

DIVORCE - A SUGGESTED APPROACH WITH PARTICULAR REFERENCE TO DISSOLUTION FOR LIVING SEPARATE AND APART

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Much of the present English and American law governing the dissolution of the marriage status is derived from the English canon law and ecclesiastical court practice applicable to suspension of marital cohabitation,¹ without regard to the distinction between cohabitation and status, and without recognition that the distinction may involve basic differences that might require different policies and principles.

Dissolution of a valid marriage by divorce for wholly post-nuptial cause² is of relatively modern origin in England and the United States.

Because of the close initial connection between the marital difficulties of Henry VIII³ and the nascent English Reformation,⁴ it is

1) Divorce a mensa et thoro and proceedings for restitution of conjugal rights. The matrimonial jurisdiction of these courts was abolished in England in 1857.

2) To be distinguished from divorce (or annulment) for reasons making a marriage invalid in its inception. Indissolubility (except by death) of valid marriage was stated authoritatively as Church doctrine in the 12th and 13th centuries. Sometimes disregarded locally, it was firmly established by the Council of Trent in 1563.

3) B. 1491, r. 509-47.

4) For an account of his six marriages, two ending in "divorce" (for:

perhaps surprising that dissolution divorce did not appear in England until 1669, and then it was obtained by a special, or private, act of Parliament.⁴ This remained the only method until 1857.

In that year Parliament enacted the Matrimonial Causes Act⁵. This statute created a new secular court for divorce and matrimonial causes,⁶ conferred upon this new court the former jurisdiction of the ecclesiastical courts in matrimonial matters, and provided for dissolution divorce by general law to be judicially administered. Adultery and cruelty were continued as grounds for limited divorce (*a mensa et thoro*), henceforth to be called, however, judicial separation, and to these was added desertion for two years (formerly a matter for restitution of conjugal rights). Dissolution of a marriage could be obtained by the husband for the wife's adultery, and by the wife for bigamy, or certain sexual offences, or aggravated adultery by the husband, and also for his adultery coupled with such cruelty or such desertion as would independently of the adultery be grounds for judicial separation.⁷

The concept of cruelty for divorce *a mensa et thoro* required violence (or at least conduct of either a barbarous character or made cruel by motive) resulting in or giving rise to a reasonable apprehension of serious injury to life or health. A decreed separation was justified in the interest of self-preservation of the complainant.⁸

Such conduct may not necessarily result in permanent disruption of the marriage relation. Moreover, these ideas of cruelty developed at a time when dissolution of the status could be of no concern to the courts, a fact which further demanded a strict attitude to avoid sanctioning by compulsion the living apart of two persons who remained

invalidity), see 2 CAMBRIDGE MODERN HISTORY, 418, 436 et seq. (1903).

4a) See I Bishop, Marriage, Divorce and Separation, § 1425 (1891).

5) 20 & 21 Vict. c. 85.

6) Supplanted in 1875 by the probate, Divorce and Admiralty Division of the High Court. 36 & 37, Vict. c. 66 (1873).

7) Simple adultery by the husband became ground for dissolution to the wife in 1923, 13 & 14 Geo. 5, c. 19.

8) *Evans v. Evans*, 1 Hag. Con. 35 (1790); *Chestnutt v. Chestnutt*, 1 Sp. Ecc. & Ad. 196 (1854).

nevertheless married to each other and thus incapable of forming other relations except meretricious. On the other hand conduct which is not cruel in character and involves no apprehension of injury to health may be permanently disruptive in that it destroys mutual trust and confidence, or otherwise renders the relation irreparably intolerable.⁹

The Matrimonial Causes Act of 1937,¹⁰ enacted following the first comprehensive re-examination of divorce in England since 1857, makes cruelty and desertion for three years, as well as adultery grounds for either judicial separation or dissolution, and adds unsoundness of mind under certain conditions.

