

---

---

---

# Historical Perspective and Current Trends in the Legal Process of Divorce

Sanford N. Katz

## Abstract

*Sanford N. Katz, J.D.,  
is professor of law at  
Boston College Law  
School.*

Over the past 30 years, the legal status of husbands and wives in marriage has undergone major changes with the result that wives are now beginning to have more of an independent legal identity than in the past and, to some extent, more of an equal relationship with their husbands although full equality has not yet been achieved. At the same time, divorce laws and policies have consistently moved toward a view of marriage as an economic partnership and away from the concept of marriage as a status totally regulated by the state and dominated by the husband. This trend has produced significant changes in the statutes, which have, to a certain extent, limited judicial discretion regulating the assignment of marital property and the awarding of alimony upon divorce. These changes have given more consideration to the contribution of wives to the marital enterprise and to the financial needs of children. In addition, recently there has been a movement toward legislating how couples divorce, particularly with regard to their ability—with or without the assistance of counsel—to conclude their divorce with minimal official action. This article explores the trends toward the equality and legal autonomy of husbands and wives in marriage and in the divorce process with particular emphasis on methods of allocating marital property and on new and simplified procedures for divorce.

**A**merican divorce laws and the process by which they are implemented have undergone enormous changes during the past half century. The reasons for these changes are complex but essentially have a great deal to do with changes in the nature, idea, and definition of family relationships—especially that of husband and wife—changes in the social mores, shifts in the political climate as a result of the impact of various of the civil rights movements, and changes in the legal profession.<sup>1</sup> Some laws that have changed regarding the process of divorce are mentioned below. Many of the topics that are discussed in this article also receive more in-depth attention in various articles throughout this journal issue. (A topic that is not addressed below is changes in child custody laws. For a complete discussion of this topic, see the article by Kelly in this journal issue.)

## Changes in the Definition of Marriage

Today one legal definition of marriage as being an economic partnership, although not necessarily of equals, is quite different from that which considered the relationship one of "status," totally governed by state laws which favored the husband.<sup>2</sup> Until the past 30 years, no serious thought could be given to a couple's formally defining the internal workings of their own marriage and family responsibilities with the expectation that the state would sanction them.<sup>3</sup> With regard to legal matters external to the relationship, the state, probably manifesting the hierarchical nature of marriage, treated marriage as "one," and that one was the husband. Basically, a married woman's legal identity was submerged in her husband's. For example, only about 25 years ago, upon marriage, a wife assumed her husband's domicile (permanent state residence), not because she had any choice in the matter, but because the law required it even if she had never lived in her husband's state.<sup>4</sup> She assumed his name, again, not because she alone or with her husband chose it, but because of custom and, in some states, by law.<sup>5</sup> Simple matters like acquiring credit through a credit card, taking title to real estate (like the marital home), or registering to vote could not be accomplished unless both husband and wife shared the same last name.<sup>6</sup> Although there may have been no legal basis for some of these rules, the custom was established by the actions of officials (like clerks in courts or in city halls), and these actions took on the appearance of law. To change the official pattern, a woman would have to initiate some legal action like seeking an opinion of the state attorney general on the legality of some official's conduct or suing the official and requesting the court to order the official to make the necessary changes in a record.

The internal (that is, personal) relations between husband and wife during marriage also reflected a dependent and

subordinate role of the wife (which the law sanctioned) rather than one of equality.<sup>7</sup> A wife's role was to be at home, raise children, contribute to the marital enterprise, and basically obey her husband. Obedience was synonymous with submission. Thus, a married woman could not be raped by her husband because a wife's body belonged to her husband.<sup>8</sup> The remedy for physical abuse was divorce; yet except for using cruelty as a ground for a divorce (which was not easy to prove), there were few legal opportunities for a wife to obtain relief from her husband's brutality.<sup>9</sup>

Changes began to occur in the 1960s (with the mandatory child abuse reporting statutes) which limited the notion that family privacy was supreme and not open to public intrusion. That is to say, before the 1960s, relations (namely, how people conducted themselves) between husbands and wives and parents and children were considered to be private, not public, matters. Family violence statutes enacted within the past 25 years changed the private nature of family relations. They provide a wife with a civil remedy to protect her from an abusive husband.<sup>10</sup> Child abuse and neglect statutes of various kinds allow for public intervention into the parent-child relationship to protect children.<sup>11</sup> It can no longer be said that American law so insulates a family from public scrutiny that all forms of violence can occur with legal impunity.<sup>12</sup> Of course, the violence must be discovered and someone must take action by seeking the assistance and cooperation of the appropriate official agency.<sup>13</sup>

## Divorce Procedure

### The Shift from Adversarial to No-Fault Divorce

Until the introduction of no-fault divorce, American divorce procedure had been and, in instances where the action is for a fault, still is based on the adversarial model. This model assumes protagonists: each party, free of fault, suing the other in

court. American law has never adopted a transactional approach to divorce which would allow a husband and wife to enter into a private divorce agreement without any official involvement (like a judge or a court clerk) at all.<sup>14</sup> With the adversarial model came a body of law based on English equity principles.<sup>15</sup> For example, under a fault system, among other limitations, divorces could not be consensual, and a divorce could be defended and defeated because of the conduct of the plaintiff (the moving or petitioning party). Further, years ago, if both plaintiff and defendant were guilty of fault, theoretically, unless changed by statute, neither could get a divorce.<sup>16</sup> The old English adages applied in divorce: one must do equity to receive equity, and one must come into court with clean hands. Divorce actions have been described as resembling those for torts (civil wrongs). To recover in tort, one must show that one was not at fault or has not contributed to the wrong.

---

***Fault-based divorce . . . not only affected the grounds for obtaining a divorce but also influenced the assignment of children and property.***

---

When a fault-based system of divorce was the exclusive method of obtaining a divorce, evidence for formally proving grounds—for example, cruelty or adultery—was critical. If the ground was not proven, no divorce could be granted. Because of the strict requirements for cruelty and adultery, the grounds were often difficult to prove unless there was secret collaboration with the defendant. In the case of adultery, which was the only ground for divorce in New York until 1967,<sup>17</sup> it was not uncommon for a spouse to fake an adultery scene. The situation was so bad in New York that, as early as 1945, the Committee on Law Reform of the Association of the Bar of the City of New York recommended divorce reform to the state legislature. A portion of the report read: “We . . . urge a liberalization of the divorce laws under proper legal sanctions. We do so in the hope that we may thus eliminate what has come to be recognized as a scan-

dal, growing out of widespread fraud, perjury, collusion, and connivance which now pervade the dissolution of marriages in this State.”<sup>18</sup>

In states where there were a number of divorce grounds and a judge wanted to grant a divorce but was not presented with persuasive evidence, he or she might interpret the ground for divorce broadly, for example by interpreting the ground of cruelty (which customarily required some evidence of physical force) to mean emotional or mental distress without any physical manifestations such as a slap or a punch. The result was that divorce cases were often considered illustrations of two processes occurring at the same time. On the level that could be observed in court, there was the formal process of a divorce case: lawyers and litigants going through the motions of a civil law suit. On another level, there was private understanding between lawyers and litigants that there would be a certain amount of lying and perjury. Because of this mutual pretense, divorce practice was considered to be low level, and judges assigned to hear divorce cases were often thought to be part of the legal charade. Thus, they were not very competent and had little respect for the legal system.<sup>19</sup>

Fault-based divorce, the model that existed in the United States for years and still exists (in some instances side by side with no-fault) in about 30 states,<sup>20</sup> not only affected the grounds for obtaining a divorce but also influenced the assignment of children and property.<sup>21</sup> It was hard to separate the evidence for proving a ground like cruel and abusive conduct or adultery from the litigation over who was assigned custody of what child and how much a spouse would have to be paid in alimony. At least one state, Florida, by statute denied a woman alimony if she was proven to have committed adultery. And appellate case law is filled with cases in which a spouse is denied custodial rights in the first instance or after a modification hearing on the basis of moral turpitude.<sup>22</sup>

During the 1960s and early 1970s, the legal profession and state legislatures came to realize the deplorable state of divorce laws and practice.<sup>23</sup> Respect for divorce law and procedure, if there ever really was any, had declined. Reform was needed not only in terms of changing substantive laws, like grounds for divorce, but also with regard to the process of divorce.

