

STATE GROUNDS FOR DIVORCE

STATE GROUNDS FOR DIVORCE: A BRIEF HISTORY

by Charlene Wear Simmons, Ph.D.

Laws reflect the attitudes and beliefs of dominant social and political groups and as such are an “...important influence on the incidence of divorce at any given time.”ⁱ Legal standards define which marriages qualify for dissolution, and as those grounds have expanded in Western societies over the last 200 years, divorce has become more accessible and the divorce rate has increased. Nonetheless, there is no clear causal link, as social, economic, demographic, cultural and institutional factors are also key influences. As a practical matter, commentators note that marriage relationships can end whether or not divorce is available, and that divorce allows the possibility of remarriage.²

Many American states enacted divorce legislation soon after Independence, in the 1780s and 1790s. Connecticut was the most liberal, permitting divorce for “...adultery, fraudulent contract, desertion for three years, or prolonged absence with a presumption of death.”ⁱⁱ In 1843, the state added two additional grounds for divorce: habitual drunkenness and intolerable cruelty. The Connecticut state legislature also dissolved marriages on other grounds by legislative action. In 1849, the courts were given sole responsibility for divorce, and grounds were extended to include “life imprisonment, any infamous crime involving a violation of the conjugal duty, and-most important-‘any such misconduct as permanently destroys the happiness of the petitioner and defeats the purpose of the marriage relation.’”ⁱⁱⁱ

Divorce laws were generally more liberal in the West than in the rest of the country. California’s first divorce law, in 1851, contained the following grounds for divorce: impotence, adultery, extreme cruelty, desertion or neglect, habitual intemperance, fraud, and conviction for a felony. In practice, the courts extended the definitions of these terms. Historian Carey McWilliams writes that California’s divorce rate was the highest in the world during the gold rush, and that “divorces were naturally looked upon with favor and were freely granted.”^{iv} The plaintiffs were invariably women, whose relative scarcity afforded them a wide variety of options.

American states broadened the grounds for divorce throughout the 19th century, encompassing more and more matrimonial conditions. By 1900, most states had adopted four major elements of divorce law: “fault-based grounds, one party’s guilt, the continuation of gender-based marital responsibilities after divorce, and the linkage of financial awards to findings of fault.”^v

Divorce rates in the United States and in other Western countries have been climbing steadily since 1860. There was a large jump in the U.S. rate after World War II, a period of stability in the 1950s, an increase from 2.1 per 1000 people in 1958 to 2.9 in 1968, and

² Approximately 75 percent of Americans divorced during the last 25 years remarried.

a peak of 5.3 in 1979, followed by a decline to a recent rate of 4.5 per 1000.^{vi} (See charts detailing U.S. and California³ divorce rates in Section II.)

A wide variety of contributive factors have been studied. One analysis finds that three factors have generally been used to explain the increase: "...easier access to divorce, married women's employment, and changes in social values."^{vii} For example, some researchers suggest that the last decades' decline in the divorce rate may be due in part to "a rise in the median age of first marriages and the aging of the baby boom generation."^{viii} Some commentators assert that legal changes relative to fault had a minimal, short-term impact on divorce rates; others contest this view. (See Section VII.)

Variable residency requirements appear to affect state (although perhaps not national) divorce rates. When Connecticut's residency requirement decreased from three years to one year during the 19th century, the state became a preferred location for quick divorces. Similarly, the immediate increase in California divorce rates after the 1969 enactment of no-fault divorce has been attributed principally to decreases in the state's residency and time-to-final decree requirements, from one year to six months.⁴ These changes lessened Californians' incentives to travel to Nevada for a quick divorce.

In 1969, prior to the enactment of the Family Law Act, California law specified the following seven grounds for divorce or separate maintenance: adultery, extreme cruelty, willful desertion, willful neglect, habitual intemperance, conviction of a felony and incurable insanity. California's enactment of the first no-fault divorce law,⁵ which limited the grounds for divorce to irreconcilable differences and incurable insanity, "...launched a legal revolution."^{ix} The law was the result of several years of debate and analysis, and only partially encompassed the recommendations of the 1966 *Report of the Governor's Commission on the Family*, which envisioned a comprehensive Family Court. (See "Introduction" of the *Report* in this section.)