The English system of ecclesiastical law and courts having in the matter of marriage and divorce the effect of law of the land was not brought to America upon its settlement. General divorce statutes to be applied by the courts as part of the ordinary administration of law appeared earlier than in England¹¹ Similarity to the English laws of grounds enacted by American statutes is, however, close and to be expected: adultery, cruelty under various descriptive designations, and desertion with various requirements have become almost universally provided for, and rarely with any statutory definition of meaning.¹²

Although statutes in different states may use such terms as intolerable cruelty, intolerable severity, physical cruelty, cruel and abusive treatment, or merely cruelty instead of the extreme cruelty of the

9) *Milner v. Milner*, 4 Sw. & Tr. 240 (1861). Nevertheless "cruelty" when involved in English dissolution cases was held to have the same meaning as in judicial separation (*mensa et thoro*). *Russell v. Russell* [1897] A.C. 395 (11 Haw. L. Rev. 188).

10) 1 Edw. 8 & 1 Geo. 6, c. 57. The concept of cruelty has not been changed. *Horton v. Horton* [1940] 3 All Eng. R. 380 (52 Jurid. Rev. 253); *Atkins v. Atkins* [1942] 2 All. Eng. R. 638.

11) For example in Massachusetts in 1785, and New Hampshire in 1791.

12) In many States a variety of other grounds have been added. See 2 Vernier, *Am. Fam. Laws*, §§ 75-73. In some States all grounds without distinction are grounds for either limited divorce or dissolution; in some, one or more but less than all are grounds for one type of divorce but not the other; and in some, they are grounds for dissolution divorce only. See 2 Vernier, *Am. Fam. Laws*, § 114 (1932).

English ecclesiastical law, little in any change in meaning is usually attributable to the legislative wording as such. But through the process of judicial decisions many changes have developed in reference to the elements constituting the concept of cruelty (seemingly irrespective of the type of divorce): the nature of the conduct, motive, intent, and effect. Violence or threat thereof is no longer generally required, motive and intent are little stressed, and the effect on health may be indirect through the nervous system, or in some states the effect may be humiliation.

Desertion (particularly if of considerable duration) is usually more indicative of disruption of the relation as well as of cohabitation than either simple adultery without more or cruelty in original and literal connotations. Yet, its relation to the English ecclesiastical bill for restitution of conjugal rights has been close.¹³

American statutes apply various designations to desertion such as "utter," "willful," "complete," or may refer to abandonment or simply desertion. The same elements, however, usually are required: cessation of cohabitation, intent, lack of consent, lack of justification and privilege, and often a minimum length of time.¹⁴ Otherwise, a disruptive separation, however irreparable, is not desertion. Moreover, enlargement of justification to include conduct that is neither a ground for divorce nor breach of a recognized marital duty often results also in a marital stalemate, unless alleviated by the doctrine of constructive desertion.

Not only are the concepts of adultery, cruelty, and desertion predicated on marital wrongdoing or fault but traditionally other grounds for divorce have also usually been based on fault. The party from whom a divorce is obtained must be found to be a wrongdoer. Conversely the part obtaining a divorce must be free from wrongdoing. If by this is meant, as it usually is, wrongdoing in respect to

13) *Jackson v. Jackson* [1924] P. 19 10 Corn. L. Q. 374; *Weathersley v. Weathersley* [1947] A.C. 628, 175 A. L. R. 704 (64 L. Q. Rev. 243). *Southwick v. Southwick*, 97 Mass. 327 (1867). Cf. *Mirizio v. Mirizio*, 242 N.Y. 74, 150 N. E. 605, 44 A. L. R. 114 (1926) (commented on in numerous law reviews).

14) *Vernier*, Am. Fam. Laws, § 67 (1932).

the other party and not simply a wrongdoing to society in violating the social order, this attitude is often most unrealistic. Conflicts are deep seated and blame often difficult to assess. True reasons may not come to light.¹⁵

Bars to divorce¹⁶ — reasons for denying the relief based on considerations other than the lack of elements necessary to constitute the ground itself — complement the concept of fault. Apart from the element of human emotions, connivance as a bar to *a mensc et thoro* divorce may have reflected the courts' recognition of the undesirability of a formally sanctioned separation of parties still married to each other and unable to form other lawful relations. It is questionable whether connivance when applied to dissolution divorce is of utility in maintaining a stable social order. Condonation, except for the doctrine of conditional condonation and revival, seems least subject to criticism.

