DIVORCE: THE PLACE OF THE LEGAL SYSTEM IN DEALING WITH MARITAL-DISCORD CASES

QUINTIN JOHNSTONE*

DIVORCE is one of the most disturbing problems of modern times. It is the subject of frequent comment by religious, governmental, and academic leaders, and the number of articles on it in the press and popular periodicals indicates great concern on the part of the general public. Because divorce is a legal proceeding, many lay groups are prone to hold the legal system—the law, lawyers, and the courts—responsible for the problem and to believe that reforms in the law are the solution to it. This article attempts to examine realistically the legal system's responsibility for divorce, both in the light of what it is doing and what it can be expected to do.

Any adequate treatment of the subject requires a consideration of the contributions that nonlegal groups can make toward easing the problems of marital discord. Nonlegal groups share divorce responsibility with the legal system. They also may be able to achieve more than courts and lawyers can in dealing with marital-discord matters. There may be points where the legal system should withdraw its efforts in favor of nonlegal alternatives, and there may be points where the most effective action will require the joint efforts of the legal system and nonlegal groups.

WHAT THE LEGAL SYSTEM DOES IN DIVORCE CASES

Courts and lawyers have much to do with problems of marital discord. These problems arise in many kinds of actions in which a wide variety of relief is sought. The most common marital-discord actions are those for divorce, annulment, separate maintenance, child custody, and nonsupport. The most common legal results sought are termination of marital status, award of property and support, award of child custody, declaration of child-visitation rights, resumption of maiden name, injunction against interference by one person with another, and criminal penalties of fine and imprisonment.

From the viewpoint of society, as well as the legal profession, divorce suits are the most important marital-discord cases dealt with by the legal system. Their importance lies in their large volume and the effect they have on the personal lives and property rights of the families involved.

* Associate Professor of Law, University of Kansas, Lawrence, Kansas.

[297]
Statistical data on the volume of divorce decrees entered in the United States is fairly complete; but information about important details of divorce litigation, such as the number of cases contested, dismissed, or in which relief was denied, and the grounds alleged by the parties, is fragmentary. Judicial statistics in the United States are generally very poor. The Federal courts and the courts in a few states, including Kansas, are exceptions to this. A uniform system of judicial statistics, adopted by all states, would greatly further the efficient administration of American courts.

The volume of divorces has increased rapidly in the United States during the twentieth century. A peak was reached in 1946, from which there has been a decided decline, but the present rate is still probably in excess of the pre-World War II rate, with about 350,000 to 400,000 divorces now granted each year.

Annulment accomplishes about the same objectives as divorce. In states where divorce is exceptionally difficult or very slow, annulment is often used instead. This is true in New York, where adultery is the sole ground for divorce but where there are liberal grounds for annulment. Annulment is also common in California, probably because the one-year waiting period between an interlocutory and final decree is not required in connection with it.

In most states, of which Oregon is typical, annulment is rare in comparison with divorce. In Oregon, during 1948, annulments amounted to only 2.3 per cent of the total annulments and divorces granted; for each annulment there were forty-two divorces.

Divorce supplies the courts with one of their most prevalent classes of litigation. During the years 1936 to 1950, between 34 and 62 per cent of all cases filed annually in the circuit courts of Oregon were divorce cases.

What do courts and lawyers do in divorce cases? What procedure is followed, what laws are applied, and what is usually accomplished in divorce litigation?

The great majority of divorce cases are uncontested in court. In Oregon, during recent years, only 4 to 7 per cent of the divorce cases have been contested. If "contested cases" are considered as those in


3. These percentages are based on the published reports of judicial business appearing in the biennial reports of the secretary of state of the state of Oregon.

4. Ibid.
which the defendant does more than appear or file an answer, the percentage of contests has been even smaller. In most divorce cases no counsel even appears for the defendant. It is not unusual for defendants to retain counsel who do not appear, but who negotiate with plaintiff's counsel on various issues, such as property settlements and alimony.

The ordinary way of contesting a divorce is to deny the charges. When a case is contested, there is likely to be a counterclaim requesting that a divorce be granted to the defendant instead of to the plaintiff.

In most kinds of lawsuits, if the defendant does not contest, the plaintiff will be granted the relief asked for in his pleading without any evidence being submitted to the court. This is not true of uncontested divorce suits. When a divorce suit is uncontested, the plaintiff must present to the court enough evidence to make out a prime-facie case. Not until then can he get a final decree. The purpose of this requirement is to increase the likelihood that divorces will be granted only in cases that merit them. To this end the judge can observe the demeanor of witnesses and ask questions.

An uncontested-divorce hearing usually lasts about ten minutes. It is customary for the plaintiff and one or two corroborating witnesses brought by the plaintiff to testify. The judge may ask a few questions, particularly if there are children of the marriage, but vigorous examination does not take place. The defendant's misdeeds as recited by the witnesses may be only mildly offensive—occasional name calling or a slap in the face—and yet may make out the plaintiff's case. In states where the grounds for divorce are very restricted, for example, New York, perjury is reputedly commonplace in divorce hearings. The same is true of evidence submitted on the question of domicile during migratory-divorce proceedings. In New York, remote circumstantial evidence of adultery is, as a matter of practice, acceptable as sufficient proof of adultery.

There is a surprisingly large percentage of dismissals in divorce litigation. This fact may have important implications for the reform of divorce law. Statistics available indicate that the percentage of divorce-case dismissals varies from 20 to 40 per cent of the total divorce cases filed.

---

As surprising as the high percentage of divorce cases dismissed is the extremely low percentage of divorce requests denied. Statistics on this are exceptionally poor, but any divorce judge will admit that he rarely denies a divorce. The Kansas Judicial Council issues accurate figures on denials in the state of Kansas. These figures disclose that from 1937 to 1950 there was only one denial to every 171 divorces granted in the state. During the last year for which statistics are available, there were just 23 divorce denials in Kansas as compared with 4,697 divorces granted.\(^7\)

In addition to legally terminating the status of marriage, divorce decrees affect the property rights of the parties. Divorce ends the right of one spouse to succeed to the property of the other upon death, including intestate succession, widow's allowances, and dower. Divorce also ends the obligation of one spouse to support the other, unless express provision for support is made in the divorce decree or settlement agreement. But provisions for alimony, child support, and property division are often included in divorce decrees.

Predivorce negotiation between spouses on matters affecting property may be tedious and involved. But, when there is a large amount of money or property at stake, this type of negotiation brings lawyers the largest fees obtainable in divorce practice. Settlement agreements between spouses as to property, alimony, and support, even when made in contemplation of a divorce, are not considered illegal collusion.