The thought was that the law should not mask deception but should, as far as possible, reflect reality. It was at this time that the Governor's Commission in California found that the fault-based divorce laws in effect in California were no longer viable and should be replaced with laws that allowed a divorce without a showing of fault. Thus, in 1969, California became the first state to implement a divorce law without any fault-based grounds for divorce. Although, because of strong resistance from some segments of society, only a few states have entirely done away with fault as a basis for divorce, all 50 states have enacted some type of no-fault provisions as part of their divorce laws.<sup>24</sup> Whether a client chooses a fault or no-fault divorce depends on the facts of the case and the laws specific to fault and no-fault divorces.

At the same time that no-fault divorce laws were being enacted, a major procedural reform was taking place: changes in residency laws. Prior to 1970, it was not uncommon for a state to have a one- or two-year residence requirement before a person could file for divorce. The idea behind such residence requirements is that a state should have an interest in the status of a marriage before it allows its courts to be used for dissolving that marriage. In addition, residence requirements provide a certain amount of time to consider divorce. Further, for practical reasons, long residence requirements, like two years, act as a deterrent to divorce and reflect a policy of marriage being a serious undertaking, not easily dissolved.<sup>25</sup> Nevada, with a short residency requirement of six weeks, had the dubious distinction of being the "divorce mill" state, and "the road to Reno" became another way of saying "the road to divorce."<sup>26</sup>

Reducing the length of time a person must live in a state before he or she may petition for a divorce is a reflection of that state's view of marriage and divorce. The longer the residence requirement, the more likely it is that the state views marriage as a serious institution worth preserving. In addition, a long residency requirement discourages persons not having lived in the state for a certain length of time from seeking a divorce there. The theory, rightly or wrongly, is that a state has an "interest" only in marriages of its domiciliaries. The general view has been that a divorce action should not be like a tort action. A tort action (a transitory action) allows the damaged party

(plaintiff) to sue the wrongdoer (tortfeasor) wherever he or she can be found. No state takes the position that divorce should occur in a state that has no contact with the marriage at all, although the statutory trend seems to be clearly in the direc-

---

*It is an oversimplification to say that once a no-fault system of divorce is in place, the idea of fault is abandoned.*

---

tion of shortening the time necessary to live in a state before one can sue for a divorce.<sup>27</sup> As more and more states either relax their grounds for divorce or adopt a liberal no-fault system, the need to leave a state to get a divorce—what the law terms (with negative connotations) migratory divorce—becomes less and less important.

#### **No-Fault Divorce**

It is an oversimplification to say that once a no-fault system of divorce is in place, the idea of fault is abandoned. It is important to note that there are two kinds of no-fault divorce statutes: those that allow one of the spouses to contest the claim that the marriage is "irretrievably broken" or that the spouses are "incompatible," and those that do not allow any contest. In the first kind, if one spouse claims that her marriage is "irretrievably broken" and her husband claims it is not, the wife must prove her allegation by what amounts to factors that might have been satisfactory to show a fault ground.<sup>28</sup> Where there is no contest, one spouse's allegation of "incompatibility" might be sufficient for a judge to grant a divorce. The pure no-fault model—that which does not provide for a contest—basically allows one spouse to leave the marriage at will. It also minimizes the role of the judge.<sup>29</sup> But it must be emphasized that no-fault in this context only operates to terminate the marital relationship. It does not affect the assignment of property or the custody of children, both of which are separate issues.

There has been a great deal of discussion in the academic literature as to the effect of no-fault divorce on the divorce process and on society as a whole. It is generally believed that no-fault divorce has decreased the acrimony and hostility between the spouses and civilized the

process.<sup>30</sup> There is no more need for charades. Two questions have been raised with regard to the social implications of no-fault divorce. The first concerns the rate of divorce: Has the advent of no-fault divorce increased the divorce rate? A second question is whether a pure no-fault divorce economically favors one spouse over another. There is no clear and simple response to the first question. Most researchers have concluded that there is little if any causal relationship between the introduction of no-fault legislation and the rise of divorce even though, during the years in which this legislation was enacted (1970 to 1975), there was a substantial increase in the number of divorces, from 2.5 per 1,000 population in 1965 to 3.5 per 1,000 in 1970 and 4.8 per 1,000 in 1975.

The explanation most frequently given for stating that no-fault legislation had little effect on the divorce rate is that fault laws were ineffectual and were not complied with anyway. Thus, removing fault provisions or adding a no-fault provision would have

little impact on the number of divorces rendered. One scholar who has reviewed the significant research in the field and conducted his own inquiry differs from the conventional view.<sup>31</sup> He found that in 31 states there was a correlation between the no-fault divorce legislation and the rate of divorce. However, he could give no clear explanation as to the reason. There are too many variables, including individual states' residency requirements and the actual no-fault standard in each state, as well as a particular state's political, social, and cultural make-up. He has written that "it is not feasible to discern why some no-fault laws did and others did not affect the divorce rates. . . . There is a sizable gray area in which individual laws may or may not have impacts."<sup>32</sup> In other words, it appears that the most accurate statement that can be made is that no-fault divorce laws apparently stimulated divorce in some states but failed to do so in others.<sup>31</sup>

As to whether no-fault divorce favors one spouse or another, again it can be said that it is not absolutely clear whether this is so or not. One researcher has maintained that, at least in California, divorced women are economically worse off than their divorced husbands, perhaps because judges, using their discretion, have awarded inadequate support orders.<sup>33</sup> A more recent study concludes that the effects of no-fault on the economic condition of divorced women "were either modestly benign or neutral."<sup>34</sup>

While no-fault divorce may not have a major adverse effect on women, this does not mean that the same can be said about divorce itself. There seems to be no dispute in the literature about divorce's negative effect on women.<sup>35</sup> The reasons for this latter phenomenon have much to do with the fact that the social and financial position of the wife, who usually has custody of the children, tends to be frozen at the time of divorce, while the husband's position is more fluid. In other words, a working husband may have his alimony and child support payments calculated on the basis of his existing job at the time of divorce. There may be little or no consideration of his future finances such as his working overtime, receiving a promotion, or taking a second job. If any of these eventualities do occur and a divorced wife needs additional support for herself and her child, she must seek a modification of her alimony decree and child support order on the basis of "changed circum-

stances.”<sup>36</sup> However, such modification actions would require her to obtain counsel, collect evidence, and secure a hearing date. Doing so takes money and time, namely to pay a lawyer and to obtain a date for a hearing.

If a divorced wife chooses to work outside the home after divorce, she may find that her years out of the commercial work force have put her in an economically disadvantageous position compared with men and women who did not leave the labor force to raise children.<sup>37</sup> Divorced husbands do not necessarily have the same experience. In fact, men who stayed in the work force throughout their marriage may have more opportunities to increase their income by taking advanced training in their particular career and being promoted. In addition, men tend to remarry more quickly than divorced women and may benefit financially from their new wives, especially if they are women working in the commercial world. (For further discussion of no-fault divorce, see the article by Carbone in this journal issue.)

## Specific Aspects of Distribution of Economic Resources

With the inclusion of no-fault divorce in American law, the emphasis in a divorce case has shifted from determining and proving fault grounds for divorce to determining what are marital assets and how they should be assigned. For the most part, the economic aspects of divorce constitute the main concern in divorce negotiation in lawyers’ offices and the major time in litigation. Divorce that involves a couple with substantial financial resources has become so complex that, in order to prepare for such a case, lawyers must hire not only accountants but experts in special types of valuations, such as those who specialize in valuing the position (including benefits and advancement possibilities) which a spouse holds and the industry in which a spouse’s business is located. The reason for this change in divorce practice and litigation is that marriage is now considered an economic partnership in which each spouse may have an interest in the other spouse’s business or career.