Nearly every state enacted some form of non-fault divorce in the following decade. A 1985 review found that 18 states had enacted "pure" no-fault divorce laws, of which 14 made marital breakdown the only ground for divorce: Arizona, California, Colorado, Florida, Hawaii, Iowa, Kentucky, Michigan, Minnesota, Montana, Nebraska, Oregon and Washington.^x Three other states (Kansas, New Mexico and Oklahoma) made "incompatibility" the only ground for divorce. Twenty-two states added the no-fault standard of "marital breakdown" to existing fault-based grounds for divorce. (See *National Survey of State Laws*, "Grounds for Divorce," in this Section.)

³ California has not collected divorce statistics for almost 20 years; more recent data is from surveys and the U.S. Census.

⁴ The California Department of Health Services estimated that, "...from 93 to 100 percent of the excess marriage dissolutions in 1970 and 1971 can be accounted for by the shortened minimum waiting period." *Marriage and Marriage Dissolution in California, 1966-1973*, Department of Health Services, p. 21.

⁵ The Family Law Act was effective January 1, 1970.

Divorce rates vary by region: “In 1986, the no-fault West and fault-oriented South had almost indistinguishable divorce rates of 5.6. and 5.5 respectively, while the mixed Midwest had a rate of 4.4 and the more fault-oriented Northeast a rate of 3.6.”^{xi}

Table 1 details the change from a fault-based system of contestable divorce, tied to one party’s guilt and linked to continuing financial obligations, to a no-fault “petition for dissolution” which does not require the consent of both parties and is based on “irreconcilable differences.”

Table 1
Summary of Changes in Divorce Law

Traditional Divorce	No-Fault Divorce
Restrictive Law To protect marriage	Permissive Law To facilitate divorce
Specific Grounds Adultery, cruelty, etc.	No grounds Marital breakdown
Moral Framework Guilt vs. innocence	Administrative framework Neither responsible
Fault One party cause divorce	No fault Cause of divorce irrelevant
Consent of Innocent Spouse Needed Innocent spouse has power to prevent or Delay the divorce	No consent needed Unilateral divorce No consent or agreement required
Gender-based responsibilities Husband responsible for alimony Wife responsible for custody Husband responsible for child support	Gender-neutral responsibilities Both responsible for self-support Both eligible for custody Both responsible for child support
Financial Awards Linked to Fault Alimony for “innocent” spouse Great share of property to “innocent” Spouse	Financial Awards Based on Equality and Need Alimony based on need Property divided equally
Adversarial One party guilty, one innocent Financial gain in proving fault	Nonadversarial No guilty or innocent party No financial gain from charges Amicable resolution encouraged
Source: Lenore Weitzman, 1985, page 40	

ENDNOTES

ⁱ Roderick Phillips, *Putting Asunder; A History of Divorce in Western Society*, Cambridge University Press, 1988, p. 314.

ⁱⁱ Phillips, p. 440.

ⁱⁱⁱ Phillips, p. 442.

^{iv} Carey McWilliams, *California, The Great Exception*, A.A. Wyn, New York, 1940, p. 82.

^v Lenore Weitzman, *The Divorce Revolution*, The Free Press, 1985, p. 7.

^{vi} Ira Mark Ellman and Sharon Lohr, "Marriage as Contract, Opportunistic Violence, And Other Bad Arguments For Fault Divorce," *University of Illinois Law Review*, 1997, 719. Other commentators cite different figures, although the trend is the same. See, for example, Patricia H. Shiono and Linda Sandham Quinn, "Epidemiology of Divorce," *The Future of Children: Children and Divorce*, Vol. 4, Number 1, Spring 1994, The Center for the Future of Children, David and Lucile Packard Foundation, p. 18.

^{vii} Phillips, p. 620.

^{viii} Ellman and Lohr, p. 726.

^{ix} Weitzman, p. x.

^x Doris Freed and Timothy Walker, "Family Law in Fifty States: An Overview," *Family Law Quarterly*, Vol. 18, Winter 1985, as cited in Weitzman, p. 41.

^{xi} Ellman and Lohr, p. 726; data from the National Center for Health Statistics.

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Report
of
THE GOVERNOR'S COMMISSION
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EDMUND G. BROWN
Governor

December 1966
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Introduction

The Governor's Commission on the Family was established by Governor Edmund G. Brown on May 11, 1966, to begin what he termed a "concerted assault on the high incidence of divorce in our society and its often tragic consequences." Noting that "the time has come to acknowledge that our present social and legal procedures for dealing with divorce are no longer adequate," the Governor charged the Commission with four principal responsibilities: First, to study and suggest revision, where necessary, of the substantive laws of California relating to the family; second, to determine the feasibility of developing significant and meaningful courses in family life education, to be offered in the public schools; third, to consider the possibility and desirability of developing uniform nationwide standards of marriage and divorce jurisdiction; and fourth,--and perhaps most important--to examine into the establishment of Family Courts on a statewide basis, and to recommend the procedures whereby they may function most effectively.

