DIVORCE: LIVING APART STATUTES AS A REPLACEMENT FOR FAULT

Statistics indicate that in one out of every 4.1 marriages[1] the marriage vows might be rephrased to read "until divorce do us part."[2] The divorce-marriage ratio fifty-eight years ago is estimated at one to 13.28.[3] This startling increase between 1900 and 1956 has evoked a variety of suggestions and proposals ranging from free love to a return to the strictness of the middle ages.[4] Most of the suggestions, when offered as a panacea, may be analogized as an attempt to treat an internal wound by an external application. They diagnose divorce as the infection, when in fact it is the attempted surgical medication.[5] An awareness that divorce is not the cause of a marriage failure but is the legal termination of a marriage that has already factually failed will prompt inquiry into the true causes. According to prevailing divorce statutes, cause—synonymous with grounds—for divorce generally includes adultery, cruelty and desertion.[6] These grounds, seldom the actual cause of the breach, are often recognized torts intervening between the more fundamental breach and the suit for divorce.[7] Gen-

1. Vital Statistics, Special Reports, National Summaries, Vol. 48, April 9, 1958.

2. "[Statistics] tend to make a mockery of the sacramental phrases which are traditionally used to tie the bonds of matrimony. If the phrases reflected the divorce statistics, they would read 'till death or the divorce court do you part.'" Ploscowe, The Truth About Divorce 2 (1955) (hereinafter cited as Ploscowe).

3. Vital Statistics, Special Reports, National Summaries, Vol. 31, Nov. 4, 1949.

4. Free love is based on the premise that a permanent marriage relationship is becoming outmoded. A variation of this is the "trial marriage" primarily for sexual experience, differing from free love in that it contemplates permanency. Parsons, The Family, An Ethnological and Historical Outline 348-49 (1906). A suggestion of a companionate marriage contemplates a tentative "legal" marriage for purposes of determining the desirability of a permanent relationship. This marriage could be dissolved by consent prior to the birth of children. Knight, The Companionate and the Family, 10 Journ. of Social Hygiene 257 (May 1924). The most conservative approach calls for a return to the allegedly indissoluble marriage. Kelly, Catholic Law, 2 Va. L. Weekly Dicta Comp. 14 (1949-50). Idealists, approaching the problem from a sociological standpoint, list a set of rules for the good husband and the good wife. Mowrer, Family Disorganization 10 (1927). Others suggest education and reconciliation fostered by marriage clinics conjunctive with domestice relations courts. Chute, Divorce and the Family Court, 18 Law & Contemp. Prob. 49 (1953).

5. See Ernst and Loth, For Better or Worse 245 (1952).

6. Harper, Problems of the Family 657 (1952).

7. If a determination of fault is made, it is an "indemnification for tort" and should be irrelevant to family law. Silving, Divorce Without Fault, 29 Iowa L. Rev. 527, 533 (1944).

erally marital instability results from inter-personal conflicts, beyond the investigation of the trial court, and often beyond reparation by the parties. Divorce is fundamentally a sociological problem, caused by divergent personalities, created in different environments and complicated by a time of changing values and personal needs.[8] The requirement of fault for divorce is an attempt to solve this sociological problem by a resort to standard legal criteria. The many fictions, collusive suits and archaic concepts that have appeared in modern divorce practice may be attributed to the use of the fault doctrine. Any initial attempt to modernize the present structure of domestic relations law necessitates a re-examination of the whole fault doctrine with an eye toward its complete replacement by the adoption of living apart statutes.

A pure living apart statute would provide for a judicial decree of divorce after a husband and wife had lived apart continuously for a specified period of time with the intention of discontinuing the marital relationship. To assess the worth of living apart statutes as a present day solution to the confusion, fictions and inconsistencies existing in American divorce laws, it is necessary to trace briefly the historical superstructure on which modern divorce laws are erected.[9]

HISTORY

Pre-Christian ideas of marriage and divorce are as varied as the number of societies that existed at that time. The permanence of marital ties ranged from terminable at will to indissoluble.[10] There is evidence that marriage, and correspondingly divorce, existed even in pre-literate societies, and was controlled by custom and ministered by

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8. See text supported by notes 28-39 infra.

9. For a history of marriage and divorce see generally Goodsell, A History of Marriage and the Family (1934) (hereinafter cited as Goodsell); Howard, A History of Matrimonial Institutions (1904). For English legislative history see Bishop, Commentaries of the Law of Marriage and Divorce (5th ed. 1873); and for recent English history see A Century of Family Law (Graveson & Crane ed. 1957).

10. In primitive societies marriage was commonly considered a private contract and was dissolvable at the will of one or both parties. Goodsell 30. In Hebrew society, divorce, while originally obtained merely by writing the wife a "bill of divorcement" and sending her out of the house, was later limited to certain defined moral offenses. The wife had no divorce privileges. Goodsell 70-72. In early Greek society a husband was considered justified in obtaining a divorce if the wife was either barren or had committed adultery. Goodsell 98-101. In the Roman Empire about the second century B.C., marriages could be dissolved at pleasure. Goodsell 144. Under the laws of Manu, a Hindu civilization, marriage was considered indissoluble. Monier-Williams, Brahmanism and Hinduism 500 (4th ed. 1891).

the individual.[11] As custom grew into law, states gradually began to exert controls over individual freedom to marry and divorce. In spite of this, a divorce could generally be procured at the whim of the husband or by mutual consent of the parties. The doctrine of fault, while existing in some societies, played little part in the termination of the marital relationship.[12] Attempts to control divorce were not entirely successful and many abuses existed.[13] It was not until the rise of the Christian religion that western civilization developed the current idea of a monogamous, continuous, and permanent marriage.[14]

During the first few centuries after the beginnings of Christianity, marriage maintained its secular significance. Church control came gradually, however, and complete domination was achieved in approximately the twelfth century.[15] Some of the delay can be attributed to an enigma which developed in church doctrine. Continued expansion of church control over marriage was inconsistent with ideals of celi-

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11. 1 Westermarck, The History of Human Marriage 26-76 (1901). The ease and reasons for obtaining divorce were dependent upon the form of marriage, e.g., where polyandry was condoned, or where the line of inheritance traced through the mother, the right of divorce rested chiefly in the wife; but in the case of polygamy and patrilineal descent divorce rested chiefly in the husband. Sumner, Folkways 377-78 (1906).