Child custody is another question with which divorce litigation is frequently concerned. Almost one-half of all divorce cases involve parents with minor children.\(^8\) It is usual for the courts to make custody awards in such cases, but sometimes an award is not made because no request is made by the parties or the children are out of the state and the court has no jurisdiction over them.

Actually child custody is seldom an uncertain issue in divorce cases. The uniform American pattern is to award the children to the mother, except under very unusual circumstances such as where the mother has deserted the family and her whereabouts are unknown, or where she does not want the children, or where she wants the children but, because she has abused them in the past or because of immoral conduct on her part in the past, she is not considered a proper person to bring them

\(^7\) KAN. JUD. COUNCIL BULL. (Oct. 1951) p. 102.

\(^8\) ANNUAL REPORT, 1950, COURT OF DOMESTIC RELATIONS AND JUVENILE COURT, LUCAS COUNTY, OHIO, 31. MARSHALL AND MAY, THE DIVORCE COURT, vol. 1 (Maryland), p. 69 (1932); vol. 2 (Ohio), p. 96 (1933). A study of divorces in Multnomah County, Oregon showed that 61 per cent of the cases involved childless couples. Two earlier national studies showed about the same thing. Bee, A Partial Analysis of 2368 Divorces Granted in Multnomah County, Oregon, During 1942, 17 RESEARCH STUDIES OF THE STATE COLLEGE OF WASHINGTON 18 (1949).
If both parents are adjudged unqualified to care for their children, the court may award them to some third person.

Although there are variations among the states in the legal grounds that may be alleged for divorce, almost all states permit divorce for adultery, cruelty, desertion, habitual drunkenness, and nonsupport. The overwhelming percentage of divorces are sought and granted on grounds of cruelty or desertion. Nationally these two grounds accounted for 79 per cent of the cases in 1928, and 83 per cent of them in 1939. A study by Professor Lawrence S. Bee shows that cruelty and desertion accounted for 98 per cent of the Multnomah County, Oregon divorces in 1942, and in 1948, 87 per cent of all Oregon divorces were granted for cruelty, and 11 per cent for desertion. Adultery is seldom alleged in states that permit cruelty and desertion as grounds. In 1948, the number of divorces granted for adultery in selected states permitting divorce for cruelty and desertion were as follows: Oregon, one; South Dakota, six; Wisconsin, sixteen; Iowa, thirty-four; and New Hampshire, seventy-one. Grounds such as insanity, impotency, and conviction of a felony are seldom invoked.

Fault is the basic tenet of Anglo-American divorce law as declared in statutes and judicial opinions. A divorce is granted only if the defendant has been at fault and has committed some serious acts of misconduct toward the plaintiff. If the plaintiff has also been at fault, then there is no divorce.

The idea of fault is under serious attack today. First, it is claimed that basing divorce on guilt and punishment has proven harmful to family stability. This is one of the assumptions under which the Interprofessional Commission on Marriage and Divorce Laws, sponsored by the American Bar Association, is proceeding. Second, it is generally recognized that the grounds alleged in divorce suits are seldom the real reasons for marriages breaking up. At best they are symptoms of basic causes. More often they are predicated on trivial, meaningless incidents that can be squeezed into one of the legal grounds, or they are substantiated by grossly distorted or completely fabricated evidence having little or no relation to the truth. Third, the affirmative fault defenses to

9 Weinman, The Trial Judge Awards Custody, 10 LAW & CONTEMP. PROB. 721 (1944).
10 CAHEN, STATISTICAL ANALYSIS OF DIVORCE 38 (1932).
12 Bee, supra note 8.
13 Source cited note 2 supra.
14 Ibid.
15 OUTLINE OF THE RESEARCH PROGRAM OF THE INTERPROFESSIONAL COMMISSION ON MARRIAGE AND DIVORCE LAWS (mimeographed).
divorce suits—collusion, condonation, and recrimination—are seldom exerted although evidence to support them probably exists in a majority of cases. The idea of fault is meaningless if the evidence does not accurately show who is really at fault.

Many lawyers feel that divorce practice is less respectable than most phases of law practice. This attitude is most widely held in the large eastern cities; and many lawyers there will not take divorce cases. An occasional lawyer will be found in small towns who avoids divorce cases for the same reason. This feeling that divorce is a somewhat dirty business is due to the perjury existing in divorce cases, the hypocrisy characteristic of modern divorce trials in which legal rules and standards are first invoked and then ignored, and the unethical solicitation and collusion engaged in by some big-city divorce attorneys.

No lawyers, with a few exceptions in large cities, have practices in which a majority of their time is spent on divorce cases. But in every city over 50,000 population, a few lawyers, maybe only two or three, have a far greater amount of divorce business than has the average lawyer.

The bench is much more specialized in the domestic-relations field than is the bar. In small counties there is only one judge for the general court of first instance, and he hears all the divorce cases in that county. In large counties, the trend is to assign one or more judges exclusively to domestic-relations and family matters, of which divorce cases make up the largest proportion.

It is not uncommon to find judges who dislike hearing divorce cases. They know that a great amount of fraud and deception takes place in the courtroom; and they also know that there is nothing constructive that they can do about it. Divorce cases are frustrating and somewhat degrading to the bench. They are also repetitiously dull. Many judges avoid them if they can.

Divorce is an important institution, but how much influence and control does the legal system actually exercise over it? Divorce proceedings are largely rituals by which spouses can end the marriage relationship. The most important factor in divorce is the decision by both spouses that divorce is desirable. An express understanding may be reached by the spouses, or the defendant spouse may decide that there is no hope of reviving the relationship and that there is hence no point in attempting to block the other's decision to secure a divorce. As long as both spouses want a divorce, and judicial proceedings to accomplish that end are pushed, the legal system will grant a divorce decree. The vast body of

---

16 For the efforts made by one local bar association to raise standards of practice in divorce cases after the county had been accused of being a divorce mill, see *Chattanooga Divorce Report*, 19 TENN. L. REV. 944 (1947).
substantive and procedural divorce law is no bar. Even in the rare cases where an uncontested divorce suit results in a denial, the plaintiff can always succeed by amending his pleadings, waiting a few months, and relitigating in the same court, or by starting a new suit in a different county or a different state. Nor is there any substantial difference in this respect between cases with contested and uncontested trials. Defendants in contested divorce trials are not motivated by the expectation that success will result in a resumption of normal marriage relations. The motives are to force better property, alimony, support, or custody arrangements than can otherwise be obtained.