Following the Governor's charge, the Commission recommends, in essence, the creation of a statewide Family Court system as part of the Superior Court, with jurisdiction over all matters relating to the family. The Family Court is to be equipped with a qualified professional staff to provide counseling and evaluative services. We recommend that the existing fault grounds of divorce and the concept of technical fault as a determinant in the division of community property,

support and alimony be eliminated, and that marital dissolution be permitted only upon a finding that the marriage has irreparably failed, after penetrating scrutiny and after the parties have been given by the judicial process every resource in aid of conciliation. We recommend that a neutral petition be substituted for the present adversary pleading by complaint and answer. In short, it has been our goal to establish procedures for the handling of marital breakdown which will permit the Family Court to make a full and proper inquiry into the real problems of the family--procedures which will enable the Court to focus its resources upon the actual difficulties confronting the parties, and will at the same time safeguard their rights and preserve the confidentiality of the information thus acquired.

In responding to the Governor's call for substantial, if tentative, recommendations by the end of the year, the Commission has found it necessary to establish priorities and to focus its efforts upon the first and fourth points above--the revision of the substantive law and the creation of a Family Court--and to reserve for future study the areas of premarital and family life education and the development of uniform standards. The magnitude of our tasks and the severe limitations of time have precluded the working out in fine detail of all facets of the proposed Court's operation and of all the needed changes in the substantive laws. Large areas have had to be excluded from concentrated study: among them, adoption; legitimation; emancipation; abandonment; the conflicts-of-laws aspects of marital dissolution, child custody

and support; a number of points concerning community property; and the working out of the jurisdictional intricacies between the existing Juvenile Court and the proposed Family Court. The problems in these fields must be left to a future commission or other group, but we would emphasize our conviction that attention should be given to them.

In order to meet its responsibilities, the Commission organized subcommittees to develop and report to the full body upon each point of the charge. The complexity of the subject matter demanded the simultaneous development of those areas deemed by the Commission to be most immediately pressing, and for this reason no public interim reports of our progress have been made. The Commission met in full session on ten occasions; the principal subcommittees met on the average of once per week.

The Commission has relied heavily upon preparatory studies made by other groups, particularly the Assembly Interim Committee on Judiciary, whose work spanned more than a year and whose Final Report Relating to Domestic Relations formed our point of departure. Additionally, we have sought the views of interested groups and individuals, both professional and lay, on the issues being considered. We are grateful to, and in the debt of, too many persons to permit their individual mention, but in this connection, we must express our particular thanks to Dr. David Crystal, representing the Greater Bay Area Council of Family Service Agencies, who gave so unstintingly of his time and energy in assisting the Subcommittee on the Family Court.

I. FINDINGS AND RECOMMENDATIONS

The Family Court

In the last fiscal year, 99,827 actions for divorce, separate maintenance, and annulment were filed in California's Superior Courts. ⁽¹⁾ Projected estimates for the present year approach 110,000, and family matters (even excluding actions brought in Juvenile Courts, guardianships and the like) comprise well over fifty percent of all civil litigation.

As Governor Edmund G. Brown said in his charge to the Commission:

"Whatever the cause of the growing divorce rate--the anxieties in our world, a society of rootlessness and increasing mobility, an erosion of the moral absolute--divorce produces not only broken homes but broken lives. It erodes the very foundation of our society, the family...Society is paying an almost intolerable price for this breakdown of family life--in terms both of human misery and of public financial resources."

There is a high correlation between family disruption and the rate of crime and juvenile delinquency, and it has become increasingly apparent that our legal procedures for handling family difficulties are simply not adequate to the vast tasks of dealing with the complexities of family breakdown, which these figures reflect.

The Commission is convinced that if we are to begin to cope with this burgeoning problem, our legal processes must be such as to permit a thorough examination into the real difficulties of the families before the Court. If the goal of the law is--as we believe it must be--to further the

stability of the family, then the process of dissolving a marriage must be carried out in such a setting and in such a manner that the Court can fully inquire into the problems before it, and can bring to bear professional resources to ameliorate them. In short, the law cannot operate blindly; it must be able to act with an eye to the whole family situation, not just that of two parties. It must be able to take account of the total impact of the marital breakdown: upon the spouses, upon their children, and upon society as a whole.