12. See note 10 supra. However, when an act, considered morally reprehensible, was committed against the marriage other dire consequences might have resulted. Under Julian law during the Roman Empire the father of an unfaithful wife was permitted to kill both the daughter and her lover. Goodsell 147. Under the Code of Hammurabi, in 2300 B.C. adultery by the wife was not a ground for divorce, but carried the penalty of the wife and lover being bound and thrown in the water. Harper, Code of Hammurabi § 129 (1904). Adultery was not a ground for divorce in early Anglo-Saxon law, though it was punishable pecuniarily. Lichtenberger, Divorce, A Social Interpretation 62-65 (1931) (hereinafter cited as Lichtenberger).

13. See, e.g., Goodsell 145, where the author notes that attempts by Roman emperors to curb divorce abuses had little effect.

14. The teaching of Matthew 19:6 that "What therefore God hath joined together, let no man put asunder," is generally considered the basis of the sacramental concept of marriage. The further admonition in Matthew 19:7-9 that whoever puts away his wife except for fornication, commits adultery, is the assumed basis for considering divorce as an evil.

15. The rise of the ecclesiastical marriage began with the church's benediction of the nuptials. Religious control increased in the fifth century with the advent of the bride-mass, but its function being purely religious the church gained no legal control. In the tenth century, though the marriage was complete, the priest participated in the ceremony and gave a second blessing within the church. The fourth step was the celebration of the ceremony by the priest, although the ceremony took place outside the church door. Finally canon law replaced secular jurisdiction. 1 Howard, op. cit. supra note 9, at 62-65. Chronologically this event can be traced to the Council of Trent in 1563. Lichtenberger 87.

bacy which had become part of basic church dogma.[16] Marriage was regarded as an evil because of the impurity of the sex act.[17] To encourage the solemnization of marriage in the church therefore appeared to be contradictory. The sacramental theory of marriage solved the dilemma of the church and profoundly influenced all future ideas of marriage and, consequently, divorce.[18] Marriage, as a sacrament, was considered indissoluble except by death. To effectuate this concept the church finally achieved complete control of divorce in its own ecclesiastical courts.[19] Absolute divorce, being contrary to church doctrine, was practically non-existent.[20] There were, however, provisions for declaring a marriage void ab initio, and separation was allowed when certain fault grounds were shown.[21] It is this heritage which the early American colonists brought to this country.

The New England colonies, influenced by the Reformation, rejected the sacramental and adopted the civil contract theory of marriage,[22] a concept which has spread to all jurisdictions in the United States. Consistent with the civil contract theory, divorce, when allowed at all, was granted by civil government rather than ecclesiastical authority.[23] Absolute divorce, as well as judicial separation, was generally obtainable in the northern colonies.[24] Thus, from colonial time, civil control replaced church control over marriage and divorce. Yet church influence remained. The fault doctrine used by ecclesiastical courts in granting separations formed the basis for American divorce law.[25] The only change from this basic structure has been an expansion of

16. Messer, The Family in the Making 144-45 (1928) (hereinafter cited as Messer).

17. Messer 150.

18. Lichtenberger 82-87.

19. See Goodsell 211-15.

20. Messer 167-68.

21. The practice of annulment of marriages was fairly widespread and grounds for annulment, such as affinity, were often invented by the parties. Divorce a mensa et thoro (from bed and board) was allowed on grounds of adultery, heresy, and cruelty. Goodsell 213. Absolute divorce could be procured in rare cases by act of parliament from about the seventeenth century. A Century of Family Law 5 (Graveson & Crane ed. 1957).

22. The southern colonies, however, adopted the English idea of marriage as a sacrament, so that considerable variation existed in the colonies as a whole. Goodsell 366-67.

23. Goodsell 392-97. McCurdy, Divorce—A Suggested Approach, 9 Vand. L. Rev. 685, 689 (1956).

24. Goodsell 392-97. In the southern colonies there were no ecclesiastical courts, yet neither were there provisions for divorce by civil authority so that legal separation was unknown in the South. Goodsell 396.

25. McCurdy, supra note 23, at 689. See also Lichtenberger 98-99.

fault grounds in some states.[26] The fault doctrine presents an inconsistency in the application of the civil contract theory of marriage. While mutual consent is required to marry, the relationship created, unlike other "civil contracts," can be terminated, in most states, only by resort to fault grounds more properly found in the law of torts.[27] But the existence of this inconsistency in present divorce law and its basis in legal history is only part of the present divorce problem.

Superimposed upon the historical-legal developments of marriage and divorce are profound changes in economics and sociology brought about by industrial, political and religious revolutions. These changes have affected both the physical and philosophical aspects of the family unit while failing to have a comparable effect on the law governing family disruption.