### Property Distribution

Two kinds of marital property systems have existed side by side in the United States: the common law system and the

community property system.<sup>38</sup> The common law property system is based on evidence of title. In other words, under the common law property system, the motto “He who holds title takes the property” has a ring of truth to it. Under the community property system, found in nine states in the western and southwestern part of the country, the distribution of marital property (accumulated during marriage) upon divorce is theoretically based on the principle that each spouse owns an undivided one-half interest in each community property item. While four of the community property states seem to conform to the fifty-fifty split (assuming there has not been a prenuptial agreement that assigns property according to a different formula), the other five incorporate equitable distribution principles (that is, a judge considers the equities of a case) which may result in a different formula than an equal split.<sup>39</sup>

In the past 20 years, there has been a major decline in the number of states that either by statute or by case law adhere to the old common law property system. In fact, only North and South Dakota lack a statutory scheme deviating from the title theory of marital property.<sup>40</sup> Now, the prevailing method of assigning marital property upon divorce is called equitable distribution. Basically, equitable distribution has changed the nature of the judicial inquiry when making an assignment of property. Instead of asking who holds title, the questions asked are: What is considered marital property regardless of title?

---

*With the inclusion of no-fault divorce in American law, the emphasis in a divorce case has shifted from determining and proving fault grounds for divorce to determining what are marital assets and how they should be assigned.*

---

Who has contributed to the acquiring of that property? Who has helped to enhance its value or who has depreciated the property? When should it be valued (for example, at the time of separation, of initial court petition for divorce, or of the divorce trial) and what is its value? Who should be assigned it? A whole body of law has developed to give courts guidance in answering these questions, but the fundamental as-

sumption of equitable distribution is that marriage is an economic partnership in which there is a shared enterprise. In some respects the modern American marriage is an investment which, at times, pays off (in a long and productive relationship) and, at other times (divorce), does not.

More than a decade ago, marital property was thought of as mainly tangible items like a house, an automobile, a painting, or cash in the bank and investments. Today, the definition of marital property goes beyond these items to include less obvious ones like, for example, pensions, interests in a spouse's business, reputation, or career.<sup>41</sup> The reason for this phenomenon has a great deal to do with the changes that have occurred in society. That is, for most Americans today (although this may be changing because of the current economic recession and companies' downsizing their work forces) one's job—the work place—generates one's property, not one's family (by way of inheritance).<sup>42</sup> Thus, instead of accumulating wealth in investments in land and in stocks and bonds, and inheriting money from relatives, most Americans derive their assets and status from their employment. In addition, economic contributions to the marital enterprise are not limited to those directly created by employment outside the home (such as a salary) but by contributions made within the home itself. Thus, in the context of a divorce, a value may be placed on a wife's

---

*Economic contributions to the marital enterprise are not limited to those directly created by employment outside the home.*

---

(or husband's) household services, which include caring for the marital house and raising children. The percentage of the marital property awarded to a spouse who performs household services during the marriage and does not work outside the home varies according to the facts of the case.<sup>43</sup> One state considers homemaker services only to the extent that they contributed to "the acquisition, preservation

and maintenance, or increase in value of marital property."<sup>44</sup>

The nature and provision of equitable distribution statutes vary from state to state. Basically state statutes contain a list of factors that a court must consider to properly determine the assignment of property.<sup>45</sup> One goal of enacting such legislation was to provide guidance to judges. A second was to provide some uniformity in decisions. Although at first blush stating factors that must be considered for making an assignment of marital property might seem to be a method to limit judicial discretion, the history of the application of state statutory provisions has not proved this to be true. In other words, even though judges are governed by statutory provisions, there is still wide discretion in interpreting statutory factors and applying them to a particular situation. In fact, one commentator has gone so far as to label equitable distribution as "discretionary distribution of property."<sup>46</sup>

The factors that are considered in the assignment of property are not weighted equally. Nor does an equitable distribution provision provide a formula. The statutes merely state that certain factors are to be considered, thus allowing the judge to set his or her own priority of importance. Some attempts have been made to create either a presumption of equal division or a fifty-fifty starting point for division. A handful of state statutes contain a presumption that marital property will be divided equally. At least two states have provisions which contain presumptions that the contribution of each spouse to the acquisition of property during the marriage is equal or at least substantial.<sup>47</sup>

We have had nearly a quarter of a century of experience with some form of equitable distribution. Has the existence of statutory factors reduced judicial discretion? What trends can be discerned? Equitable distribution legislation has limited judicial discretion to some extent but certainly has not eliminated it.<sup>48</sup> A review of the statutes and case law suggests that, absent statutory guidance, courts are generally more likely to divide property equally in long-term marriages (fifteen years and longer) and, conversely, less likely to presume equal division for short-term marriages (one to three years).<sup>49</sup>

The assignment of property upon divorce is only part of the economic consequences of divorce. Alimony and child

support are additional financial considerations. Both have undergone major changes in the past 30 years.

### Alimony

Until the passage of the Married Woman's Property Acts in the mid-nineteenth century in the United States, a woman's property became her husband's upon marriage. A husband, then, had the duty to support his wife during marriage. Upon divorce that duty continued under the legal term *alimony*. It was customary to say that alimony was based on a balance between the husband's ability to pay and the wife's needs. English legal history reveals that the amount of an alimony award was based on the station of life that the wife enjoyed during her marriage and, to some extent, on the value of the property she lost control over and which the husband acquired upon marriage.<sup>50</sup> Unlike today's equitable distribution laws, which include factors for a judge to consider in assigning property,<sup>45</sup> before the enactment of these laws, there were no standardized statutory guidelines, which resulted in judges' using their own discretion in making awards. At that time, no thought was given to the now-accepted idea that a wife may have contributed something of value to the economic well-being of the family (as she did in the past, although this is often lost sight of, by bringing her own property into the marriage) by her household services or by giving up certain opportunities in the commercial work force and that the husband's payment of alimony was really repayment of what was owed to the wife. In other words, today alimony is considered to be a right possessed by a wife, not a privilege that may or may not be judicially recognized.

In reading appellate cases decided more than 30 years ago, it is not unusual to find instances where a wife who divorced her husband after 10 years of marriage (during which time she did not work outside the home) received alimony for the rest of her life. Why was lifetime alimony routinely awarded in the past? One thought is that, if a wife never worked outside the home, she would not have qualified for any benefits like a private pension or Social Security. Thus, if she were divorced without any financial support from her husband and unable to find a job, she would become a public charge. Perhaps, in those old cases (before 30 years ago), alimony could have been

thought of as a substitute for a pension or Social Security except that instead of a pension or government Social Security check, a wife would receive one from her former husband. Another view is that alimony serves as severance pay paid out either in a lump sum or in installments. If one viewed alimony as like either a government benefit or severance check, one would have to think of the marriage relationship as similar to that of an employer and employee with the husband acting as the employer.

Alimony was the economic link that continued a relationship between divorced spouses. That is to say, if a husband had a duty to pay alimony, he was forced to have some kind of relationship with his former wife. In other words, he had to communicate with her, even if it was by

---

*As attitudes toward the role of men and women in marriage as well as the definition of marriage itself changed, so did the concept of alimony.*

---

mailing her a check. If the divorced husband remarried, that fact alone did not ordinarily discharge his alimony obligation. He had to consider his first wife (and first family if he had children) in all his economic planning. Permanent alimony meant that a divorced wife could passively receive her former husband's alimony without any effort to reduce her financial dependency on him. As attitudes toward the role of men and women in marriage as well as the definition of marriage itself changed, so did the concept of alimony.

Today long-term permanent alimony is an unusual outcome of a divorce except in a very long marriage (of 20 years or more), where the wife is not in good health or has been out of the commercial work force for so long that she is now unemployable. In its place is short-term alimony (for a few years to help a wife through the difficult period of postdivorce adjustment) or *rehabilitative alimony*.