The doctrine of collusion is more consistent with dissolution than with separation in that since valid marriage is indissoluble by consent alone, dissolution is not granted except for grounds set by law and for the existence in fact of such ground in a particular case. Applied to separations alone as in the English ecclesiastical system and thereafter, it is more related to judicial administration. Not only is the concept of what constitutes collusion not uniform, but collusion may be deprived of effect by not permitting one of the parties to raise the question after decree; and otherwise detection may be haphazard.

Recrimination and collusion reflect exclusively public policy restrictive of divorce. In the United States, recrimination, even when not mentioned in the statute, is usually held to be part of the divorce law. Whatever its beginnings¹⁷ recrimination has tended to develop

15) See **Bradway**, 11 *Tulane L. Rev.* 377 (1937)

16) Not only must there be statutory grounds for divorce but there must be absent connivance, condonation, recrimination, and collusion. See *Matrimonial Causes Act, 1857*, 20 § 21 *Vict. c. 85*, § 31; 1937, 1 *Edw. 8 & 1 Geo. 6*, c. 57, § 3. See further 2 **Vernier**, *Am. Fam. Laws.* 15-78 (1932). In the matter of recrimination, these English Acts made a distinction between limited and dissolution divorce, the court being given a discretion in dissolution cases.

17) See **Beamer**, *Recrimination in Divorce Proceedings*, 10 *U. Kan.*

into a symmetrical formula whereby if the petitioner and the respondent are each independently guilty of grounds for divorce, neither can obtain divorce.¹⁸ However, the doctrine of comparative rectitude is applied or provided for in some States; and in some, the doctrine of recrimination is restricted to certain grounds, or abolished.¹⁹

That the exercise of discretionary power present difficulties has been well stated;²⁰ and in rejecting such power the Massachusetts court²¹ pointed out: "The absence from our divorce practice of any discretionary right to grant or deny divorce makes for uniformity of justice. In respect to divorce wide cleavages of opinion exist. * * * The divorce law has to be administered by judges whose personal opinions vary as widely as do those of other people. * * * The public policy of the Commonwealth as to divorce is to be found only in the statute."

The doctrine of recrimination has evoked more criticism than has any of the other bars to divorce.²² This situation that results in denying a dissolution would seem to many a fortiori to require or permit one.²³

City L. Rev. 213 (1942); 2 **Bishop**, Marriage, Divorce, and Separation, §342 (1891).

18) *Reddington v. Reddington*, 317 Mass. 760, 59 N. E. 2d 775, 159 A.L.R. 1448 (1945); *Hove v. Hove*, 219 Minn. 590, 159 A. L. R. 731 (1945) (30 Minn. L. Rev. 306).

19) 2 **Vernier**, Am. Fam. Laws, § 78 (1932).

20) *McPherson v. McPherson* [1943] 4 D.L.R. 381.

21) *Reddington v. Reddington*, 317 Mass. 760 (1945).

22) See **Scott**, The Doctrine of Recrimination in Divorce Proceedings, 21 Rocky Mt. L. Rev. 407 (1949). See also *Hatfield v. Hatfield* 113 W. Va. 113 W. Va. 135, 167 S. E. 89 (1932).