If the spouses' decisions are all-important in the issue of divorce, do courts, lawyers, or the law have any influence in shaping these decisions? The answer is some but not much. It is not uncommon for lawyers and judges to try to reconcile the parties. This works occasionally. The fact that litigation is necessary to end a marriage also influences some spouses. The notoriety and emotional strain of divorce proceedings deter some from lightly entering marriage or filing for divorce and cause some divorce litigants to reconcile their differences even without pressure from a judge or lawyer.

Although the influence of the legal system is very limited on the question whether or not parties shall be divorced, its influence in divorce cases is substantial in other respects. It frequently and effectively performs a vital function in establishing and enforcing financial and child-custody rights between divorcing spouses. These are the points in divorce proceedings where the real disagreements between litigants exist. It is here that the legal system exercises real control.

The substantive law of divorce has another influence that is generally ignored, but which may help to explain the survival of present legal divorce grounds and defenses in the law. The substantive law of divorce is based on standards of marriage conduct that are generally accepted in our society. The divorce law helps to perpetuate these standards by educating the public as to what they are and by giving them the dignity of legal authority.

THE REAL REASONS FOR DIVORCE

The real reasons for divorce are of great importance to a currently much-discussed divorce reform, the family court. The primary reason for divorce is marital discord. Many spouses just cannot get along with one another in the close relationship of marriage. A great deal of research and speculation has been done on the reasons for marital discord. The conclusions on this question vary depending upon the field of inquiry.
In psychology and psychiatry, emphasis is placed on the basic personality structure of the individual. In sociology, emphasis is on the influence of social forces and institutions on family disorganization.17

The complexity of modern industrial society is responsible for many present-day evils as well as many things that we consider to be good. Life today is complicated, uncertain, and changeable. There is great variety among individual people in how they earn a living, in their recreation, in their religious affiliations, education, and social status. This variety has been accentuated in the United States by the heterogeneous racial and cultural background of the population. The freedom to mix with one another that different groups have had and the process of cultural amalgamation that has always characterized American life have contributed to American tensions. Our population is also very mobile geographically and between jobs. These elements of change and variety and cultural amalgamation increase the chances of mismating in marriage and the growing apart of husbands and wives after marriage. Frequent or severe changes imposed by a complex world make continued adjustments to marriage impossible for many spouses, even for many who were adjusted early in marriage. Moving from farm to city, from one section of the country to the other, the wife getting a job, the husband going into the military service, the children growing up and moving from the parental home—changes of this sort can cause discord that leads to divorce.18

The relative rate of personality change may differ between spouses after marriage. This is most likely with couples who marry when under twenty. Marital tension is often the result.19

The family as a center for economic production, recreation, religious practice, education, and care and development of children is less important than formerly. Competing and supplementing institutions for performing these functions have grown in importance. But, on the other hand, the family has become relatively more important in supplying the emotional needs of affection, prestige, and self-respect. Human beings have these emotional needs; and it is increasingly difficult to satisfy them, except in the family, because of the increasingly impersonal, limited, and casual nature of the relationships between people outside of

17 Good general works on the sociology of marital discord are Elliott and Merrill, Social Disorganization (3d ed. 1950); Burgess and Locke, The Family (1945); Mowrer, Family Disorganization (2d ed. 1939); Mowrer, Disorganization, Personal and Social (1942); Truxal and Merrill, The Family in American Culture (1947); Nimkoff, Marriage and the Family (1947); Lichtenberger, Divorce (1931).
18 For a discussion of the historical changes in American marriage and the reasons for them, see Llewellyn, Behind the Law of Divorce, 33 Col. L. Rev. 249 (1933).
19 Mead, Male and Female 362 (1949).
the family. Some scholars think that providing for emotional needs is the principal function of the modern family. But the emotional relations of human beings, particularly between husband and wife, are inclined to be volatile and fluctuating. So this increased significance of the family as an emotional unit, because it is concerned with such an uncertain and irrational aspect of human behavior, has increased marital instability.

There seems to be a correlation between the size and kinship of those living in the family unit and the existence of marital discord. Divorce and discord are more frequent when families are doubled up, and especially when a parent of the husband or wife is living in the family. Conversely, there seems to be less discord and divorce in families where there are children. The place in which a family lives and its social class also have an effect on marital discord and divorce.

The personality of every human being is in part the result of the age in which he lives, the kind of family in which he has grown up, and the kinds of communities in which he has resided. Physiological and biological factors also influence the nature of human personality. The result is that human beings differ greatly in personality characteristics, and hence respond with much variation to such interpersonal relationships as marriage.

Some individuals have personality characteristics that make adjustment to any marriage difficult or even impossible. These characteristics are deep-seated; and the individuals possessing them are usually unaware of their existence, scope, or cause. They include such matters as extreme selfishness; hatred for one parent that will be transferred to a spouse; great affection for one parent that prevents the giving of affection to a spouse; a great desire to be mistreated and defeated; and undeveloped or homosexual attitudes toward sex. Sometimes these individuals behave so abnormally that they are institutionalized as insane or criminals. Sometimes they become alcoholics. More commonly they are normal enough to stay out of trouble with the law but have great

---

21 The term "personality" has many shades of meaning, but in this article it is used to mean the patterns of reaction of individual persons. For the various meanings given to the word "personality," see Sapir, Personality in 12 Encyc. Soc. Sci. 85 (1937).
22 Alcoholics are less likely to marry than nonalcoholics; but, when they do marry, or when alcoholism develops after marriage, extreme marital discord is almost inevitable. One study of male inebriates who had been arrested by the police showed that this group had been divorced twelve times as often and separated six times as often as men in the same age group in the general population. Bacon, Excessive Drinking and the Family in Alcohol, Science and Society 223, 229 (1945).
difficulty in maintaining close personal associations with others, either in or out of marriage.

In recent years a group of sociologists has been inquiring into the kinds of people that are the most likely to be failures in marriage. Stress in their studies is placed not only on the individual's characteristics but on the combinations of individuals that make for unsuccessful marriages. Happiness and permanence are the major tests of marital success or failure. These studies indicate that certain readily observed, superficial indications of personality make for unhappiness in marriage: pessimistic temperament, domineering behavior, hypercritical and inconsiderate attitudes toward others, lack of self-confidence, emotional self-sufficiency, frequent loneliness and touchiness. Some nonpersonality factors were also shown to have an effect on marriage: age at marriage—teen-age marriages are failures in an unusually large number of cases; occupation—men who are unskilled laborers, travel extensively in their work, and salesmen are particularly unsuccessful in marriage, as are persons with irregular-work records before marriage; family background—persons from broken homes or homes with considerable discord are bad risks, a fact indicating that marital discord tends to perpetuate itself through the children; education—the less formal education, the less chance of success in marriage. Differences between spouses that make for marriage failure include the following: age (husband more than ten years older than his wife); social class; family background; education; substantial differences in values and objectives in life; lack of common interests, including recreation and religion; and lack of joint participation in activities related to common interests. Lack of emotional and sexual adjustment between spouses often exists even though neither spouse is abnormal, and when each might readily make successful adjustments to other persons in a marriage relationship. Maladjustment in sexual relations has been found to exist in almost all cases of marital discord.