The industrial revolution has altered the physical nature of the family.[28] Where once husband and wife worked side by side, children were educated at home, and women depended on the family to economically exist,[29] the husband now works away from home, schools and other outside activities draw children away from the family circle, and women as a class are no longer economically tied to the family.[30] Transportation and communications have freed the individual from a local environment.[31] Household inventions and the opportunity to enhance the family pocketboot have encouraged the wife to leave the kitchen and seek outside employment. An abundance of outside entertainment has taken the place of the home as the center of recreation.[32] Economic necessity and immobility, on which much of the stability of the home once rested, are factors which, in the United States, have largely ceased to exist.

Combined with economic influences on the physical nature of the family is the spirit of individual self-realization that is reflected in modern political institutions and religious and intellectual liberalism.[33]

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26. Ploscowe 249. The same volume, at 265-94, contains a compilation of the various grounds for divorce available in the several states. See also Harper, Problems of the Family 657-59 (1952), where the author collects the "uncommon" grounds for divorce in order to show the trend in state legislative policy.

27. See note 7 supra. See also 73 Reports of The Am. Bar Ass'n 302 (1948), where it is recommended that the whole American divorce structure be re-examined and revised along social rather than adversary lines.

28. See generally Mowrer, Family Disorganization 145-58 (2d ed. 1939) (hereinafter cited as Mowrer); Lichtenberger 262.

29. Messer 261-66.

30. Chapin, A Historical Introduction to Social Economy 182-214 (1917); Mowrer 149-58.

31. Chapin, op. cit. supra note 30, at 247-60.

32. Mowrer 145-58.

33. The relationship of these social forces to the divorce problem is treated extensively by Lichtenberger 289-333.

The basic democratic ideals of life, liberty and the pursuit of happiness reflect this desire for individualism.[34] Liberal religious thought emphasizes conduct and social action, rather than historical church doctrine.[35] Recognizing that life is one of the highest values, this religious liberalism does not follow the early ecclesiastical idea of indissoluble marriage, for it is felt to be inconsistent with the general spirit of Christian teaching to attribute to God the authorship of a loveless marriage.[36] Individualism is reflected in the romantic concept of marriage, which has replaced economic instigation and parental control.[37] More is demanded of each partner in the way of personal satisfaction. While procreation has always been the primary purpose of the union of sexes, the psychological value is now openly recognized.[38] Marriage, then, as a social institution, while naturally reflecting this individualism, is presently influenced by external pressures of the competitive industrial world unknown to the pre-nineteenth century family. The greater chance of marriage between persons of different cultures, educational levels, and communities adds to this pressure.[39] Upon comparison between the span of time that marriage was controlled by environmental needs or by the church and the sudden transition to the influences of today it is not surprising that there has been an increase in the divorce rate. Whether this increase is entirely the result of family instability cannot be accurately determined. Certainly the divorce rate includes a direct reflection of self-expressionism that would have been smothered in an earlier era. However, mere resort to the doctrine of fault, created in a time when the family relationship bore little resemblance to the one of today, seems a shallow solution to the difficult divorce problem.

Because the doctrine of fault has proved an inadequate solution to family discord, law makers, particularly in European countries,[40] have shifted the emphasis to the more realistic concept of "factual marriage." This concept describes the actual rather than the legal rela-

34. See Lichtenberger 289-99. See also More, Bacon, Rousseau, Campanella, Famous Utopias 3-125 (1937).

35. See Lichtenberger 319-29.

36. This view has been voiced even by some American clergymen. See Lichtenberger 324-25.

37. See Mowrer 158-65; Lichtenberger 340-50.

38. See Mowrer 195-215; Lichtenberger 359-89. "Sex has come to play in modern marriage a far greater role than formerly. It is bound up intimately with the happiness and therefore with the stability of the marriage relation." Lichtenberger 367.

39. Mowrer classifies the tensions influencing family disruption into four categories: (1) incompatibility in response, (2) economic individualization, (3) cultural differentiation, and (4) individualization of life-patterns. Mowrer 196.

40. For a survey of European development of the "factual marriage" concept see Silving, Divorce Without Fault, 29 Iowa L. Rev. 527 (1944).

tionship. If a husband and wife are living apart and have no intention of resuming the marital relationship, the marriage, though existing in law, no longer exists "in fact." Application of this theory to the law has taken form as a ground for divorce upon separation of the parties for a specified period of time. It is this theory that is the basis of living apart statutes.[41]

PRESENT LIVING APART STATUTES IN THE UNITED STATES

Twenty-two jurisdictions[42] allow divorce pursuant to separation for a specified period of time. The worth of these statutes cannot be fully measured since they supplement rather than substitute for existing fault grounds for divorce.[43] Variations among the present statutes make a comparison of the decisions of one state with those of another of questionable value. The policy behind the statutes, however, seems common to all jurisdictions; i.e., the interests of the parties and society can best be served by granting a "legal" divorce where the marriage has factually ceased to exist.[44] By requiring a specific period of separation, modern application of the statutes contemplates placing a check on the parties to encourage reconciliation and preclude action in the heat of anger.[45]

The legal question most often arising under present living apart statutes concerns the nature of the separation contemplated. Colorado, Minnesota, North Dakota and Utah limit the scope of their statutes to suits for divorce only after the granting of a separate maintenance decree.[46] In other jurisdictions no restriction is made by the language

41. Living apart statutes have been advocated previously as a new approach to the divorce enigma. See McCurdy, supra note 23; Ploscowe 247-64.