Rehabilitative alimony is a phenomenon derived from the application of judicial discretion in alimony cases.<sup>51</sup> The thought is that divorced wives should ac-

tively attempt to reduce the husband's alimony obligation by developing skills to become employable.<sup>52</sup> In a way, conceptualizing rehabilitative alimony in this way suggests the idea of mitigation of damages in contract law—that is, that a contracting party should try to reduce the amount

---

*Today, child support is governed by standardized guidelines to which judges must conform or express reasons for their deviation.*

---

owed her under a contract. In divorce, it would mean that the divorced wife eventually would have to seek employment, and if the wife needed additional education to obtain a position, the husband would support his divorced wife to secure the education.<sup>53</sup> In a way, rehabilitative alimony is designed to take into account the spouse's (usually the wife's) lost opportunities for either education or employment advancement.

### **Child Support**

The process for awarding child support is currently in reform. In the past, the amount of child support awarded was a simple matter of judicial discretion,<sup>54</sup> and court-ordered child support tended to greatly undervalue the true costs of raising children.<sup>55</sup> Today, child support is governed by standardized guidelines to which judges must conform or express reasons for their deviation.<sup>56</sup>

Prior to 1984, when the U.S. Congress passed the Child Support Enforcement Amendments, child support orders very often bore no relationship to the cost of supporting a child, were not complied with after a few years, and were not zealously enforced. For example, child support obligors, mostly fathers, failed to fulfill their support obligation at the rate of \$4 billion annually. In addition, half of the divorced custodial parents did not have a support order to enforce.<sup>57</sup> With no other means of support, divorced women turned to departments of public welfare to assist them in raising their children. This placed an unusually severe financial burden on public welfare agencies and the taxpaying

public. To reduce divorced women's dependency (as mothers) on public funds, the federal government's Child Support Enforcement program provided creative ways of forcing fathers to comply with court orders and, ultimately, to support their families.<sup>58</sup> For example, specific enforcement remedies include wage withholding, imposition of bonds, securities or other guarantees, liens on real and personal property, and interception of federal and state income tax refunds.

Even with the new legal machinery in place and support laws on the books by way of child support guidelines, recent data indicate that a large number of children are still not receiving support from the parent with the obligation.<sup>59</sup> One explanation for this phenomenon is that the custodial parent herself does not seek support because she thinks it would be futile or because she does not want to have to communicate with her former husband.<sup>60</sup> In such cases, if the mother seeks assistance from the welfare department, the department seeks reimbursement from the delinquent father if the father can be found and he has funds. Of course, if the current economic conditions persist and parents with support obligations are unable to find employment, nonsupport of children will continue to be a major social problem as well as a drain on public welfare funds.

In the present economic climate, judges have a difficult time arriving at an economic balance between the divorced spouses when there just are not enough finances to support the reorganized family. Attempts are made to preserve some assets, and where possible and economically practical, the spouse who will be raising the children is assigned title to the family home.<sup>61</sup> Further, child support obligations may not necessarily be abruptly stopped in some states when a child reaches 18 if he or she is in college.<sup>62</sup> (For further discussion of child support awards and enforcement, see the articles by Garfinkel and by Roberts in this journal issue.)

### **Divorce and Decision Making**

Throughout this article, judges and lawyers have been referred to as the major decision makers in the divorce process. This is so because, as stated previously, divorce uses a judicially managed adver-

arial model in a court setting for determining an outcome. The adversarial process for divorce has been subject to major criticisms because it has been thought of as creating antagonists. Use of the term “versus” in the title of a divorce case pits husband against wife. The alternative approach could be to label a divorce case as “In the Matter of the Divorce of Husband (Name) and Wife (Name).”

Is the judicially managed adversarial model always appropriate for divorce? Because, as with other civil matters, the legal costs of divorce have increased dramatically as a result of such factors as attorney’s fees and the costs of hiring experts, there has been a consumer demand both to simplify the divorce procedure and to make divorce available without using a lawyer. In response to that demand, six states (California, Colorado, Indiana, Minnesota, Nevada, and Oregon) have enacted legislation providing for *summary dissolution of marriage*, a form of divorce that does not require the parties to make a court appearance or to use a lawyer (although they may still do so), but merely to file a form with the appropriate government body. The legislation addresses uncomplicated divorce. Thus, as a general statement, it may be said that summary dissolution provisions apply to cases in which the parties have been married for a short length of time, have limited assets, have no children, and mutually desire a divorce. It should be emphasized that summary dissolution is a formal method of terminating a marriage because public documents must still be completed and officially filed and approved. (Indeed, no American jurisdiction permits a private, informal, unregulated contract of divorce.) But unlike the conventional formal adversarial model managed by a judge who makes the decision, in summary dissolution it is the parties themselves who are the principal actors and decision makers, not lawyers or judges.

A development related to summary dissolution is the *simplified divorce procedure*. A simplified divorce procedure (called summary process or divorce by mutual consent in some jurisdictions), unlike summary dissolution, requires a court appearance. However, the divorce is granted on the basis of mutual consent of the parties, rendering the court appearance a mere formality. Such a process also lessens or eliminates the need to procure a lawyer. Some form of simplified divorce procedure

has been adopted by Alaska, Arizona, Connecticut, Florida, Hawaii, Illinois, Mississippi, Montana, Ohio, Tennessee, Washington, and Wisconsin.<sup>63</sup>

Surprisingly, there has been little commentary or analysis concerning summary dissolution or simplified divorce. Therefore, it is difficult to assess how many couples have used these procedures with or without legal counsel. However, the advantages of summary dissolution and simplified divorce are clear. They decrease the costs of obtaining a divorce by streamlining the divorce process and by rendering it less time-consuming both for the divorcing couple and for court personnel. These procedures may be an attractive model for many states to adopt if the costs of divorce continue to rise out of the reach of an increasing number of people.

### Mediation

In complex divorce cases—those in which the custody of children is in dispute and where complicated property issues are to be resolved—divorce by registration or summary dissolution procedures may be inappropriate. A major question is how to resolve complex cases in the most efficient and civilized manner.

---

*In contrast to decisions imposed by lawyers and judges, mediation promotes party self-determination and decision making by consent.*

---

There is no question that people tend to respect decisions in which they have had some input or, at least, the opportunity to be heard and to have presented their views. This is true with regard to complying with laws on a broad scale or making decisions on a personal level. Applying this principle to divorce means that spouses who participate in the decisions about their children and about their finances are more likely to comply with those decisions than are those who have a decision imposed upon them without their having had an opportunity to be heard.

In contrast to decisions imposed by lawyers and judges, mediation promotes party self-determination and decision

making by consent. Although mediation has been a major method of resolving disputes in the labor field as well as in family counseling settings, its use in divorce on such a large scale is relatively new. Its focus in divorce is on resolving a variety of family issues which become crucial for a divorce but may continue to exist in some form or another after a divorce decree is issued. Therefore, unlike mediation in other settings, mediation in divorce must take into account that the parties may continue to have a relationship after the divorce judgment.

The mediation process facilitates the effectuation of a formal agreement in a relatively informal atmosphere using a presumed neutral third party as mediator. The mediator, in helping the parties to come to an agreement, may help clarify issues, suggest possible accommodations and alternatives, assist the divorcing couple to develop their own parental, financial, and property agreements, and help promote decision making within the

---

*Because mediation is non-adversarial, many technical legal issues, like procedure and rules of evidence, are set aside.*

---

family. Mediation differs from courtroom litigation in that it is not adversarial in nature. Instead of each party's retaining a lawyer who advocates for him or her, the parties speak for themselves and there is usually only one neutral mediator.

There are several advantages to the mediation process with an experienced mediator. It may be less expensive and more expeditious than protracted courtroom litigation. Mediation may be a more humane process than an adversarial proceeding and, in some instances, may be better able to discover and address the emotional issues that may be having a negative effect on resolving practical legal problems. Lawyers (especially those who specialize in litigation) in an adversarial proceeding are often accused of actually reinforcing conflict between the parties and creating obstacles to settlement. In some instances, this may be true. Because mediation is nonadversarial, many techni-

cal legal issues, like procedure and rules of evidence, are set aside.