Those who oppose divorce or the making of divorce more easy believe that a major reason for marital discord is that husbands and wives do not make sufficient efforts to adjust to marriage. These people think that the sociologists, psychologists, and psychiatrists have ignored the force that human will and religious faith can have and should have in solving marital problems. They argue that the availability of divorce, or

---

23 These studies are reported on in Burgess and Cottrell, Predicting Success or Failure in Marriage (1939); Terman, Psychological Factors in Marital Happiness (1938); Locke, Predicting Adjustment in Marriage (1951); Burgess and Locke, The Family c. 15 (1945); Burgess, Predictive Methods and Family Stability, 272 Annals 47 (1950).
24 Folsom, The Family and Democratic Society 437 (1943); Lichtenberger, Divorce 383 (1931).
at least easy divorce, makes for continued marital discord and divorce by allowing spouses to terminate their marriages rather than to face and solve their marital problems. This position has some merit, especially in the early years of marriage. But it is doubtful if eliminating divorce or materially tightening up on the law of divorce would make things better. There still would be almost as many marriages that would be failures because the spouses were unhappy, discontented, and destructive of one another and their children. And problems such as desertion, non-support, promiscuity, and illegitimate relationships would increase. What is more, like it or not, the institution of divorce is now so well established in our society that its elimination in the foreseeable future is inconceivable.

Although marital discord is the primary reason for divorce, it is not the only reason. Nor is divorce inevitable where great discord exists. Adherence to religious beliefs and a deep ethical feeling that divorce is morally wrong prevent some divorces. So do fear of family and community criticism and fear of financial insecurity. Some families are held together by a sense of responsibility to the children of the marriage. Some spouses are able to put up with a lot and still remain married; they have a high tolerance to discord. The absence of these beliefs, fears, personality traits, and the absence of children, increase the likelihood of divorce when excessive marital discord exists.

A significant reason for the increase in divorce is the change in attitude concerning it. It is far more acceptable than formerly; and it is less frequently considered evil and a sin.

Changes in the divorce law have probably had less effect on the volume of divorces than is often thought. Of course, permitting absolute divorce where it formerly was not permitted, as South Carolina recently did, has a tremendous effect; but it is less important if liberal annulment and divorce a mensa et thoro were permitted before the change. Making divorce a judicial rather than a legislative function also has tended to increase the number of divorces. So apparently has the addition of the grounds of desertion and cruelty in states where adultery was formerly the sole ground.25 Making divorce financially more available has tended to increase its volume.

Nonlegal Institutions and Groups Dealing with Marital-Discord Problems

Marital discord and the problems caused by it are the concern of

25 In England the divorce rate has multiplied by ten since the grounds for divorce were increased in 1938. Mace, *Family Life in Britain Since the First World War*, 272 *Annals* 179 (1950).
many groups other than lawyers and judges. The legal system has no monopoly over marital-discord cases. In fact, lawyers and judges are more and more often seeking assistance in marital cases from nonlegal specialists.

Spouses who are having trouble adjusting to one another, and families in which disorganizing influences are apparent, may receive advice and counsel from various nonlegal sources. Some sources are available only to those who voluntarily seek assistance. Others force themselves on to discordant families.

Besides lawyers, those who are most frequently sought out for advice in cases of marital discord are clerics, physicians, psychiatrists, and marriage counselors. The advice of ministers and priests is usually based on religious doctrine and common sense. In cases of religiously devout persons, this kind of counseling is frequently successful. There is a growing trend to give theological students and ministers some background knowledge in sociology and psychology as they are related to marital discord;26 but so far this has had little influence on clerical post-marriage counseling.

Physicians do the most effective counseling in marriage-discord cases if there is an organic physical defect related to the problem. Physicians can also give good common-sense advice. Like ministers, they are respected persons, and they can look at the personal problems of others in an impartial manner.

The psychiatrists approach marital-discord problems by trying to discover the conscious and unconscious personality characteristics of the spouses that are causing friction between them. This involves a difficult and highly skilled technique, and is done by observation and interrogation in lengthy interview or conference sessions between the psychiatrist and the patient. These sessions are usually held with only one spouse at a time. It is not unusual for one psychiatrist to work with one spouse, and another one with the other spouse. The psychiatrist’s first problem is to ascertain the personality factors that are causing the marital difficulty and the events in the person’s past experience that have created these factors. This ordinarily takes several sessions of an hour or so each. After the diagnosis, treatment consists in bringing to the patient an awareness of and insight into his personality characteristics and their relation to the marital conflict. Then an effort is made to re-educate the patient in the light of this new insight. The psychiatrist may make suggestions and attempt subtle persuasion. The aim of this whole process is to relieve the patient’s anxieties, to help him realize his de-

sires, and to assist him in adjusting to the inevitable facts in his life. So far as the marriage is concerned, it may mean establishing a firmer, more workable relationship; or it may mean adjustment to dissolution of that relationship.

Many persons who have difficulty adjusting to marriage also have difficulty adjusting to other interpersonal relationships. They may fail as parents, at earning a living, and in their recreational associations. All of their failures may stem from the same personality factors. Successful psychiatric treatment in the marriage sphere may require improvement in these other relationships. The average length of time required for effective diagnosis and treatment in marriage cases is four to five months if the psychiatrist sees the patient once a week.

Psychiatry is a specialized branch of medicine, and nearly all psychiatrists are doctors of medicine. The fees of psychiatrists in private practice are high, which means that when in private practice they are available in marital-discord cases only to the middle- and upper-income classes.

A limited knowledge of psychiatry is made use of by several professions: nursing, social work, and a new profession usually known as marriage counseling. Those who consider themselves professional marriage counselors are a miscellaneously trained group that spend a substantial amount of working time in advising persons who are having marital difficulties.\(^{27}\) Some marriage counselors have been trained as physicians, some as psychiatrists, some as psychologists, some as psychiatric social workers, some as sociologists, and some have no particular training but think they have a flair for unraveling marriage problems. Personality analysis in relation to marriage is the general approach of them all, although there are variations in skill and method.\(^{28}\) Marriage counseling has been distinguished from psychiatry by its lesser depth of observation and explanation. In marriage counseling the "deep unconscious" is avoided, and explanations are limited to "conscious and near-conscious" material.\(^{29}\)

The problem of minimum standards is a serious one in the marriage-counseling field. What training should be required of marriage counselors and what conduct prohibited?\(^{30}\) The field is now so nebulous that

\(^{27}\) On marriage counseling, see CUBER, MARRIAGE COUNSELING PRACTICE (1948); GOLDSTEIN, MARRIAGE AND FAMILY COUNSELING (1945); Mudd, THE PRACTICE OF MARRIAGE COUNSELING (1951); Groves, MARRIAGE AND FAMILY LIFE c. 18 (1942); THORNE, PRINCIPLES OF PERSONALITY COUNSELING (1950).