42. Present living apart statutes and individual variations are collected in a table at the end of this note.

43. See, e.g., Wis. Stat. Ann. § 247.07 (1957) where, in addition to providing for divorce in the case of voluntary separation for a period of 5 years, the statute includes adultery, impotency, sentence to imprisonment for 3 years or more, wilful desertion for one year prior to action, cruel and inhuman treatment by husband of wife, or vice versa, or if wife is given to intoxication, and habitual drunkenness for one year, as other grounds for divorce.

44. See Barrington v. Barrington, 206 Ala. 192, 194, 89 So. 512, 513 (1921), where the court stated, "Manifestly [the statute] intends to deal simply with a social and economic status—a fait accompli; and, the remedy of divorce being already available to the husband who has not consented thereto, it extends the same remedy to the wife. The object is to put an end to a situation barren of good, capable of evil, and probably irremediable by any other means." See also Parks v. Parks, 116 F.2d 556, 557 (D.C. Cir. 1940); Dawson v. Dawson, 62 Wyo. 519, 526, 177 P.2d 200, 202 (1947); and see Keezer, Marriage and Divorce § 455 (3d ed. 1946).

45. McCurdy, op. cit. supra note 23, at 700-01.

46. See table supported by notes 96, 101, 105, 108 infra.

of the statute,[47] and a former decree of separation is neither necessary nor a bar to divorce on living apart grounds.[48] A minority of courts require mutual consent or voluntary separation.[49] This seems contradictory to the factual concept of marriage, since if one party leaves the other with the intention of remaining away permanently the marriage has factually ceased to exist. In most cases where voluntary separation has been required the results were compelled by the wording of the statute, rather than by judicial insistence.[50] Where voluntary separation is essential it must be voluntary from inception to expiration of the required statutory period,[51] though this rule is sometimes modified where acquiescence to the separation is manifest over a long period of time.[52] All jurisdictions require complete physical separation. This means living entirely separate and apart from bed and board without cohabitation.[53] Some courts include separation

47. See table following this note.

48. Jones v. Jones, 199 Ark. 1000, 137 S.W.2d 238 (1940); George v. George, 56 Nev. 12, 41 P.2d 1059 (1935); Lockhart v. Lockhart, 223 N.C. 559, 27 S.E.2d 444 (1943); Dawson v. Dawson, 62 Wyo. 519, 177 P.2d 200 (1947).

49. Bowers v. Bowers, 143 F.2d 158 (D.C. Cir. 1944) (involuntary separation raised as a defense); Butler v. Butler, 154 F.2d 203 (D.C. Cir. 1946) (willingness of one party to effect reconciliation precluded separation from being voluntary); Campbell v. Campbell, 174 Md. 229, 198 Atl. 414 (1938) (coerced acquiescence raised as a defense, but wife found to have waived right to object because of lapse of time); Parker v. Parker, 210 N.C. 264, 186 S.E. 346 (1936) (must be mutual agreement to separate); Powless v. Powless, 269 Wis. 552, 69 N.W.2d 753 (1955) (desertion held not mutually voluntary).

50. See notes 95, 100, 111, 113 infra and table supported thereby. But cf. Brooks vs. Brooks, 201 Ark. 14, 143 S.W.2d 1098 (1940), where the Arkansas court, in construing its statute requiring separation by voluntary act or mutual consent, held that parties were entitled to a divorce even if the wife had been caused to separate involuntarily.

51. Owen v. Owen, 208 Ark. 23, 184 S.W.2d 808 (1945) (intermittent cohabitation interrupting voluntary separation); McClure v. McClure, 205 Ark. 1032, 172 S.W.2d 243 (1943) (same); Otis v. Bahan, 209 La. 1082, 26 So. 2d 146 (1946) (induction into service not voluntary); Kline v. Kline, 179 Md. 10, 16 A.2d 924 (1940); Miller v. Miller, 178 Md. 12, 11 A.2d 630 (1940) (involuntary separation at inception). But cf. Bowers v. Bowers, 143 F.2d 158 (D.C. Cir. 1944) (divorce allowed because defendant failed to prove withdrawal of agreement to separate).

52. Parks v. Parks, 116 F.2d 556 (D.C. Cir. 1940) (silent acquiescence as a waiver of objection to separate); Campbell v. Campbell, 174 Md. 229, 198 Atl. 414 (1938) (wife deemed to have waived right to contest coerced agreement to separate).

53. This generally means that a wife and husband living under the same roof do not meet the statutory requirement. See Caine v. Caine, 262 Ala. 454, 79 So. 2d 546 (1955) (husband not deemed to have separated until he moved from house to barn); Rogers v. Rogers, 258 Ala. 477, 63 So. 2d 807 (1953) (separate rooms in the same dwelling not sufficient separation); McDaniel v. McDaniel, 292 Ky. 56, 165 S.W.2d 966 (1942); Christiansen v. Christiansen, 68 R.I. 438, 28 A.2d 745 (1942); McNary v. McNary, 8 Wash. 2d 250, 111 P.2d 760 (1941). In some

caused by the imprisonment of one of the parties in computing time,[54] but separation caused by one spouse being committed to a mental institution cannot be used to comply with the statute.[55] Time spent in the armed services can be included, if preceded by the decision to separate.[56]

The doctrine of fault does not generally apply in actions brought under present living separate and apart statutes,[57] but Vermont and Wyoming specifically exclude the party chargeable with fault from bringing suit.[58] Recriminatory defenses, derived from fault concepts, are not generally available under the statutes.[59] Some states, however, take fault into consideration when passing on claims for alimony,

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special circumstances, however, parties living under the same roof may qualify. See Boyce v. Boyce, 153 F.2d 229 (D.C. Cir. 1946) (spouses lived on separate floors and did not take meals together); Stewart v. Stewart, 45 R.I. 375, 122 Atl. 778 (1923) (same building, but different apartments).

