of children beyond the jurisdiction of the court which determined custody and visitation rights frequently defeats the interest of the other parent and of the child. The enactment of uniform legislation is not a solution to all of our problems of enforcement, although we concede our opposition is not as emphatic as it is toward a uniform dissolution of marriage code generally. Removal of children beyond the jurisdiction of the state granting divorce does not present the insurmountable obstacle to proper judicial determination of custody and visitation disputes, at least in Wisconsin, that the proposal contemplates. The parties may be warring and domiciled in different states after judgment, but based upon experience with similar situations, the law does come to the rescue and ample precedent is available. For instance, it is established that jurisdiction of custody and support may be exercised although not exclusively, by the court granting the divorce and it also may be concurrent with that of a sister state, if the child being supported is present, resident and domiciled in such state and the state has a substantial interest in his welfare. Brazy v. Brazy, establishes guidelines by cautioning that the Wisconsin court cannot review the judgment of a sister state where the latter had jurisdiction of the subject matter of custody and support, and personal jurisdiction over the husband by reason of personal service on him there, although the Wisconsin as well as the California court had jurisdiction to decide such questions. Thus, while the jurisdiction of the California court was not exclusive, once it was asserted by the latter, the Wisconsin court erred in entertaining an application for a change in provisions affecting custody and support. As corollaries to these principles, we call attention to several other cases which help to clarify this area. The rule that the court of either the state which granted a divorce or the sister state is free to decline to exercise jurisdiction, and may yield to the other for reasons of policy was enunciated in Hatch v. Hatch. Ordinarily, a court should not exercise subject matter jurisdiction in a case when another competent court has previously done so. The court which granted the divorce may be better informed, having resolved some of the original disputes, and will generally be able to acquire personal jurisdiction of the parties. A parent's right to custody of his children is a personal right and cannot be affected in a divorce action unless the court has personal jurisdiction over the parent. The full faith and credit clause of the U.S. Constitution does not entitle a judgment in personam to extraterritorial effect when

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26 Restatement, Conflict of Laws § 457 (1934).
27 5 Wis. 2d 352, 92 N.W. 738, 93 N.W.2d 856 (1958).
is was rendered without personal jurisdiction of the person sought to be bound.\textsuperscript{30}

\textit{Legal Representation for Children in Domestic Relations Cases}

The Commission applauds the Wisconsin practice of appointing an attorney or guardian \textit{ad litem} for children in divorce proceedings when one is needed to represent the rights of the children as a third party and urges that this practice become a statutory requirement and not merely a voluntary procedure. It also urges that attention be given to insuring that the services of a guardian \textit{ad litem} are more than casual and that this practice keep step with the purpose of protecting the children.

The guardian \textit{ad litem} is required to be an attorney and his appointment by trial courts in child custody disputes is encouraged by a line of cases beginning with \textit{Edwards v. Edwards},\textsuperscript{31} and sturdily reinforced in \textit{Wendland v. Wendland}.\textsuperscript{32}

But that the protection of a guardian \textit{ad litem} was not intended as indispensable to every case involving a child or children is evident from the admonition in \textit{Wendland} that “the appointment of a guardian \textit{ad litem} is a step that the trial court should take only in an extraordinary situation where the trial court believes that what may be in the best interests of the children may not be brought out by the two contesting parties.” We agree that the practice of such appointments merits wider acceptance by lawyers and trial courts, since the enhancement of the welfare of the children involved amply justifies both the expense and the enlargement of the judicial process in resolving child custody disputes.

In concluding its report the Commission observes, “The stability of family life is of basic importance, and the traditional view is that to achieve this stability a woman’s role should be, either exclusively or at least presumably, that of mother and homemaker. However, by limiting them to these roles, many women suffer loss of self-esteem and even retrogress in their personal development. . . . The availability of a range of choice to Wisconsin women will create a more meaningful and socially useful life for both men and women. . . . But recognizing that more and more women do become involved in the mainstream of life outside the home, men must at the same time become more involved in life within the home to make marriage an equal and effective partnership. . . . Marriages in which both husband and wife contribute within as well as outside the home will serve to strengthen and stabilize the family in a rapidly changing social scene.” It is difficult to find fault with views as eminently down-to-earth as those expressed in the conclusion since for the most part they only reflect recognition of modern ways of life not

\textsuperscript{30} \textit{Supra} note 27 at 361, 92 N.W.2d 738, 742-743.
\textsuperscript{31} 9 Wis. 2d 115, 100 N.W.2d 554 (1960). \textit{See also} \textit{May v. Anderson}, 345 U.S. 528, 73 Sup. Ct. 840, 97 L Ed. 1221 (1953).
\textsuperscript{32} 270 Wis. 48, 70 N.W.2d 22 (1955).
particularly in need of legal implementation. One is tempted to observe that such an approach is a far cry from the type of extremism displayed by some feminist equal rights advocates. What the Commission is really saying is that today's woman should be free to either be a homemaker, enter the labor market, or attempt a combination of both roles but cautions gently that the men-folk had better beware. The latter will have no choice but to tear themselves away from certain recreational pastimes and pitch in with the chores to fill the void caused by the woman's exercise of "freedom of choice" to engage in other pursuits. Whether the "silent majority" would actually endorse this practice by secret ballot may be open to question, but there is an unmistakable trend in this direction and it appears to be the wave of the future.

CONCLUSION

The concept of irreconcilable differences, the advent of the women's liberation movement, and the changes in social, economic and moral philosophies, has afforded us a glimpse of the problems which may arise in the Domestic Relation law in the next decade. Despite the sound basis of the Family Code, challenges remain.

Conceivably, Mr. Justice Cardozo has contributed an answer when he said:

"The inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow." 33

It is hoped that this article has provided some food for thought and has assisted in providing some solutions for the inevitable problems which lie ahead.