\(^{28}\) Two case studies that indicate the methods used by marriage counselors are reported on in 13 MARRIAGE AND FAMILY LIVING 29 and 52 (1951).

\(^{29}\) Mudd and Preston, The Contemporary Status of Marriage Counseling, 272 ANNALS 102 (1950).

\(^{30}\) Pearl, Are We Developing a Profession?, 12 MARRIAGE AND FAMILY LIVING 128 (1950).
charlatans and well-meaning incompetents can set themselves up as professional counselors. There is considerable support for plans to license marriage counselors as members of a separate occupation. If mandatory minimum standards were established requiring a good working knowledge of psychiatric methods, the number of those who now could qualify would be restricted to the psychiatrists, some psychiatric social workers, some clinical psychologists, and very few others.

The medical profession and the marriage counselors are in conflict as to how far marriage counselors should be permitted to go in using psychiatric techniques without being licensed to practice medicine.31 To avoid criticism and to increase the accuracy of their work, some marriage counselors frequently consult with psychiatrists concerning their cases. They also refer their more difficult cases to psychiatrists.

The number of marriage counselors in private practice who regularly take marital-discord cases is small. In Oregon, exclusive of psychiatrists, there are not more than three or four of them, and they do counseling only as a part-time side line. Oregon also has about a dozen psychiatrists in private practice, and all of them do some marriage counseling. In most larger American cities there are family-service agencies, frequently community-chest supported, that do marriage counseling. The best known of these are located in New York, Philadelphia, and Los Angeles.32 One was to be opened in Portland, Oregon during the fall of 1951.

The success of marriage counseling is difficult to estimate because of the uncertainty as to criteria and the lack of follow-up data. In a preliminary study made at the Marriage Council of Philadelphia, it was concluded that 58 per cent of a 72-case sample showed "positive movement" during counseling.33

A good marriage counselor using a psychiatric approach can handle only a small number of cases if he is trying not only to diagnose but build a workable adjustment. Devoting full time to this, the case load should not be more than 25 to 40 cases if the counselor is working with only one of the spouses in each marriage. The annual number of cases disposed of by a counselor with such a case load would be 75 to 125. It would be only half as many if he is counseling both spouses. With good group therapy, the volume can be increased somewhat.

31 Stokes, Legal Status of the Marriage Counselor, 13 MARRIAGE AND FAMILY LIVING 113 (1951); Ellis, Legal Status of the Marriage Counselor: A Psychologist's View, id. at 116.

32 Stone, Marriage Education and Marriage Counseling in the United States, 11 MARRIAGE AND FAMILY LIVING 38 (1949); Groves, Conserving Marriage and the Family 120 (1944) (lists marriage-counseling agencies); Popenoe, Family Consultation Service, 17 J. Soc. HYGIENE 309 (1931).

33 Mudd and Preston, supra note 29.
In addition to marriage counseling of discordant spouses, there is another major approach to problems of marriage discord that the legal system does not participate in. This is education for marriage. Most of it is premarital education and is carried on through formal courses given in high schools and colleges. Some marriage-education classes are also held by church groups and parent-teacher associations, and the family-service agencies conduct premarital information and training programs in addition to their counseling on marital discord.

**ALTERNATIVE LEGAL DEVICES AVAILABLE FOR ACHIEVING OBJECTIVES IN THE FIELD OF MARITAL DISCORD**

Many suggestions have been made for changing the law so as to solve or alleviate marital-discord problems. The important differences among important groups as to what society's objectives should be in relation to marital discord help account for the number and variety of these suggestions. The suggestions vary in their chances of being adopted. Some have no chance of ever being adopted. Some have a chance of acceptance into the law at some time in the distant future and perform now a valuable function of stimulating thought about the nature of domestic problems and their solutions. Some stand a good chance of acceptance in the immediate future.

The best way of determining what suggestions fall in this latter group is to observe the changing and growing points in the law. In our federal system, the law over which the states have jurisdiction develops by one state trying an idea and other states copying it if it is well received in the first state. This is true of legislation as well as case law. In the field of domestic relations, most of the current suggestions for law reform have been tried out by one or more states. If the ideas have been successful where tried, there is a strong possibility that they will be workable elsewhere.

The most frequently suggested change in divorce law has, at least until recently, been to alter the grounds for divorce. The trend has been to increase the number of grounds; but ineffectual pressure to reduce the number has also been brought to bear. In New York, where adultery is still the sole ground, strong efforts have been made to add cruelty and desertion. Since 1937, several Anglo-American jurisdictions have greatly liberalized their formerly strict laws as to grounds for divorce.

---

35 South Carolina, which formerly permitted no absolute divorce, in 1949 enacted a statute allowing absolute divorce for adultery, desertion for one year, physical cruelty, and habitual drunkenness. S. C. Acts 1949, no. 137. Prior to 1935, absolute divorce could be secured in the District of Columbia only for adultery. Since 1935, it has been available for two-years desertion, five-years separation,
This leaves New York and several of the Canadian provinces as the only important common-law jurisdictions retaining adultery as the exclusive ground for absolute divorce.

Considerable controversy has centered on two other advocated grounds for divorce: incompatibility and the consent of the spouses. New Mexico and Alaska permit incompatibility as a ground. There is no statute in this country which expressly provides for divorce if, without more, the husband and wife consent to it. But sixteen states and the District of Columbia have statutory provisions making separation for from two to ten years a ground for divorce. In some of these jurisdictions, the fact of separation for the required period is all that is necessary. Fault, collusion, and recrimination are immaterial on the issue of divorce; so the parties may agree that they want a divorce and separate with this in mind and yet their rights to a divorce under the statute will not be impaired. In fact, under the Maryland and District of Columbia statutes, the separation must be voluntary and based on an agreement of the parties for the separation ground of divorce to apply.