The mediation process in divorce, however, poses a few potential problems. The leading writers in the field suggest that mediation between people of unequal bargaining power tends to lead to agreements reflecting that inequality.<sup>64</sup> Therefore, mediation is particularly appropriate for parties who have already achieved some independence and have relatively equal bargaining power, but may be less appropriate for parties of unequal bargaining power.

The concept of divorce mediation has not yet gained complete acceptance by the general public because many divorcing couples seek lawyers first, and the lawyer's initial response may be to rely on traditional litigation strategies. Generally, the highest level of participation is found in compulsory mediation programs such as those found in California which, in 1980, made such mediation mandatory for contested custody and visitation issues. Today, more than 30 states have such a mandatory mediation requirement. Voluntary mediation programs do not attract a substantial number of participants. This has been attributed to the legal community's somewhat neutral attitude toward mediation and the public's lack of information about mediation as an alternative to the adversarial process. However, researchers find that those who undergo the mediation process achieve a more successful outcome both in the short term and the long term than do their adversarial counterparts.<sup>65</sup> Because parties are often more satisfied with the agreements which they, themselves, have forged through mediation, they are more likely to follow the terms of those agreements than court ordered settlements. Mediation has not met with unanimous approval from the legal community.

When mediation was first suggested as an alternative conflict resolution mechanism, it was criticized by some lawyers, who saw it as an intrusion by nonprofessionals. It was said that, just at a time when divorce was becoming highly complicated because of the newness of equitable distribution, lay people were becoming involved with decision making in the divorce process. How can a nonlawyer know the complexities of marital property laws when lawyers themselves may be unaware of them was one question.<sup>66</sup> Such criticism has waned

as mediation has matured into a conventional method of resolving disputes, and a mediation industry has developed in the metropolitan areas of the country. Lawyers themselves can be mediators (although they may not act as lawyers in the case if they are), and nonlawyers can be trained in the complexity of the law so as to assist spouses properly.<sup>67</sup> (See the article by Kelly in this journal issue for further discussion of mediation.)

Some states have built into their divorce system procedural stoplights in order to attempt to resolve disputes along the way toward an actual trial. For example, in Massachusetts some probate courts have established pretrial conferences which have the effect of trying to reach consensus on divorce matters. These pretrial conferences, led by the judge who will hear the case with lawyers and their clients present, are not meant to mediate the dispute, but are designed to give the judge a fair assessment of where the parties are in their negotiation. The judge can then attempt to have the lawyers reach an agreement on all or certain issues, thus minimizing the length of a trial.

## The Future of Divorce

There seems to be no end to legislative activity insofar as divorce law and procedure are concerned. On one hand, there is a feeling that divorces should be prevented or, at least, made difficult because of the belief that divorce results in a number of social ills including juvenile delinquency.<sup>68</sup> More than 20 years ago, Professor Max Rheinstein responded to conclusions of this sort by writing that it was not divorce that caused social ills, but marriage breakdown.<sup>69</sup> Some legislatures are constantly reviewing substantive laws and procedures in an effort to improve them by making the laws more realistic and the process more efficient.

No-fault divorce is now a part of American jurisprudence. There seems to be no returning to the past when divorce was difficult to obtain because of our reliance on English law that reflected a culture and customs of a different time and place. With no established national church in the United States, where we have a more heterogeneous population than in Great Britain, we are not held hostage to a single religious dogma. Nonetheless, some states in the United States have been dominated by particular

religious groups who have influenced divorce legislation. If the immediate past history of divorce is any indication of the future, reforms will most likely be in the

---

*Some states have built into their divorce system procedural stoplights in order to attempt to resolve disputes along the way toward an actual trial.*

---

direction of further relaxing substantive and procedural laws regarding divorce. However, the requirement of the presence of at least one spouse at the divorce hearing will probably not be abandoned. In other words, divorce by proxy or divorce by mail, either in the United States or in a foreign country, like renewing a license or a passport, will not be attractive alternatives because of our fundamental belief in marriage and family as serious American institutions requiring personal attention and the investment of time and concern. Divorce by registration or summary procedure—the wave of the future—requires the presence of both parties and the involvement of some official who reviews documents and issues a divorce.

Divorce by the conventional adversary method is expensive. The costs of securing a divorce are high because of the present hourly fee of lawyers (in metropolitan areas like New York, Boston, Chicago, Los Angeles, and San Francisco, well-known divorce lawyers charge anywhere from approximately \$125 to \$350 an hour) and the absence of legal aid lawyers who handle divorces. Reports from judges suggest that, at the present time, an inordinate number of litigants are pursuing their cases themselves, that is, acting as their own attorneys—*pro se*.<sup>70</sup> This practice presents difficulties for the court system (because *pro se* cases do not move through the system in an orderly fashion as compared with cases handled by lawyers) and for the judges who, according to judicial ethics, must be neutral and are not allowed to act as counsel to litigants, yet are confronted with the reality that the litigants need assistance. Institutional responses for *pro se* cases are varied. One is to refer the litigants to lawyers who are willing to represent them at a reduced rate. A court in Arizona

features a video that runs continuously and provides litigants with basic information about divorce procedure. Some courts have volunteer lawyers (in the court building) not to represent litigants but to be available to them as consultants or aides.

Just as important as it is to litigants with uncomplicated divorces to provide them with inexpensive and timely divorces, it is vital to those going through a complex divorce to provide a setting that reduces, to the extent possible, the anxiety of getting a divorce. Currently judges and court staffs, despite their knowledge and experience, are often overwhelmed by both the

---

*As substantive family law has become complex . . . divorce law practice has become extremely complicated.*

---

volume and complexity of divorce cases. In many states, a reform movement is under way to establish integrated family courts that would handle the range of family related matters (divorce, child protection, guardianship, domestic violence, etc.) with both specialized staff and specialized services.<sup>71</sup> Whether or not courts are formally integrated to handle family disputes, the goal of creating a court system that is both more accessible and more helpful to families will likely continue to spur court improvements nationwide.

The tension that exists in divorce is that, on one hand, the economic and child custody aspects of divorce are extremely complex requiring the use of traditional procedural mechanisms for discovering facts. On the other hand, there is a desire to simplify, expedite, and reduce the financial and emotional costs of the divorce process by utilizing as many alternative

conflict resolution methods as are appropriate. Additionally, family courts can serve as a community-based institution that coordinates all legal matters dealing with the family in a holistic manner. That is, it can provide necessary social and psychiatric services that may be incident to the divorce on the site of the court. It can be the institution to which divorced spouses as well as children of divorce can turn for future services such as postdivorce counseling.

For years lawyers who handled divorce and judges who heard divorce cases were looked upon by their colleagues at the bar with some disdain. Perhaps the reason for this lack of respect was that family law in general was considered "soft law," something less than the "hard law" of corporations, property, or taxation. It dealt with the brute facts of life, not its theoretical or intellectual aspects. As substantive family law has become complex, especially those laws dealing with the assignment of marital property, divorce law practice has become extremely complicated. No longer is it the practice of the inexperienced lawyer. Today, to practice divorce law, a lawyer must have a working knowledge of all aspects of pensions, business law, property law, estates, bankruptcy, and taxation. The divorce of spouses with considerable wealth today can take on the attributes of a dissolution of a business partnership.

But, no matter what the economic position of the divorcing spouses, divorce is an emotional experience that can leave lasting scars on husbands, wives, and children. The goal of any divorce procedure should be to lessen the scarring process. This means that those professionals involved in divorce ought to be aware of the impact they will have on the parties involved and approach their task of, in the case of lawyers, helping their clients get through the ordeal or, in the case of judges, deciding cases (knowing their own limitations and their inability to foresee the future clearly) in a fair, just, and timely manner.