54. Colston v. Colston, 297 Ky. 250, 179 S.W.2d 893 (1944) (husband's confinement included in computing time of separation); Davis v. Davis, 102 Ky. 440, 43 S.W. 168 (1897) (husband serving life term). But see Sitterson v. Sitterson, 191 N.C. 319, 131 S.E. 641 (1926) (imprisonment held not to be voluntary and therefore could not be counted in determining requisite separation).

55. Dorsey v. Dorsey, 94 F. Supp. 917 (D.C.D.C. 1950), aff'd 195 F.2d 567 (D.C. Cir. 1952) (insanity can't be counted even though voluntary separation before period of insanity); Clark v. Clark, 215 La. 835, 41 So. 2d 734 (1949) (no voluntary separation where cause of separation is insanity). See also Serio v. Serio, 201 Ark. 11, 143 S.W.2d 1097 (1940); Woodruff v. Woodruff, 215 N.C. 685, 3 S.E.2d 5 (1939). The general theory behind these decisions is that an insane person is not capable of decision. But see Knabe v. Berman, 234 Ala. 433, 175 So. 354 (1937), where the court held insanity was irrelevant under the Alabama statute.

56. Mogensky v. Mogensky, 212 Ark. 28, 204 S.W.2d 782 (1947) (service time included where separation was prior to induction); Davis v. Watts, 208 La. 290, 23 So. 2d 97 (1945) (implied); Moody v. Moody, 225 N.C. 89, 33 S.E.2d 491 (1945) (dictum).

57. Parks v. Parks, 116 F.2d 556 (D.C. Cir. 1940) (party suing entirely at fault held not to bar divorce); Mohr v. Mohr, 214 Ark. 607, 215 S.W.2d 1020 (1949); Colston v. Colston, 297 Ky. 250, 179 S.W.2d 893 (1944); Kohlsaat v. Kohlsaat, 62 Nev. 485, 155 P.2d 474 (1945); McKenna v. McKenna, 53 R.I. 373, 166 Atl. 822 (1933).

58. This is provided specifically in the statutes of these states. See notes 109, 112 infra and table supported thereby. Although the North Carolina statute is silent, decisions indicate that fault on the part of the spouse bringing the action may preclude him from securing a divorce on living apart grounds. See Taylor v. Taylor, 225 N.C. 80, 33 S.E.2d 492 (1945); Pharr v. Pharr, 223 N.C. 115, 25 S.E.2d 471 (1943).

59. See, e.g., Joliffe v. Joliffe, 76 Idaho 95, 278 P.2d 200 (1954). But see note 58 supra for those states which fail to separate fault considerations in living apart statutes.

child custody and property rights.[60] Since the doctrine of fault is generally an unnecessary element in living apart statutes and because the basic influences behind the rising divorce rate may be attributed to factors other than fault, it is the purpose of the remainder of this note to estimate the worth of living apart statutes as a complete replacement for existing fault grounds for divorce.

LIVING APART AS THE SOLE GROUND FOR DIVORCE

In assessing the worth of living apart statutes as the sole ground for divorce it is necessary to consider their effect (1) as a replacement for present fault grounds, (2) on the divorce rate, and (3) on the interests of the families involved in marital difficulties. In making this estimate living apart statutes are considered in their most desirable form; i.e., where separation may be established by one or both parties, and where the period of separation required is not too long, thereby discouraging the displacement of fault grounds and disserving the interests of the parties, but is not so short that divorce would be encouraged, thereby defeating the worth of the restrictive period required prior to the granting of a divorce.

Effect as a Replacement for Fault

Replacement of fault grounds by living apart statutes substitutes a realistic approach for an unrealistic one. Divorce, under separation statutes, would not be precluded where true "legal" fault grounds existed, while divorce could be procured where the factual cause of family disruption did not meet present existing statutory fault grounds. The concept of fault assumes that only specified conduct justifies a judicial remedy,[61] when, in fact, the marital difficulties may be caused by a more basic conflict in the disposition and attitudes of the parties.[62] Present grounds for divorce are so limited in some jurisdictions that continuous unharmonious conduct and even criminal behavior may not justify divorce.[63] In other jurisdictions fault is so extended that two slaps by the husband[64] or kissing the wife of one's

60. Mohr v. Mohr, 214 Ark. 607, 215 S.W.2d 1020 (1949); Joliffe v. Joliffe, 76 Idaho 95, 278 P.2d 200 (1954); Sandlin v. Sandlin, 289 Ky. 290, 158 S.W.2d 635 (1942); Davis v. Watts, 208 La. 290, 23 So. 2d 97 (1945).

61. See note 7 supra.

62. See notes 28-39 and text supported thereby.

63. See, e.g., Cohen v. Cohen, 200 Misc. 19, 103 N.Y.S.2d 426 (Sup. Ct. 1951), where a wife was denied a divorce because of the limited grounds available, even though her husband had pleaded guilty and was convicted of sodomy. This case is severely criticised in Ploscowe 97, 257.