Permitting divorce for incompatibility or by consent of the spouses eliminates much of the hypocrisy from modern divorce law by bringing conviction of a felony, in addition to adultery. D. C. Code sec. 16-403 (1940). By the Matrimonial Causes Act of 1937, England added three-years desertion, cruelty, and insanity as grounds for absolute divorce. 1 Edw. VIII and 1 Geo. VI, c. 57, sec. 2. Prior to this act, adultery had been the sole ground.

In Japan, divorce by agreement of the spouses is legally permitted. The agreements are validated by recording them at a government registration office. Most divorces follow this procedure. Appleton, The New Family Courts of Japan, 30 Focus 85 (1951). A similar system of easy divorce formerly existed in the Soviet Union. Application by one or both spouses to a registry bureau was all that was necessary. Even a de facto divorce received the same legal recognition as a registered divorce. But this system was replaced in 1944-45 by a system of strict judicial divorce. Berman, Soviet Family Law, 56 Yale L. J. 26, 45 (1946); Coser, Some Aspects of Soviet Family Policy, 56 Am. J. of Sociology (1951). Consensual divorce is permitted in Sweden after court-authorized legal separation for one year and after mediation by a neutral person has failed to effect a reconciliation. Segerstedt and Weintraub, Marriage and Divorce in Sweden, 272 Annals 185 (1950).

These statutes are cited and discussed in Note, Separation for a Period of Years as Grounds for Divorce, 97 U. of Pa. L. Rev. 705 (1949). For an argument in favor of making divorce "decent and logical" by having only one ground for divorce, separation for two years, see Walker, Our Present Divorce Muddle: A Suggested Solution, 35 A. B. A. J. 457 (1949).

Clemens v. Clemens, 143 F. 2d 24 (D. C. Cir. 1944); Young v. Young, 207 Ark. 178 S. W. 2d 309 (1944); Sandlin v. Sandlin, 289 Ky. 290, 158 S. W. 2d 635 (1942); Robertson v. Robertson, 217 S. W. 2d 132 (Tex. 1949); Recent Decisions, 48 Mich. L. Rev. 125 (1949); Annot., 166 A. L. R. 498 (1947); Annot., 170 A. L. R. 1076 (1947); Comment, Divorce: Statutory Abolition of Marital Fault, 35 Calif. L. Rev. 99 (1947); Note, Separation for a Period of Years as Grounds for Divorce, 97 U. of Pa. L. Rev. 705 (1949).

ing the legal grounds closer to the realities of marital disintegration. But it also permits easy divorce as a matter of legally declared principle. And when consensual divorce is allowed, it is a formally admitted surrender by the state of authority to decide whether or not a marriage shall be terminated.

Some states permit divorce for incurable insanity, impotency, conviction of a felony, and undisclosed pregnancy by another at the time of marriage. These grounds exist in only a small percentage of cases; but, when they do exist, a normal, successful marriage is unlikely. Sporadic efforts are made to adopt them as grounds for divorce in other states. But when consensual divorce is allowed, it is a formally admitted surrender by the state of authority to decide whether or not a marriage shall be terminated.

At least three states expressly give the courts discretion in deciding whether or not to grant a divorce if certain grounds exist. This discretion idea has been extended much farther in criminal and juvenile cases. It is possible that it may be extended more generally in divorce cases.

The substantial differences between states in grounds for divorce is disturbing to laymen. Lawyers are concerned with the uncertain legal effect of migratory divorces that has developed from the Williams Cases and their successors. The result has been suggestions for Federal and uniform divorce laws. Beginning in 1923, Senator Capper regularly introduced legislation to amend the Constitution so as to permit Federal marriage and divorce statutes, but with no success. Efforts to secure uniform legislation on divorce matters have been disappointing. A uniform marriage and divorce act was drafted and has been adopted by three states, Delaware and New Jersey in 1907 and Wisconsin in 1909; a uniform divorce jurisdiction act has been adopted by only one state, and that state has repealed it; a uniform divorce recognition act has been adopted as a ground for divorce in the following states: Kentucky, Ky. Acts 1950, c. 162; Nebraska, Neb. Rev. Stat. sec. 42-301 (Supp. 1947); North Carolina, N. C. Session Laws 1945, c. 755, as amended by N. C. Sessions Laws 1949, c. 264.


41 Discretion in the court to grant a divorce if the parties have lived separate and apart for three years, Nev. Comp. Laws sec. 9467.06 (Supp. 1931-41); if the parties have lived separate and apart for ten years, R. I. Gen. Laws c. 416, sec. 3 (1938); discretion in the court to refuse a divorce if the parties are equally in the wrong, Kan. Gen. Stat. sec. 60-1506 (1949).


nition act,\textsuperscript{47} approved in 1948 by the National Conference of Commissioners on Uniform State Laws, had been adopted by seven states, as of 1950.\textsuperscript{48} This latter act, designed to increase certainty in the migratory-divorce field, is the only type of uniform divorce act that promises to be widely adopted. Senator McCarran has sought to obtain certainty in the migratory-divorce field by a proposed full-faith-and-credit statute that would protect migratory divorces.\textsuperscript{49}

There is little chance that any kind of national divorce law will be adopted. Constitutional amendments are difficult to put through, and opposition from the conservative opponents of divorce and their opposites in the divorce-mill states probably will kill all efforts at Federal divorce reform. The Supreme Court of the United States may yet solve the problem of the uncertain effect of migratory divorce. Further case-law developments on this question are indicated by the evolution that has taken place in the full-faith-and-credit concept in relation to divorce decrees since the first \textit{Williams Case}.

Apart from full-faith-and-credit and conflict-of-laws problems, the differences between states in their divorce laws should not cause concern. After all, we do live under a federal system and there are important regional differences in attitude toward divorce.

Not only has the law as to grounds for divorce been frequently criticized, but so has the law of divorce defenses. It is argued that continuation of recrimination, collusion, connivance, and condonation as defenses is unrealistic and based on the undesirable standard of fault.\textsuperscript{50} Inroads on these defenses have been made by a group of cases holding that, when the grounds are not based on fault (for example, the ground of separation), the defenses based on fault do not apply.\textsuperscript{51} Refusal to recognize recrimination as a defense has even been extended in a few cases to situations in which the grounds are based on fault: conviction of a felony involving moral turpitude;\textsuperscript{52} incompatibility;\textsuperscript{53} and "misconduct, misbehavior, desertion, and general abandonment of the marriage obligations."\textsuperscript{54} There is also authority for overriding the defense of recrimination by granting divorces to both spouses in the same suit if

\begin{thebibliography}{99}
\bibitem{47} 9 \textbf{Uniform Laws Ann.} 367 (1951).
\bibitem{48} \textit{Id.} at 364.
\bibitem{51} See cases cited in note 38 \textit{supra}.
\bibitem{52} Vanderhuff \textit{v.} Vanderhuff, 144 F. 2d 509 (D. C. Cir.1944).
\bibitem{53} Pavletich \textit{v.} Pavletich, 50 N. M. 224, 174 P. 2d 826 (1946).
\bibitem{54} Stewart \textit{v.} Stewart, 158 Fla. 326, 29 So. 2d 247 (1946).
\end{thebibliography}
both have committed acts constituting grounds for divorce,\textsuperscript{55} and by permitting a court in its discretion to award a divorce to one spouse even if the spouses have been equally in the wrong.\textsuperscript{56} Recrimination has also been weakened by the doctrine of comparative rectitude. Further gradual erosion of the fault defenses by judicial decision is to be expected.