- 
1. The changes referred to in this article are discussed in Weyrauch, W.O., Katz, S.N., and Olsen, F.E. *Cases and materials on family law: Legal concepts and changing human relationships*. St. Paul, MN: West Publishing Co., 1994. For a discussion of many changes that have taken place and explanations for them, see Weyrauch, W.O., and Katz, S.N. *American family law in transition*. Washington, DC: Bureau of National Affairs, 1983, pp. 1-4, 115-18, 225-28, 350-53, 495-98.
  2. See note no. 1, Weyrauch and Katz, pp. 14.

3. Consider, for example, an excerpt from a contract entered into in 1877: "We, the undersigned, hereby enter into a copartnership on the basis of the true marriage relation. Recognizing love as the only law which should govern the sexual relationship, we agree to continue this copartnership so long as mutual affection shall exist, and to dissolve it when the union becomes disagreeable or undesirable to either party. We also agree that all property that shall be acquired by mutual effort shall be equally divided on the dissolution of said copartnership. Should any children result from this union, we pledge ourselves to be mutually held and bound to provide them support whether the union continues or is dissolved."

The Supreme Judicial Court held that, as a marriage contract, it was unenforceable. Since by 1892 the parties had not gone through a formal marriage ceremony or had lived in a state that legally recognized their relationship as marriage, they were not married. *Peck v. Peck*, 155 Mass. 479, 30 N.E. 74 (1892). It is perfectly possible that now in some American states such a contract would be enforced not as a marriage contract but as a cohabitation contract.

4. This requirement was based on English law: "[A] woman acquires the domicile of her husband on marriage, and retains this dependent domicile throughout coverture." A.J. Bland. *The family and the conflict of laws in a century of family law*. R.H. Graveson and F.R. Crane, eds. London: Sweet & Maxwell, 1957, p. 376.
5. There is conflict in American case law as to whether custom or law is the source of a woman's assuming her husband's surname upon marriage. In *State v. Green*, 177 N.E. 2d 616 (1961), the Court of Appeals of Ohio stated at p. 619: "It is only by custom, in English speaking countries, that a woman, upon marriage, adopts the surname of her husband in place of the surname of her father. The State of Ohio follows this custom but there exists no law compelling it." However, in *People v. Lipsky*, 63 N.E.2d 642 (1945), the Appellate Court of Illinois stated on page 644: "[I]t is well settled by common-law principles and immemorial custom that a woman upon marriage abandons her maiden name and takes the husband's surname, with which is used her own given name."

Later in the opinion, the court quotes *Chapman v. Phoenix National Bank of City of New York*, 85 N.Y. 437: "For centuries, by the common law among all English speaking people, a woman, upon her marriage, takes her husband's surname. That becomes her legal name, and she ceases to be known by her maiden name. By that name she must sue and be sued, make and take grants and execute all legal documents. Her maiden surname is absolutely lost, and she ceases to be known thereby."

6. As late as 1993, this issue has been litigated. In a May 26, 1993 Nevada Attorney General's Opinion (Opinion No. 93-12), it was stated that a married woman does not have to change her surname to that of her husband and register again to vote under that name. The facts that led to the conflict involved the Eureka County Clerk, who removed the married woman's name from the voter registration rolls and required her to change her surname to that of her husband and register again to vote under that name. The case is reported in *Family Law Reporter* (June 15, 1993) 19:1376.
7. See note no. 1, Weyrauch and Katz, pp. 225-28.
8. The historical antecedent of this statement seems to be that made by Lord Hale, Chief Justice of the Court of King's Bench from 1671 until 1675. Lord Hale wrote in *Hale P.C.* 1:629, "but a husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retreat." This statement and cases abolishing a husband's immunity from prosecution for the rape of his wife are cited in the Georgia case of *Warren v. State*, 336 S.E.2d 221 (1985).
9. It is interesting to read divorce cases decided before the concept of the battered child and wife became a recognized phenomenon. Judges limited their opinions to the issues involved and did not comment on even the most outrageous fact pattern that led up to the court case and appeal. To illustrate this point, see *Warner v. Warner*, 76 Idaho 399, 283 P.2d 931(1955).
10. See Scherer, D.D. Tort remedies for victims of domestic abuse. *South Carolina Law Review* (1992) 43:543.
11. A comprehensive study of all the child abuse and neglect statutes in the United States was undertaken in the mid-1970s by Katz, S.N., Howe, R.W., and McGrath, M.S. Child neglect laws in America. *Family Law Quarterly* (1975) 9:1. Although the data may be out of date today, the collection serves as a historical document for purposes of comparisons with contemporary laws on child abuse and neglect.

12. See Katz, S.N. *When parents fail*. Boston: Beacon Press, 1971; Wald, M. State intervention on behalf of "neglected" children: A search for realistic standards. *Stanford Law Review* (1975) 17:985-1040.
13. In the early 1960s, the Children's Bureau of the U.S. Department of Health, Education, and Welfare set up a working group to study the law's response to child abuse. It was at this group's meeting that Dr. C. Henry Kempe presented his findings regarding battered children. This author was a member of the working group which was led by the then chief of the Children's Bureau, Katherine Oetinger. The result of that group's work was the Model Mandatory Child Abuse Reporting Act, which required certain professionals to report incidents of child abuse. There were obstacles that we met in proposing the act to states. One concern was family privacy and the confidentiality of the doctor-patient relationship. It is interesting to observe the advancements that have been made in 30-odd years and how there are few questions about privacy and confidentiality today.
14. Nevertheless, some people do assume that they are divorced because they have deserted their spouses or gone through certain motions or signed legal documents in a lawyer's office. Legally, however, they are not divorced. In a 1961 law review article Professor Henry Foster coined the phrase "common law divorce," which he defined as "the private termination of marriage, independent of judicial action, which may be relied upon by the parties as carrying with it a privilege to remarry." There is no such doctrine as "common law divorce" in American law. Foster, H.H. Common law divorce. *Minnesota Law Review* (1961) 46:43,58-62.
15. For a history of the law of divorce procedure, see Clark, Jr., H.H. *The law of domestic relations in the United States*. St. Paul, MN: West, 1987, pp. 405-19.
16. This was called the defense of recrimination. It has been abolished in the United States. Katz, S.N., and Raskin, M.G. The dying doctrine of recrimination in the United States of America. *Canadian Bar Review* (1947) 35:1046.
17. The Divorce Reform Act of 1966 changed the law to broaden the grounds. The act became effective on September 1, 1967. See New York Law 1966 Ch. 244, Sec. 15.
18. This passage is cited in Wels, R.H. New York: The poor man's Reno. *Cornell Law Review* (1950) 35:303-4. In his article, Wels discusses "the mockery and the fraud attendant upon divorce proceedings" in New York.
19. See note no. 18, Wels, p. 326. Wels writes: "Our present laws [referring to the laws of New York], from a lawyer's viewpoint, are bad because of the corrupting effect which their administration has had upon our courts. The keystone of our Western democracy is the integrity and honesty of our courts, and the knowledge that any citizen who has been aggrieved will obtain just and honest dealing there. Our divorce practice has become an evil in that it has corrupted and degraded those courts."
20. See note no. 15, Clark, p. 496.
21. For a full discussion of fault and no-fault divorce, see note no. 15, Clark, pp. 496-528.
22. A case that illustrates this point is *Jarrett v. Jarrett*, 78 Ill.2d 337, 400 N.E. 2d 421 (1979), where the Illinois Supreme Court held that a divorced mother who lived with a man to whom she was not married was denied custody of her child because of her immoral conduct. To the Illinois Supreme Court, such conduct "debases public morality." Mrs. Jarrett appealed the decision to the U.S. Supreme Court, which denied certiorari. 449 U.S. 927 (1980).
23. The reform movement, especially in California, is discussed in Kay, H.H. Beyond no-fault: New directions in divorce. In *Divorce reform at the crossroads*. S.D. Sugarman and H.H. Kay, eds. New Haven, CT: Yale University Press, 1990, pp. 6-36.
24. See note no. 23, Kay, pp. 67.
25. See note no. 18, Wels, p. 306. The same can be said for grounds of divorce. For example, in writing about New York divorce law when adultery was the only ground for divorce, Wels writes: "In establishing adultery at the time [in 1787] as the sole ground for divorce, the Legislature then intended to make divorce as difficult as possible for the purpose of preserving the family unit. For many years this result was attained, and the statute exercised a severe restraint upon divorce actions."
26. Blake, N.M. *The road to Reno*. Westport, CT: Greenwood Press, 1962. In the 1940s Arkansas, Florida, and Idaho had a reputation of "key[ing] their laws to the revenue of the divorce trade, . . . [seeking] such traffic to compensate for the lack of real gold mines within their boundaries." See note no. 18, Wels, p. 304. It should be noted that, unless both husband and wife subject themselves to the jurisdiction of a divorce court, that court can only ter-