64. See Berlingieri v. Berlingieri, 372 Ill. 60, 22 N.E.2d 675 (1939), where under a statute requiring extreme and repeated cruelty the court held that evidence of two slaps, corroborated by witnesses, was sufficient cruelty to justify divorce. This case or a similar one is noted, but not cited, in Ploscowe 248.

cousin" may pave the way to the domestic court. About ninety percent of all divorces are granted in non-contested default cases,[66] indicating that generally both parties want the divorce and belying the need for a court contest. By eliminating fault requirements any collusive actions now practiced as a fraud on the court would become unnecessary.[67]

Standard defenses to an action of divorce also approach the problem unrealistically. Recrimination, which provides that where both parties have "legal" grounds for divorce neither party has adequate grounds, presupposes that a court can order antagonistic parties to live together as man and wife.[68] In fact, separation normally results, and where adultery is the recriminatory offense meretricious relations can be expected. Condonation, another standard defense, assumes that the marital relationship has not been destroyed as evidenced by subsequent cohabitation,[69] while in reality, it is usually evidence that parties have tried again without success as indicated by their presence in court. Recrimination and condonation are irrelevant under living apart statutes.[70]

The power of the courts to determine support, alimony and property rights would not be diminished under non-fault statutes. Ordinarily parties contemplating divorce attempt to settle property rights be-

65. Elder v. Elder, 186 S.W. 530 (Mo. App. 1916), where the court held that the conduct of the husband in kissing the wife of his cousin whose presence in the house was known to be obnoxious to his spouse constituted a sufficient indignity to justify divorce. The Missouri statutory ground under which the decree was rendered in this case lends itself to extreme liberality in the granting of divorce. Mo. Rev. Stat. § 452.010 (1949) provides that divorce may be granted when either party "[S]hall offer such indignities to the other as shall render his or her condition intolerable . . . ." Charles v. Charles, 208 S.W.2d 476 (Mo. App. 1948), illustrates the variety of indignities which may justify divorce. In this case the wife complained that the husband requested money from the wife's relatives, refused to disclose his finances to the wife, and made unseemly complaints about the provisions of the will of his mother-in-law. A divorce was granted.

66. Sayre, Divorce for the Unworthy, 18 Law & Contemp. Prob. 26, 27 (1953).

67. Id. at 28. For a discussion of some collusive and fraudulent practices in the New York courts see Ploscowe 99-102.

68. Walker, Our Present Divorce Muddle, 35 A.B.A.J. 457 (1949).

69. Johnson, Suppressed, Delayed, Damaging and Avoided Divorces, 18 Law & Contemp. Prob. 72, 80 (1953), refers to condonation as "a tricky method of defeating a divorce action."

70. This is due to the different fundamental policy underlying living apart statutes and the total rejection of fault concepts in any divorce action. See McCurdy, supra note 23, at 705-06. When you recognize that the law can't compel parties to live together, "[Y]ou acknowledge that the grounds for divorce are but unhappy conflicts exposed to salacious, prurient, curious, critical, puritanical and filthy minds for no good reason at all." Walker, supra note 68, at 459. See also Ploscowe 258.

tween themselves.[71] Where a settlement cannot be reached during the period of separation or where the husband refuses to support the wife, she could bring an action for separate maintenance for herself or for support of any children and the court could determine the issues as effectively and forcefully as under present statutes. Upon determination that an estranged husband and wife have met the requirements of living apart entitling them to a divorce decree, custody and support of children would be decided by the court in a manner similar to present practice; i.e., in the best interests of the offspring involved. During separation or upon granting of a divorce the duty to support children remains the same, since this duty arises by virtue of the birth of issue and not because of the marital status.[72] For awards of alimony or property rights, the court retains control, but in jurisdictions presently making awards based on comparative fault, substitution of living apart statutes would require a change of standard. For example, in states where alimony is now granted to the wife only if she is not chargeable with fault,[73] a court operating under a living apart statute could award support to the wife whether or not she was the moving party for the divorce and regardless of her role in the factual breakup of the marriage.[74] This recognizes that the duty of support should not be penalizing or rewarding in nature. Instead, it should arise from a factual analysis of whether the wife is, or is not, placed temporarily or permanently in a state of dependency due to circumstances arising out of the marriage relationship. The public policy involved in defining support rights and alimony is better served when rights are based on the wealth and particular needs of the parties and not based on fault.[75]

71. Walker, supra note 68, at 460.

72. If the duty to support children arose solely out of the marital status there would be no point to paternity cases.

73. E.g., present Missouri law provides that the party at fault in a divorce proceeding "forfeits all rights and claims under and by virtue of the marriage." Mo. Rev. Stat. § 452.090 (1949). This statute has been held to preclude the party at fault from recovering any award of permanent alimony. Willis v. Willis, 274 S.W.2d 621 (Mo. App. 1954); Motley v. Motley, 93 Mo. App. 473, 67 S.W. 741 (1902). If Missouri adopted a living apart statute as its sole ground for divorce, since fault is irrelevant, the present rule would have to be changed and alimony would be awarded on other bases. See note 75 infra.

74. It is probably a rare case where one party is altogether innocent or entirely at fault. Spouses merely show reaction to marital discord in different ways. See Bradway, The Myth of the Innocent Spouse, 11 Tul. L. Rev. 377 (1937). In addition, awards solely on relative fault are based on tort principles which should have no bearing on family law. See note 7 supra.

75. Illustrative of considerations that can be used in determining alimony, other than resort to fault are expressed in Nickerson v. Nickerson, 152 Neb. 799, 801-02, 42 N.W.2d 861, 862 (1950), as follows: "In determining the question of alimony or division of property as between the parties the court, in exercising its

Effect on the Divorce Rate

A basic purpose of living apart statutes is to provide a period of contemplation as a deterrent to ill-considered action. The comparatively few cases based on present living apart statutes can perhaps be attributed to the relatively long period of separation required in most jurisdictions[76] and to existing and often innocuous fault grounds,[77] which provide a more expedient means of obtaining judicial relief. The effect of the waiting period would tend to minimize in the minds of the parties the perhaps over-inflated forces which have divided them. Life apart might provide a greater awareness of dependency upon one another for companionship and comforts, and time might destroy the desire to marry another.[78] Fault grounds bring parties together in court to continue their battle, widening rather than narrowing the breach. It is unrealistic for the law to be structured around the preservation of the family unit and a desire to see the disunited reunited, while at the same time providing an arena and weapons to continue the fight, solemnly awarding a prize to the winner.[79] In contrast, separation statutes allow for reconciliation by providing for a truce between embattled spouses.