Changes in the laws of marriage have been recommended as one way of preventing marital discord. Eliminate undesirable marriages and the number of divorces will decline is the argument. Considerable progress in marriage-law reform has been made in the past twenty-five years. Revision has taken place in the requirements that must be met before a couple can marry, in the types of marriages that are valid, and in the class of persons who may perform marriage ceremonies. The increasingly frequent pattern of the law as to age for marriage is to set a minimum age for valid marriage and require parental consent for marriage between the minimum age and the age of majority.\textsuperscript{57} Richmond and Hall, who made a careful study of marriage laws during the twenties, recommended that, because immaturity in mating is so serious a matter, the minimum age for valid marriage be set at sixteen.\textsuperscript{58} In many states the minimum age is below this. Richmond and Hall also recommend that marriage-license laws require a five-day time interval between application for and issuance of a license, application by both candidates, verification of the candidates' qualifications by documentary evidence, application by each candidate in his or her home county, and issuance of licenses by the home county and the state of marriage if the marriage is to take place outside the state of residence of one or both candidates.\textsuperscript{59} These requirements are designed to prevent illegal marriages and marriage-market towns of the Gretna Green sort. Richmond and Hall do not recommend mandatory publication of intention to marry which is recommended by some. They feel that a verification requirement more effectually accomplishes the objectives of publication.\textsuperscript{60} Most of the Richmond and Hall recommendations are now followed by some states.

Besides age restrictions for valid marriage, there are also health restrictions that indirectly act as preventives of marital discord by prohibiting bad marital risks from marrying. A common health restriction re-

\textsuperscript{55} Dillard v. Dillard, 197 Ga. 726, 30 S. E. 2d 621 (1944); Schirmer v. Schirmer, 84 Wash. 1, 145 Pac. 981 (1915); Flagg v. Flagg, 192 Wash. 679, 74 P. 2d 189 (1937).
\textsuperscript{56} Roberts v. Roberts, 103 Kan. 65, 173 Pac. 537 (1918).
\textsuperscript{57} E.g., O. C. L. A. secs. 63-101, 63-113, and 63-501 (1940).
\textsuperscript{58} \textsc{Richmond and Hall, Marriage and the State} 342 (1929).
\textsuperscript{59} Id. at 339.
\textsuperscript{60} Id. at 180.
quires a medical certificate showing freedom from venereal disease as a condition precedent to securing a marriage license.61

Some states have restrictions prohibiting marriage by persons afflicted with tuberculosis or any other communicable disease. Oregon requires a medical certificate of freedom from epilepsy, feeble-mindedness, insanity, drug addiction, and chronic alcoholism before a marriage license can be issued.62 Statutes of this sort not only are difficult to administer, but are phrased so broadly that, if enforced, they would prevent some persons from marrying who should not be prohibited from doing so. This is particularly true of certain types of epileptics.

An educational prerequisite to marriage has been seriously recommended as a means of preventing marital discord and divorce. Judge J. A. Sbarbaro of Chicago recommends that a marriage course be given by the state. He believes that satisfactory completion of such a course within sixty days prior to application for a marriage license should be required by law before a marriage license can be issued. The course would consist of at least six lectures on these topics: economic adjustment to marriage, the physical side of marriage, the “in-law” problem, basic information on rearing a family, the effects of divorce on children of broken marriages, and the part of the school and the church in the home.63

A group of restrictions on marriage that are of questionable value are those applying to remarriage of divorced persons. Most American states have some kind of remarriage prohibition applying to divorced persons: interlocutory decrees, final decrees with marriage prohibited for sixty days to two years, and prohibitions against the guilty parties in divorces for adultery remarrying during the lifetime of the innocent parties.64 The American trend has been to repeal or make less severe these remarriage restrictions.65 In 1946 the English remarriage restrictions were revised by reducing the waiting period between a decree nisi and an absolute decree from six months to six weeks.66

Somewhat similar to the remarriage restrictions are time restrictions on filing suit for divorce. These are designed as cooling-off periods in which spouses will be deterred from seeking quick divorces without adequate contemplation. Some of these restrictions are based on stat-

---

62 Or. Laws 1951, c. 362.
63 SBARBoro, MARRIAGE IS ON TRIAL 112 (1947).
64 The statutes are listed in Note, Statutory Restrictions on the Right to Remarry After Divorce—How They Are Avoided, 36 VA. L. REV. 665 (1950).
65 Ibid.
utes, some on the practices of judges. The refusal of many judges to grant a divorce to couples married less than a year is an example of the latter type. Statutes that require the lapse of a substantial time period between filing a divorce suit and securing a decree of divorce have the same cooling-off objective.

The suggested divorce-law reform that currently is receiving the most attention is the adoption of the family court. The enthusiasm with which family-court plans are now being received is due to dissatisfaction with other reform efforts; the popularizing of psychiatry and specialized counseling; enthusiastic and effective advocacy by Judge Paul W. Alexander and some of the other proponents of family courts; and the fact that family courts are acceptable to both liberals and conservatives on the question of divorce, apparently including those opposed to divorce on religious grounds.

The term "family court" is loosely applied to various types of courts and proposed courts. It is sometimes considered synonymous with the term "domestic-relations court." A family court, as the term is now commonly used and as it is used in this article, has these distinguishing characteristics: it is a court within the judicial system, presided over by a judge; it has broad jurisdiction over matters pertaining to the family, including the granting of divorces; and the judge has specialized assistants on his staff to aid him in investigation and counseling.

---


69 For the reactions of Catholic leaders to the family-court idea, see Alexander, Divorce Without Guilt or Sin, N. Y. TIMES MAGAZINE (July 1, 1951) p. 14. Also see Drinan, New Approach to Divorce Laws, SOCIAL ORDER (April 1949) p. 145.

70 For a discussion of the difficulties in defining a family court, see The Development of Family Courts, 1924 PROCEEDINGS OF THE NAT. PROBATION ASS'N 169.