23) A reason, perhaps more relevant, in support of this bar could be advanced: where anti-marital conduct demonstrating unfitness is involved the party addicted to such conduct should not be enabled to contract another marriage; prohibitions upon remarriage, because of limitations to jurisdiction over person and res, may not be effective (See 2 **Vernier**, American Family Laws § 92 (1932)); Nevertheless, where only one of the parties is in this position the interest in freeing the other requires freeing both; but where both parties are so addicted the simple and effective way of recrimination there is needed, however reliable statistical basis that dissolution divorce. A result also undesirable may follow: meretricious relationships. However, this danger may be less than that of a subsequent marriage ending in another disruption. In support of this argument in favor

It is questionable whether these bars are relevant to dissolution and consistent with a legally ordered civil society. Certain it is that they often lead to a permanent marital stalemate where husband and wife will not live together but neither can be free of the marriage.²⁴

The usual grounds for dissolution divorce, particularly the three that go back to the English ecclesiastical system, not only are based on fault—a concept which often results in marital deadlocks either because the defendant is not at fault, or the plaintiff is at fault, or both are at fault—but but are based on conduct that would not, in itself and without more, necessarily be permanently disruptive of the marriage relation. The lapse of a reasonable period of time would be persuasive of such disruption and could well be determinative rather than itself be a bar to divorce as it is under some statutes.²⁵ Moreover causes more disruptive but not involving elements of marital fault as such concept has evolved may exist between spouses.

Lack of realism of the fault concept undoubtedly plays a part in the prevalence of *ex parte* (noncontested) dispositions,²⁶ never adapted, even when in good faith, to the presentation of an entire and completely factual case, and particularly objectionable in divorce because of theoretical insistence (a policy different from ordinary private litigation) on requiring grounds in fact to exist to the satisfaction of the "state" which is in a sense a party. But a divorce cannot, in the interest of the meritorious plaintiff, be properly denied for the failure of the other party to defend. The judicial process (hearing and

of recrimination there is needed, however reliable statistical basis that divorced persons remarry more often than widows or widowers, and also that remarriages of divorced persons, particularly, of those addicted to anti-marital conduct, and more often in second divorce.

24) The assumption of restrictive policy seems to be that to preserve marriage as an institution an individual marriage must not be impaired. But restrictive dissolution divorce policy may result in illicit and meretricious relationships.

25) See 2 Vernier, *Am. Fam. Laws*, §79 (1932). Cf. 1 Ed. 8 & 1 Geo 6, ch. 57, § 1.

26) The percentage of uncontested cases has been variously estimated. It is probably very high. See Brand, J., dissenting in *Evans v. Evans*, 176 Ore. 403, 157 P. 2d 495, 502 (1945), where he comments that frequently acquiescence reaches the verge of collusion.

deciding on evidence brought to it by the parties) is not adapted, without some independent and complete fact-finding machinery of its own,²⁷ to reconciling uncontested divorce to basic divorce policy.²⁸

Three non-fault grounds in addition to the other grounds are, however, now provided in some States: living separate and apart, incompatibility, and post-nuptial insanity.²⁹

Insanity, although it may be regarded as disruptive under certain conditions, involves a situation of abnormal marital occurrence, and is not within the scope of this paper.³⁰

Incompatibility of temperament has been made an independent ground³¹ for dissolution divorce in New Mexico,³² Alaska³³ and the Virgin Island.³⁴

What constitutes incompatibility may not be difficult to state as a formula, but its application, balancing complex conduct, essentially

27) Limited machinery is sometimes provided by statute but has often proved inadequate. See 2 Vernier, *American Family Laws* § 80 (1932, Supp. 1938). As has the interlocutory decree (see 2 id. § 88) for purposes of reconciliation.

28) The effects of the inability (inherent in this dilemma) of the judicial process to deal realistically with such cases and make this divorce policy effective are perceived though not appreciated by the ordinary man who having only limited opportunity to judge law in operation derives his views from its dramatic aspect. The result is not calculated to enhance his respect for either divorce law or law in general.

29) Conviction or imprisonment for crime is also a ground under various conditions in most states. See 2 Vernier, *American Family Laws* § 69 (1932, Supp. 1938). But while not confined to marital fault, this ground is based on fault.

30) See McCurdy, *Insanity as a Ground for Annulment or Divorce in English and American Law*, 29 Va. L. Rev. 771 (1943).

31) Otherwise courts at times in granting or withholding divorces for conventional grounds, e.g., cruelty, are at pains to disclaim incompatibility. However it may be resorted to for the purpose of determining the effect of cruelty. See *Thompson v. Thompson*, 186 Iowa 1066, 173 N.W. 55 (1919); *Brown v. Brown*, 130 Neb. 487, 265 N.W. 556 (1936).