Adoption of living apart statutes is recognition that the divorce rate does not necessarily indicate a weakening of the social institution of marriage, but is merely a record of individual marriages declared broken by judicial decree. Whether divorce is forbidden or numerous grounds are provided, the number of broken or unhappy homes remains unaffected. Family disruption is not determined by judicial decree, but by separation, needing no "legal" declaration to exist in

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sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life, including the social standing, comforts and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income producing capacity if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just." The court's reference to conduct of the parties would, of course, become irrelevant under living apart statutes.

76. E.g., Rhode Island requires 10 years separation, Texas requires 7 years, and Arizona, Idaho, Kentucky, Minnesota, Washington, Wisconsin, and the District of Columbia all require 5 years separation. See table following this note.

77. See, e.g., N.H. Rev. Stat. Ann. § 458:7, which provides 13 grounds for absolute divorce, including a ground providing for divorce when either party has so treated the other as to seriously injure health or endanger reason.

78. Walker, supra note 68, at 459.

79. Alexander, Let's Get the Embattled Spouses Out of the Trenches, 18 Law & Contemp. Prob. 98, 101 (1953).

fact. Concern over the divorce rate exists partly because it is known and measurable, while immorality and continuous disruption in the absence of a judicial decree, perhaps greater social problems, are largely ignored because they are concealed and unmeasurable.[80]

Factual divorce will continue whether living apart statutes or fault grounds are the basis for judicial relief. "Legal" divorce should be recognized as the antonym of wedding, i.e., an acknowledgment that a marriage contract can be terminated as it was formed, by mutual consent,[81] so long as the interests of the parties and society are protected by requiring conformity with specific statutory requirements. Since sociological reasons lie at the heart of the divorce problem, perhaps more stringent requirements for marriage[82] and provisions for counseling[83] during the period of separation would more effectively reduce the factual family disruptions which are reflected in the divorce rate.

Effect on the Family

The sole concern of the law should not be to reduce the divorce rate; rather it should seek to provide for the best interests of the family in each instance and let the divorce rate be so determined. A court cannot adjudicate the best interests of the husband and wife. In a judicial proceeding it is impossible to discover the many factors that determine the attitudes and satisfy the personality needs of the parties. What can the law do? It can, by requiring counseling, provide the opportunity for husband and wife to discover the reasons for the failure of their marriage and on this basis allow them to decide whether reconciliation or dissolution will best fulfill their interests.[84] Although belief in reconciliation may not be strong enough for the spouses to contribute sufficient cooperation to make counseling effective, at least one compulsory meeting could be required with opportunity for more

80. See Lichtenberger 431-32.

81. Walker, supra note 68, at 458.

82. Ploscowe attributes much of the increase in the divorce rate to the lax marriage laws prevalent in the majority of states. Ploscowe at 6. See also Redmount, Marriage Trends and Divorce Policies, 10 Vand. L. Rev. 513, 545-51 (1957), for suggestions for tightening marriage laws.

83. See note 84 infra.

84. Counseling in conjunction with divorce proceedings and through the media of a family court has been advocated by a number of writers. See Alexander, supra note 79; Alexander, The Lawyer's Dilemma in Divorce, 33 Kan. City B.J. 7 (Dec. 1958); Chute, Divorce and the Family Court, 18 Law & Contemp. Prob. 49 (1953); MacKenzie, Spiritual Values and the Family In Court, 18 Law & Contemp. Prob. 20 (1953); Goode, Compulsory Counseling, 2 Va. L. Weekly Dicta Comp. 74 (1949-50); Sicher, Consolidated Courts, 2 Va. L. Weekly Dicta Comp. 78 (1949-50).

if the parties so desired. But counseling might become a mere hurdle to overcome before the divorce could be granted, if, in addition, a definite period of separation is not provided. By requiring a period of separation a check can be placed on poorly considered acts, thereby assuring any reconciliatory effect that the counseling might have during the waiting period.

Probably the greatest concern of society and of the law is the effect of divorce on the children of the broken homes. Approximately 300,000 children are affected by divorce each year.[85] If the number of children suffering under the discord of unhappy unbroken homes is added the figures become much larger.[86] It has long been assumed that broken homes are detrimental to a child's personality and contribute to increasing juvenile delinquency. There is little doubt that a happy unbroken home bestows the greatest benefits upon a child's mental and physical well-being. However, when comparing unhappy unbroken homes with happy broken homes there is a question whether divorce or the marital conflict itself is more damaging to the child.[87] Recent surveys[88] indicate that an unhappy unbroken home may be more harmful to a child's development than one where the disharmony is ended by separation or divorce.[89] If this is true, living apart statutes would afford greater consideration to children than present fault grounds. Where fault grounds would presently not prove adequate for a divorce, even though total family disharmony existed, living apart statutes would allow divorce, thus removing the child from the influence of constant family friction. In addition, living apart statutes treat divorce as a necessary social adjustment, thereby tending to remove any social stigma which attaches to the child of a broken home.