- minate the marriage. It does not have the power to assign property or custody of children. See *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957).
27. See note no. 15, Clark, pp. 413-14. The durational residency requirements of most states are listed in Walker, T.B., and Elrod, L.H. Family law in the fifty states: An overview. *Family Law Quarterly* (1993) 26:319,340.
  28. An illustration of this point is the Florida case of *McClelland v. McClelland*, 318 So. 2d 160 (1975), where the District Court of Appeals permitted the wife to plead adultery as the cause of an irretrievably broken marriage.
  29. This was emphasized in the Florida case of *Ryan v. Ryan*, 277 So. 3d 266 (1973), where the Supreme Court of Florida wrote that a judge is more than a ministerial officer in divorce cases. To the Supreme Court of Florida a judge must make a "proper inquiry" to determine whether a marriage is irretrievably broken (the no-fault basis for divorce in Florida).
  30. Deborah L. Rhode and Martha Minow observe that, although decreasing acrimony and hostility between the parties was a worthy goal, the early reforms in no-fault divorce did not pay sufficient "attention to vulnerable groups . . ." They write: "Early no-fault reforms gave no special attention to the concerns of particularly vulnerable groups such as displaced homemakers with limited savings, insurance, and employment options; families with inadequate income to support two households (a problem disproportionately experienced by racial minorities); or couples with no children, no significant property, and no need for a formal adjudicative procedure. Nor was child support central to the reform agenda; it appeared only as a side issue, buried within custody and other financial topics. . . . Reformers also neglected the impact of post divorce property divisions—such as the forced sale of the family home—on dependent children. And what was most critical, no-fault initiatives omitted criteria for assessing the outcomes of divorce, outcomes affecting not only the parties and their children but subsequent marriages, stepfamilies and public welfare responsibilities." Rhode, D.L., and Minow, M. Reforming the questions, questioning the reforms: Feminist perspectives on divorce law. In *Divorce reform at the crossroads*. S.D. Sugarman and H.H. Ray, eds. New Haven, CT: Yale University Press, 1990, p. 196.
  31. Marvell, T. Divorce rates and the fault requirement. *Law and Society Review* (1989) 23:542-65.
  32. See note no. 31, Marvell, p. 543. This statement is attributed to Thomas Marvell who reviews the literature dealing with the impact of divorce rates and the advent of no-fault divorce. He maintains that one cannot make a blanket statement that no-fault divorce has had no effect on the divorce rates. He criticizes the research done in the field, claiming that the methods used (for example, cross-sectional design and time-series analyses) were not well suited for the research. He claims that "the visual observation of graphs" is "unlikely to uncover subtle effects." Further, he states that some studies used incomplete data (like petitions filed instead of divorces granted) and incorrect dates for the passage of laws. Another view is stated by Herbert Jacob. He writes: "It is true that divorce rates rose sharply during the period that no-fault divorce and the other divorce law changes were being made. However, every study of the impact of these laws on divorce rates has concluded that no relationship existed between the introduction of no-fault and the rise in divorce." Jacob, H. *The silent revolution*. Chicago: University of Chicago Press, 1988, p. 162. For another view, see Zelder, M. The economic analysis of the effect of no-fault divorce law on the divorce rate. *Harvard Journal of Law and Social Policy* (1993) 16:241. Professor Zelder argues that "no-fault divorce law should be expected to increase the divorce rate . . . . The prediction that no-fault divorce law will increase the divorce rate seems obvious; commentators perceived the switch from fault to no-fault as a shift to 'easier' divorce laws, so more divorces would be expected to occur. Whether or not divorce became easier, however, the American divorce rate did not increase under no-fault during the 1970s as a consequence of divorce becoming easier."
  33. Weitzman, L.J. *The divorce revolution: The unexpected social and economic consequences for women and children in America*. New York: Free Press, 1985, p. 366. Weitzman's research has been both praised and, of late, highly criticized. For example, Herbert Jacob writes: "Weitzman does not distinguish between the effects of no-fault and the new property division rules because an equal division rule was adopted along with no-fault in California, where she obtained most of her data. . . . Another problem is that . . . the Weitzman . . . analyses focus almost entirely on asset division, alimony, and child support. . . . There are good reasons, however, to surround a discussion of these resources with caveats, because they may reflect changes in the property division and child support statutes as well as the impact of no-fault." Jacob, H. Another look at no-fault divorce and the post-divorce finances of women. *Law and Society Review* (1989) 23:95-97.
  34. See note no. 32, Jacob, p. 111.

35. The research is summarized in Bianchi, S.M., and Spain, D. *American women in transition*. New York: Russell Sage Foundation, 1986.
36. "Changed circumstances" is a legal term. It denotes that important facts unknown or not able to be determined at the time of divorce have arisen, thus justifying a hearing which might result in a modification of the original divorce decree.
37. There is a distinction between working in the home and working outside the home in the "commercial work force." Whether a person (usually the wife and mother) works in the home or outside the home, it is still "work." The difference is that working at home is devalued in our society while working outside the home or in the commercial world is not. See note no. 30, Rhode and Minow, and note no. 23, Sugarman and Kay, pp. 193-94.
38. For a discussion of both systems, see Glendon, M.A. *The transformation of family law*. Chicago: University of Chicago Press, 1989, pp. 116-47.
39. The five community property states referred to are Arizona, Idaho, Nevada, Texas, and Washington. The four are California, Louisiana, New Mexico, and Puerto Rico. For a full discussion of community property, see McClanahan, W.S. *Community property law in the United States*. Rochester, NY: The Lawyer's Co-operative Publishing Company, 1982, pp. 531-46.
40. See note no. 39, McClanahan, p. 35.
41. A recent illustration of this principle is the case of *Elkus v. Elkus*, 572 N.Y.S.2d 901 (A.D. 1 Dept. 1991), in which the New York Supreme Court (Appellate Division) held that Mr. Elkus, the husband of Metropolitan Opera star Frederica von Stade, had a property interest in Ms. von Stade's operatic career.
42. Professor Mary Ann Glendon was one of the first scholars to bring this phenomenon to the attention of others. Glendon, M.A. *The new family and the new property*. Toronto: Butterworths, 1981. In 1981 she wrote that employment ties (the employer's inability to fire an employee without cause) were more secure than family ties (because of no-fault divorce, where a spouse may leave another spouse without cause). Professor Glendon's observations were more true in the 1970s and early 1980s than they would be today. Over the past decade the employment bond itself has loosened considerably. The employment relationship today appears little more stable than the marital relationship itself. The fastest growing area in the employment sphere is multiple job holding and contingent employment arrangements. On this phenomenon see, Kohler, T.C. Individualism and communitarianism at work. *Brigham Young University Law Review* (1993) 2:727-41. Professor Kohler writes on p. 736: "It may be that instability increasingly characterizes many of the significant relationships among Americans: employment relationships in the U.S. now last an average of 4.5 years, while the average marriage lasts but seven. Trends are not wholly clear, but the average length of both may be on the way down."
43. Golden, L.J. *Equitable distribution of property*. Colorado Springs: Shephard's/McGraw-Hill, 1983, pp. 262-65. See Turner, B.R. *1990 supplement to equitable distribution of property*. Colorado Springs: Shephard's/McGraw-Hill, 1990, pp. 248-49.
44. See W. Va. Code Sec. 48-2-32 (Supp. 1985) cited and discussed in Ellman, I.M., Kurtz, P.M., and Bartlett, K.T. *Family law cases, text, problems*. 2d ed. Charlottesville, VA: Michie, 1991, p. 234. Ellman, Kurtz, and Bartlett have written: "It is often said that the homemaker wife may be essential to her husband's market success. But while it may be clear that her services and support added greatly to his comfort, or to his emotional health, it would be harder to show that her services made a significant contribution to . . . 'the acquisition, preservation and maintenance or increase in value of marital property.' Thus such language, if seriously applied, would not leave much for many homemakers. . . . It thus matters greatly whether a 'homemaker's economic contribution is equal, or merely to create an opportunity for the homemaker to try to show how her services contributed to the parties' assets."
45. These factors include: duration of the marriage, age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or an addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. Statutes also state that consideration should be given to the contribution or dissipation of each party to the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and as the contribution of a spouse as a homemaker or to the family unit. Uniform Marriage and Divorce Act, Section 307. Alternative A. *Family Law Reporter*, Section 201:0004.
46. See note no. 38, Glendon, p. 228.