32) *Pavletich v. Pavletich*, 50 N.M. 224, 174 P.2d 826 (1946), 31 Minn. L. Rev. 744, 18 Miss. L.J. 471 (1947).

33) 2 Vernier, *American Family Laws* § 73 (Supp. 1938).

34) *Burch v. Burch*, 195 F.2d 799 (3d Cir. 1952).

involves matters of difficult degree. Then too, is it important that there be an injured party and, if this ground has been inserted in a statute so requiring, can the ground be consistent with such a concept? Is recrimination applicable?³⁵

Incompatibility as a dissolution ground when properly fitted into a conventional divorce statute avoids many of the questionable features of conventional divorce grounds and is more realistically related to disruption as the proper basis for dissolution. Nevertheless incompatibility, without more, should not, it is believed, be a ground for dissolution. The nature of the conduct is not governed by a satisfactory standard, and there is no objective check, which is therefore doubly important, of having lived apart for a reasonable minimum period of time, to assure that a case is one of irreparable minimum period of time, to assure that a case is one irreparable disruption.

Dating from about the middle of the nineteenth century there has been added to the statutory grounds for dissolution in a substantial number of states a new ground, that of living separate and apart.

Kentucky Laws of 1850 (Ch. 498) provided, under causes for which a divorce may be granted, for divorce where parties to marriage "shall have separated and lived apart, without any communication whatever for the space of five years before the commencement of any suit for divorce."

Wisconsin General Law of 1866 (Ch. 37) added to the divorce grounds of that state "whenever the husband and wife shall have voluntarily lived entirely separate for the space of five years next preceding application for divorce, the same may be granted on the petition of either party."

Rhode Island followed in 1893 (Pub. Laws, Ch. 1181) "whenever in the trial of any petition for divorce from the bond of marriage, or from bed and board, . . . it shall appear that the parties have lived separate and apart . . . for the space of at least

35) Ibid.

ten years, the court, on motion of either party may enter a decree divorcing both parties from the bond of marriage."

Some eighteen states have now enacted this ground.³⁶ In three of these states dissolution is granted only if the living apart has been pursuant to a decree of limited divorce.³⁷ In three states the statutes expressly require that the living apart be voluntary,³⁸ and in two, the complainant must be without fault.³⁹ But most of these statutes do not use the terms "voluntary" or "fault," and provide broadly that the divorce may be granted to either party.⁴⁰ One expressly states that divorce will be granted without regard to fault;⁴¹ one, that the living apart may be for any reason;⁴² and one, that fault "injured party" is relevant only to property division or alimony.⁴³ These statutes all require that the living apart must have been for a specified length of time: Rhode Island, ten years; Texas, originally ten years, later reduced to seven years; North Carolina, originally ten years, later reduced to two years; Louisiana, originally seven years, later reduced to two years. In other states the

36) Ala. Code tit. 34, § 22 (Supp. 1955); Ariz. Code Ann. § 27-802(9) (1939); Ark. Stat. Ann. § 34-1202(7) (Supp. 1955); Idaho Code Ann. § 32-610 (1947); Ky. Rev. Stat. Ann. § 403.020 (1) (b) (Baldwin 1955); La. Rev. Stat. § 9:301 (1950); Md. Ann. Code art. 16, § 33 (1951); Minn. Stat. Ann. § 518.06 (8) (West Supp. 1955); Nev. Comp. Laws § 9467.06 (Supp. 1941); N.C. Gen. Stat. § 50-5 (4), -6 (1950); N.D. Rev. Code § 14-0605 (1943); R.I. Gen. Laws c. 416, § 3 (1938); Tex. Rev. Civ. Stat. Ann. art. 4629 (4) (Supp. 1955); Utah Code Ann. § 30-31 (8) (Supp. 1955); Vt. Rev. Stat. § 3205 (7) (1947); Wash. Rev. Code § 26.08.020 (9) (1951); Wis. Stat. § 247.07 (7) (1953); Wyo. Comp. Stat. Ann. § 3-5906 (1945). See also D.C. Code Ann. § 16-403 (1951); P.R. Laws Ann. tit. 31, § 321 (9) (1955).