In recent weeks, we have witnessed the spectacle of a sister state and a neighboring country jousting over which can provide the easiest marital dissolution, and we have seen the Bar of that sister state seeking a speed-up of the process of divorce, attempting to make it more expedient by permitting it at the mere behest of one party alone, without so much as a cursory glance at any social implications and for the avowed purpose of increasing its own revenue. ⁽²⁾

And, it must be said, attacks upon the legal process have not been the end of the matter. A not-insignificant (and growing) body of thought urges that the entire notion of marriage and, especially, of the family is an archaism unsuited to the pace of the present day. Proponents of this view note the transfer of the responsibility for care of the aged to institutions, and urge the same for children, saying that society must encourage the development of alternatives to marriage and the family. ⁽³⁾

As the disrepute of the law in handling family problems has increased, it has helped, we believe, call into question

the entire institution of marriage and the family.

We are convinced that this is fundamentally wrong and that we must begin--however late--to face realistically the fact that in its present state the legal process represents by its ineptitude an abdication of the public interest in, and responsibility toward, the family as the basic unit of our society. The direction of the law must be, as we have said, toward family stability--toward preventing divorce where it is not warranted, and toward reducing its harmful effects where it is necessary.

Upon this conviction, the Commission has taken as its principal duty the development of a system of judicial procedure which will deal with the troubles of a family in a comprehensive way, and which will insofar as possible reduce the friction and destructive hostility which are engendered by the present adversary process and the concept of fault as a determinant of divorce and its consequences.

To paraphrase a recent study, if a marriage is viable, it is the job of the Court, through any available personnel, to afford the parties what help they need and the Court can give. If the marriage has irretrievably foundered, then it must be the goal of the Court to aid the litigants to respond as maturely as possible to the difficult experience of the divorce. If the procedure, by "relieving tensions, or offering comfort or interpretation," can enable the litigants to respond less hysterically or vindictively and more reasonably to the experience of divorce, the legal issues can be more intelligently and constructively analyzed by the Court and counsel, and the

Court may more easily develop final orders which will operate to the best interests of the parties--and children--involved. (4)

We have concluded that under our existing system for handling domestic relations matters, this sort of treatment is virtually impossible. Family cases are likely to be fragmented among several different divisions and departments of the same Court, and there is not--and cannot be--any unified approach to them. It is not at all unusual that, in a given case, there may be simultaneous actions on the law and motion and domestic relations trial calendars, in the Juvenile Court, and in the Probate Court. All involve related aspects of a single troubled family, yet each is likely to be treated and disposed of as a single separate controversy. One hand does not know what the other is doing. At no point are the scattered pieces brought together and viewed as a whole, and we believe that this is essential if our legal institutions are to be functionally appropriate to the end they seek. As the late Dean Pound said, "The several parts are likely to be distorted in considering them apart from the whole, and the whole may be left undetermined in a series of adjudications of the parts." (5)

This distressing picture, it must be said, is not peculiar to California, and society is becoming increasingly disturbed about the failure of the law to provide adequate and realistic means for the handling of family problems. In a recent Time essay, it was said:

"...The laws that govern marital dissolution in the U.S., however, are not only widely conflicting and confusing...but are based on notions that are out of touch with the changing realities of modern society. Most of them tend to embitter spouses, neglect the welfare of the children, prevent

reconciliation and produce a large measure of hypocrisy, double-dealing and perjury..." (6)

The director of the American Association of Marriage Counselors, David R. Mace, is quoted as calling the present divorce laws "an absolutely ghastly, dreadful, deplorably messy situation," and the essay remarks that, nationwide, there is an urgent and increasing cry "to reform and humanize the divorce system." (7)

We recommend, therefore, that the procedures for handling family problems be reconstructed, and that there be created in each county a Family Court, as a part of the existing Superior Court, which would have full jurisdiction over all matters relating to the family. These would include marriage; legal separation, declarations of nullity, and dissolution of marriage; child custody and support; alimony and the division of community property; paternity and legitimation of children; adoptions; emancipation of children; guardianships of the persons of minors and incompetent persons; approval of contracts for minors' services; relations between parent and child; matters now handled in the Juvenile Courts; and any other cases which involve the legal relationships between members of a family unit. Because the time available to the Commission precluded a thorough working out of the jurisdiction of the present Juvenile Court and the proposed Family Court, we recommend that the existing Juvenile Court Law be carried over and that the Juvenile Court function as one division of the Family Court. (See Sections 007 and 007a of the Proposed Draft of the Family Court Act.) Any further revisions of the existing law must await future study.