CONCLUSION

Living apart statutes, while simplifying present divorce practice, better serving the interests of the parties and approaching marital

85. Ernst & Loth, For Better or Worse 226 (1952).

86. Nye, Child Adjustment in Broken and in Unhappy Unbroken Homes, 19 Marriage and Family Living 356 (1957).

87. Goode, After Divorce 307-10 (1956).

88. Some of these surveys may be found in Goode, After Divorce 308-13 (1956). See also Monahan, The Trend in Broken Homes Among Delinquent Children, 19 Marriage and Family Living 362 (1957). Shaw & McKay, Social Factors in Juvenile Delinquency, Washington; National Commission of Law Observance and Enforcement, Report No. 13, Vol. II, 1931, 275-76.

89. In a test administered to children of three groups: happy unbroken homes, unhappy unbroken homes, and broken homes, the attitudes of the children showed similarities between the broken homes and the unhappy unbroken homes; but on the majority of items, the children from the unhappy homes had the poorest showing of all. See Nye, Child Adjustment in Broken and in Unhappy Unbroken Homes, 19 Marriage and Family Living 356, 358 (1957).

disputes with a more realistic design, are by no means a complete solution to the complex divorce problem. Other reforms are necessary.[90] Some form of uniform divorce law along living apart lines is needed, for a living apart statute would lose much of its effectiveness if the parties could go to a neighboring state to obtain a "quickie" divorce. Special domestic relations courts are needed to handle all kinds of family problems,[91] thereby recognizing that most family difficulties are social rather than strictly legal problems. A uniform tightening of marriage laws across the country, providing for a minimal waiting period between registration and the ceremony would at least preclude the hasty marriages which often end in divorce.[92] As long as resort to fault grounds is the predominant method for obtaining a divorce there seems to be little chance for any reform. Certainly the rise in the divorce rate refutes a contention that fault grounds are an effective means of solving the problem of family disruption. Living apart statutes are at least a new and direct approach to sorely needed reform in American divorce law.

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90. See generally Ploscowe 247-64.
91. For a list of advocates of the family court see note 84 supra.
92. See note 82 supra.
93. Ala. Code tit. 34, § 22(1) (Supp. 1957).
94. Ariz. Rev. Stat. Ann. § 25-312 (1956).
95. Ark. Stat. Ann. § 34-1202(7) (Supp. 1955).
96. Colo. Rev. Stat. 46-1-2(9) (Supp. 1958).
97. Idaho Code Ann. § 32-610 (1947).
98. Ky. Rev. Stat. Ann. § 403.020(1)(b) (Baldwin 1955).
99. La. Rev. Stat. § 9:301 (1950).
100. Md. Ann. Code Gen. Laws art. 16, § 24 (1957).
101. Minn. Stat. Ann. § 518.06(8) (West Supp. 1958).
102. Nev. Rev. Stat. § 125.010 (1957).
103. N.H. Rev. Stat. Ann. § 458:7 (Supp. 1957).
104. N.C. Gen. Stat. § 50-6 (1950)
105. N.D. Rev. Code § 14-0605 (1943).
106. R.I. Gen. Laws § 15-5-3 (1956)
107. Tex. Rev. Civ. Stat. Ann. art. 4629(4) (Vernon's Supp. 1958).
108. Utah Code Ann. § 30-3-1(8) (Supp. 1957).
109. Vt. Rev. Stat. § 3205(7) (1947).
110. Wash. Rev. Code § 26.08.020(9) (1958).
111. Wis. Stat. Ann. § 247.07(7) (1957).
112. Wyo. Comp. Stat. Ann. § 3-5906 (1945).
113. D.C. Code Ann. § 16-403 (1951).
114. P.R. Laws Ann. tit. 31, § 321(9) (1955).

TABLE OF PRESENT VARIATIONS IN LIVING APART STATUTES

State	*Who May Sue*	*Special Nature of Separation*	*Period Required (in years)*	*Special Provisions*	
Alabama	Wife	Without support	2	None	91
	Either party	Pursuant to decree of separate maintenance	4	Other fault grounds are no defense	
Arizona	Either spouse	None	5	None	94
Arkansas	Either spouse	Voluntary act or mutual consent	3	None	95
Colorado	Either spouse	Pursuant to decree of separate maintenance	4	None	96
Idaho	Either spouse	None	5	None	97
Kentucky	Either spouse	None	5	None	98
Louisiana	Either spouse	None	2	None	99
Maryland	Either spouse	Voluntary	3	Beyond any reasonable expectation of reconciliation	100
Minnesota	Either spouse	Pursuant to decree of limited divorce	5	Continuous separation under separate maintenance decree requires only 2 years	101
Nevada	Either spouse	None	3	Granted at discretion of court	102
New Hampshire	Either spouse	Limited to party who has not consented to separation (given to wife when husband fails to support wife, given to husband when he has not consented to separation)	2	None	103
North Carolina	Either spouse	None	2	None	104
North Dakota	Either spouse	Pursuant to decree of separate maintenance	4	Reconcilation improbable and decree granted at court's discretion	105
Rhode Island	Either spouse	None	10	Discretion of court	106
Texas	Either spouse	None	7	None	107
Utah	Either spouse	Pursuant to decree of separate maintenance from any state	3	Former support provisions not affected	108
Vermont	Only party not at fault	None	3	Reconciliation improbable	109
Washington	Either spouse	None	5	None	110
Wisconsin	Either spouse	Voluntary	5	None	111
Wyoming	Only party not chargeable with fault	None	2	None	112
District of Columbia	Either spouse	Voluntary	5	None	113
Puerto Rico	Either spouse	None	3	Wife considered innocent spouse	114