37) Minnesota, North Dakota and Utah. In the District of Columbia dissolution may be granted two years after a decree of limited divorce at the suit of the innocent party. In Wisconsin separation under limited divorce is expressly mentioned as not being a bar to the action.

38) Arkansas and Maryland; see also Wisconsin and the District of Columbia.

39) Vermont and Wyoming.

40) All except Alabama, Vermont and Wyoming. But cf. North Carolina.

41) Washington. See also Arkansas.

42) Arizona.

43) Arkansas.

time originally required was usually five years, (although four, three and two are also found), and in some of these the time has since been reduced to a shorter period. The tendency has been to reduce the necessary time period. Lastly in three states it is expressly required that there be no reasonable likelihood of reconciliation or resumption of marital relations.⁴⁴

Legislative determination of an appropriate period of time is of the most importance. The period should be sufficiently long to indicate no likelihood of a resumption of cohabitation and not so long as to encourage the formation of meretricious relationships.⁴⁵

Legal questions raised by the living separate and apart statutes are principally : what constitutes such separation; to what extent must the living apart be voluntary and what constitutes voluntary living apart; and the effect of fault of the complainant.

Absence, to constitute living separate and apart, must be referable to disruption due to responsible conduct under circumstances where resumption of cohabitation is not reasonably likely.⁴⁶

44) Maryland, North Dakota and Vermont. In all eighteen states the ground of living separate and apart is in addition to desertion for which a shorter period of time is generally required. In six of these states conviction (sentence, or imprisonment for serious crimes is also made a ground for divorce: Alabama, Arizona, Arkansas, North Carolina, Texas and Washington; see also the District of Columbia and Puerto Rico. In thirteen of these states incurable insanity has also been made a ground for divorce: Alabama, Arkansas, Idaho, Kentucky, Maryland, Minnesota, Nevada, North Carolina, Texas, Utah, Vermont, Washington and Wyoming; see also Puerto Rico. Commitment to an institution is generally required, and the minimum period of time is usually longer than that required for living separate and apart.

45) The matter of migratory divorce may also be pertinent.

46) See also *York v. York*, 280 S.W.2d 553, 554 (Ky. 1955): "[I]t has been well settled by the decisions that a complete physical separation of living quarters be had, this court having said that the parties must live under separate roofs. . . . There seems to be a sound basis for this. . . . because the 'living apart' subsection is in a way unique. . . . The legislation seemed to have intended that in cases where the parties have actually broken up their home and remain apart for this long period of time [five years] the courts may sever the marital tie. . . . The gravamen of such actions is 'living apart without any cohabitation,' and we must assign to that phrase the meaning which its reading spontaneously suggests."

Even where express provision requiring living apart to be voluntary is absent some cases seem to consider voluntary to be an inherent element. Generally this does not necessarily mean a separation agreement, but rather manifested, volitionally responsible conduct that explains the nature of the living apart.⁴⁷

Although not generally made expressly a bar by these statutes, fault of the plaintiff was held a bar to such divorce in North Carolina in *Johnson v. Johnson*⁴⁸ where it was said: "Nevertheless, the law will not permit him to take advantage of his own wrong. Consequently, the wife may defeat the husband's action * * * by showing as an affirmative defense that the separation of the parties has been occasioned by the act of the husband in wilfully abandoning her."

There has been, however, in some States judicial recognition of the fundamentally different divorce policy of these statutes. The Idaho court has said: "[A] recriminatory defense is not available in an action for divorce on the ground of five years separation. * * * Nor can the defense be made that the separation was caused or continued by the fault of the plaintiff. * * * Our statute clearly indicates divorce is available to either party without reference to fault, and as mandatory in terms. It expresses the public policy of the state."⁴⁹

As expressed in the Nevada case of *Herrick v. Herrick*⁵⁰, "The

47) *Otis v. Bahan*, 209 La. 1082 26 So. 2d 146, 166 A. L. R. 494 (1946).