47. For a full discussion of the mechanics of the division of marital property, see note no. 43, Golden, pp. 233-82.
48. See note no. 44, Ellman, Kurtz, and Bartlett, pp. 227-42.
49. Indeed, the length of a marriage is one of the factors that judges must consider in making an equitable assignment of marital property. See note no. 44, Ellman et al. Also see Inker, M., Walsh, J., and Perocchi, P. Alimony orders following short-term marriages. *Family Law Quarterly* (1978) 10:91.
50. See note no. 15, Clark, p. 619.
51. See note no. 1, Weyrauch and Katz, pp. 319-20.
52. The 1963 Supreme Court of Washington case of *Dakin v. Dakin*, 62 Wash. 2d 687, 384 P.2d 639 (1963) illustrates this point: "The record shows that the plaintiff [wife] has no children to support or care for; that she was 53 years of age at the commencement of this action; that she was extremely nervous and upset at the time of the trial; but, otherwise she is an able-bodied woman; that, because of her past condition, she has been unable to maintain steady employment; that she attended teacher's college for two years and taught school for four years thereafter; that she has had considerable experience as a social worker, although no formal training. It is the policy of this state to place a duty upon the wife to gain employment, if possible. \* \* \*
- . . . We think that [the plaintiff] should be encouraged to rehabilitate herself and that, within a reasonable period, she may become self supporting. Although she may have been nervous and upset prior to her decree of divorce, there is no evidence which indicates this condition is of a permanent nature. Except for this condition, she appears to be an able-bodied woman capable of future employment. We conclude that alimony should be awarded which is adequate for the purpose of providing for her during her transitional period."
53. The following case is cited and discussed in note no. 1, Weyrauch and Katz, pp. 85-90. An early case that illustrates this point is *Morgan v. Morgan*, 81 Misc. 2d 616, 366 N.Y.S.2d 977 (1975). This New York case involved a wife who had financially helped to put her husband through law school. After divorce, the wife wanted to enter medical school. Her husband refused to support the endeavor. The trial court judge wrote: "In my opinion, . . . under these circumstances, the wife is also entitled to equal treatment and a 'break' and should not be automatically relegated to a life of being a well-paid, skilled technician laboring with a life-long frustration as to what her future might have been as a doctor, but for her marriage and motherhood. I am impressed by the fact that the plaintiff [wife] does not assume the posture that she wants to be an alimony drone or seek permanent alimony. Rather she had indicated that she only wants support for herself until she finishes medical school in 5½ years (1½ years more in college and 4 years in medical school) and will try to work when possible. In this regard, she merely seeks for herself the same opportunity which she helped give to the defendant [husband]. Accordingly, I am directing that the defendant shall pay a total sum of \$200 weekly for alimony and child support. . . ." The trial court judge's decision was appealed. On appeal the alimony award of \$100 was reduced to \$75 a week.
54. See Bruch, C.S., and Wikler, N.J. The economic consequences. *Juvenile and Family Court Journal* (1985) 36:5.
55. See Williams, R.B. Child support and the costs of raising children: Using formulas to set adequate awards. *Juvenile and Family Court Journal* (1985) 36:41.
56. See Thompson, R.D., and Paikin, S.F. Formulas and guidelines for support. *Juvenile and Family Court Journal* (1985) 36:33.
57. Horowitz, R.M. The child support enforcement amendments of 1984. *Juvenile and Family Court Journal* (1985) 36:1.
58. See Katz, S.N. Introduction. *Juvenile and Family Court Journal* (1985) 36:xi-xiv.
59. See note no. 44, Ellman, Kurtz, and Bartlett, pp. 402-3. The authors report that, "According to the most recent Census Bureau data, only 61% of the 8.8 million mothers living with children under 21 whose fathers were not living in the household report having either a decree or an agreement for child support. . . . While 81.1% of divorced mothers report having an award or agreement, only 43% of separated mothers and 18.4% of never-married mothers report having an order or agreement."
60. See note no. 44, Ellman, Kurtz, and Bartlett, pp. 403-4.
61. See note no. 43, Golden, p. 201. Golden writes: "Frequently, the marital home (if classified as marital property) will be awarded to the custodial parent. This is so even though the other spouse may have strong family or sentimental ties to the residence. Many states

specifically list the desirability of awarding the marital home to the custodial parent as a factor for the court to consider in making the final equitable distribution.”

62. Ginsburg, E.M., and Robboy, A.W. Support and education after age eighteen. *The Massachusetts Family Law Journal* (1993) 10:101-5.
63. Walker, T.B. Family law in the fifty states: An overview. *Family Law Quarterly* (1992) 25:417,439-40.
64. For an excellent discussion of mediation and the issues raised in my brief summary of the process see Folberg, H.J. *Divorce mediation—The emerging American model in the resolution of family conflict*. J.M. Eekelaar and S.N. Katz, eds. Toronto: Butterworths, 1984, pp. 193-232; see also Folberg, J., and Milne, A. *Divorce mediation: Theory and practice*. New York: Guilford Press, 1988.
65. See note no. 64, Folberg and Milne, pp. 431-49.
66. In *Smith v. Lewis*, 530 P.2d 589, 11 Cal. Rptr. 621 (1975), the Supreme Court of California held that an attorney who negligently failed in a divorce action to assert his client's community interest in her husband's retirement benefits was guilty of malpractice. The court stated, “[E]ven with respect to an unsettled area of the law, we believe an attorney assumes an obligation to his client to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem.” Increasingly there are unsettled areas of the law, especially with regard to what is and what is not marital property.
67. See Folberg, J., and Taylor, A. *Mediation*. San Francisco: Jossey-Bass, 1984.
68. This is manifested from time to time when legislatures either refuse or are reluctant to reduce the periods between the time a divorce decree is issued and when it is final. For example, in Massachusetts, 90 days must elapse between the time a decree is granted and when it becomes final. Attempts to reduce the period have been unsuccessful. The reason for the time period is supposedly to give the spouses time to reconcile. It is generally believed (although there are no definitive studies to prove the point) that such a goal is unrealistic.
69. See Rheinstein, M. *Marriage stability, divorce and the law*. Chicago: University of Chicago Press, 1972, pp. 5-6. For a discussion of this issue as well as the effect of divorce on families in Great Britain, see Eekelaar, J. *Regulating divorce*. Oxford: Clarendon Press, 1991.
70. The author has derived this information from his involvement in the past few years in judicial education both in the Commonwealth of Massachusetts and with the Council of Juvenile and Family Court Judges, a national organization that holds educational programs for judges from many states.
71. Katz, S.N., and Kuhn, J. Recommendations for a model family court. A report from the National Family Court Symposium. Reno, NV, 1991; Edwards, L.P. The juvenile court and the role of the juvenile court judge. *Juvenile and Family Court Journal* (1992) 43:145; Page, R.W. Family courts: An effective judicial approach to resolution of family disputes. *Juvenile and Family Court Journal* (1993) 44:1-59.