48) 237 N.C. 383 (1957). See also *McGarry, v. McGarry*, 181 Wash. 689, 44 P.2d 816. (1935). In Wyoming where the statute expressly provides that no divorce should be granted if the separation was caused by plaintiff's fault, the burden of showing fault is on the defendant. The court stressed the purpose of this ground in *Stinson v. Stinson*, 70 Wyo. 351, 250 P.2d 83 (1952), and emphasized its recent origin and liberal basis while referring to *Dawson v. Dawson*, 62 Wyo. 519, 177 P.2d 200 (1947), and quoting *Pierce v. Pierce*, 120 Wash. 411, 208 Pac. 49 (1922).

49) *Jolliffe v. Jolliffe* 278 P.2d 200, 202-03 (Idaho 1954). See also *Vanderhuff v. Vanderhuff*, 144 F.2d 509 (D.C. Cir. 1944), 23 Texas L. Rev. 254; *Young v. Young*, 207 Ark. 36, 178 S.W.2d 994 (1944); *Finnegan v. Finnegan*, 285 P.2d 488 (Idaho 1955); *York v. York*, 280 S.W.2d 553 (Ky. 1955); *Richards v. Garth*, 223 La. 117, 65 So. 2d 109 (1953); *Robertson v. Robertson*, 217 S.W.2d 132 (Tex. Civ. App. 1949), 1 Baylor L. Rev. 479.

50) 55 Nev. 59, 25 P. 2d 378 (1933).

idea . . . is an idea of recent origin. The legislative concept embodied in the statute is that when conduct of parties in living apart over a long lapse of time without cohabitation has made it probable that they cannot live together in happiness, the best interest of the parties and of the state will be promoted by a divorce There is no dissent, among the courts of states having a statute similar to ours, from the proposition that either spouse may maintain an action for a divorce irrespective of whose fault caused the separation."^{50a}

The most serious defects in divorce law and administration stem from predicating dissolution on fault of one party, freedom from fault of the other, and, the concept of fault having been satisfied, in not requiring any objective assurance of irreparable disruption.

Civil society in the interests of its basic family stability should not encourage impairment of marriage as an institution by sanctioning nasty dissolution grounds or by formalistic administration. Neither should it adopt too rigid policies that may result in meretricious relations, which would also be an impairment of the institution. A rational and realistic balance should be sought between the individual interest in a particular marriage and the interest of society in marriage in general. This balance can be reached, it is believed, by an insistence on dissolution divorce only for permanent marital disruption. A discarding of the concept of fault, either within the framework of conventional grounds or by providing for non-fault grounds, would not only make the grounds more consistent with dissolution but together with removal of the application of bars such as connivance and recrimination would also reduce marital stalemates, minimize the problem of noncontested disposition, and make collusion largely obsolete. A reasonable period of continuous disruption would be indicative of its permanence and should be a condition precedent. Reconciliation is to be encouraged, but perhaps within this require-

50a) See *Dever v. Dever*, 50 R. I. 179, 146 Atl. 478 (1929) where it was said of a living separate and apart for more than ten years: "An injury to the state from the dissolution of the family cannot now be cured by insisting on a continuance of marriage when the substance has long since disappeared." See also *PParks v. Parks*, 116 F. 2d 556 (D.C. 1940): "The liberal purpose of the 1935 amendment [divorce for voluntary separation for five years] * * * was to permit termination in law of certain marriages which have ceased to exist in fact."

ment rather than in affirmative machinery for reconciliation whose efforts might strengthen stubbornness or animosities, true reconciliation would be best achieved. Much can be said for the proposition that living separate and apart for such a reasonably sufficient length of time without any qualification except that the living apart must be referable to marital disruption is the only ground that would meet best the above objectives. Certainly its use, exclusive or additional, merits consideration. (*)

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