71 On family courts, see Alexander, The Follies of Divorce: A Therapeutic Approach to the Problem, 1949 U. OF ILL. L. FORUM 695, reprinted in 36 A. B. A. J. 105 (1950); Alexander, New Procedures and Attitudes Suggested Toward Marriage and Divorce, 32 J. AM. JUD. SOC'Y 38 (1948); Alexander, Divorce Without Guilt or Sin, N. Y. TIMES MAGAZINE (July 1, 1951) p. 14; Alexander, Divorce—Our National Horror, 19 J. KAN. B. ASS'N 322 (1951); Divorce and Children of Divorce, 30 PORTLAND CITY CLUB BULL. 347 (1949); Divorce Laws: Remedies for Abuses and Scandals Are Sought, 34 A. B. A. J. 195 (1948); Smith, Dishonest Divorce, ATLANTIC MONTHLY (Dec. 1947) p. 42; Ricks, Evolution of the Family Court, 1924 PROCEEDINGS OF THE NAT. PROBATION ASS'N 19; Day, Development of the Family Court, 136 ANNALS 105 (1928); Bradway, Family Dissolution—Limits of the Present Litigious Method, 28 IOWA L. REV. 256 (1943); Seagle, Domestic Relations Courts in 5 ENCYC. SOC. SCI. 194 (1937); Waite, Courts of Domestic Relations, 5 MINN. L. REV. 161 (1921); Perkins, Family Courts, 17 MICH. L. REV. 378 (1919); North, Milwaukee's Approach to Juvenile and Domestic Relations Cases, 18 MARQ. L. REV. 241 (1934); North, The Family Court, 19 MARQ. L. REV. 174 (1935); Note, Domestic Relations Court of Cincinnati, 3 U. OF CIN. L. REV. 458 (1929); Entman, The Origins and Development of a Family Court, Domestic
The family-court idea is not a new one. It developed as an outgrowth of juvenile courts. 72 The first juvenile court was established in 1899, and today there are an estimated three thousand such courts. Every state now has a juvenile-court act. In 1907, Oregon passed a Juvenile Court Act applicable to all counties in the state. 73 Juvenile courts deal with delinquent and neglected children. Their purpose is to safeguard, cure, rehabilitate, and correct the children that come before them, and in so far as possible remedy the situations that caused the children to become delinquent or neglected. Their procedure is informal; they are frequently staffed with specialists in child care; and they work closely with other institutions and organizations designed to give medical, psychiatric, educational, and financial assistance to problem children. The better juvenile courts avoid the penal outlook of adult criminal courts. Lawyers from private practice infrequently appear in juvenile courts. They are generally so uninformed on juvenile-court methods and juvenile-care facilities that they can perform no important function in delinquency cases. In most states, each juvenile court has jurisdiction over only one county. But in several states, including Utah, there are specialized judges who handle nothing but juvenile-court cases, have jurisdiction over a group of counties, and go on circuit to dispose of cases. 74

support, and Juvenile Court Act cases. Outside of Ohio, there are few courts that have jurisdiction over both divorce and the conventional juvenile-court matters.

The various types of family matters that a family court could have jurisdiction of are divorce, separation, annulment, juvenile delinquency, nonsupport, neglect of a child, support of indigent parents, abuse of a child, abandonment of a child, child-labor-act violations, selling liquor to a child, harboring a runaway child, contributing to the delinquency of a child, abandonment by one spouse of the other, assault and battery by a spouse on other members of the family, bastardy, award of custody, habeas corpus of a child, adoption, illegal placing for adoption, fixing visitation rights, excluding a mate from the home, consent to marriage by a child, and dependent and neglected children. Family-court proponents believe that all of these matters should be within the jurisdiction of a family court.

In 1919, Oregon passed a Domestic Relations Court Act, applicable only to Multnomah County, that established a new court with jurisdiction over the following matters: dependent, delinquent, and neglected children; contributing to the delinquency of minors; adoption and change of name; commitment of mentally defective minors; and nonsupport of a wife or children. A 1929 Oregon statute abolished this court and transferred its jurisdiction, plus most divorce jurisdiction, to a Department of Domestic Relations for the Circuit Court of Multnomah County. In 1951, a similar department with similar jurisdiction was established for the Circuit Court of Marion County.

In Multnomah County, Domestic Relations Department judges sit at the Multnomah County Juvenile Home in juvenile cases. The new building now occupied by the Juvenile Home is a model of its kind. It is the headquarters for the entire Juvenile Court staff, including fifteen case workers and thirty group workers. It also has excellent living, educational, and recreational accommodations for one hundred children. Many of the children involved in Juvenile Court Act proceedings are kept at the home for a few days to a few weeks. During this time a careful study is made of each case and a plan worked out for the child’s fu-

---

76 List prepared by Judge Paul W. Alexander, Court of Common Pleas, Division of Domestic Relations, Lucas County (Toledo), Ohio.
77 Or. Laws 1919, c. 296; O. C. L. A. secs. 93-501—93-515 (1940); Kanzler, *The Court of Domestic Relations of the State of Oregon for the County of Multnomah*, 1 Or. L. Rev. 41 (1921).
78 Or. Laws 1929, c. 183.
79 Or. Laws 1951, c. 443.
80 The new building was obtained as a result of strong public support for it. See Long, *Developing Public Support for Juvenile Courts*, 1947 YEARBOOK OF THE NAT. PROBATION AND PAROLE ASS’N 260.
ture care and training. There is close cooperation between the court and other agencies, particularly the Portland Child Guidance Clinic, public welfare, and the police. The personnel and facilities available for juvenile cases in other parts of Oregon are much less adequate. For example, the new Marion County domestic-relations judge has a total staff of one secretary and three probation officers, and the juvenile-detention facilities are undesirable and inadequate.

One argument in favor of family courts is that they give a centralized control over all matters pertaining to families. Some families have a series of different problems arising from the same basic difficulties; for example, nonsupport, child delinquency, and a request for a divorce. With an integrated family court, the same staff deals with all of these problems; there is thus a greater likelihood that a satisfactory solution can be found without duplication of effort.

A judge is the chief administrative and judicial official of the family court. This gives centralized authority and responsibility. If the volume of cases is so great that more than one judicial officer is needed, some courts use referees to hear matters, such as temporary alimony petitions or juvenile cases; others appoint masters or commissioners, and in Multnomah County, two judges are provided for the Domestic Relations Department and the senior of the two assigns cases.

The nonjudicial staff that the family-court proponents consider desirable is described by Judge Alexander as follows:

[The juvenile court] is equipped with a staff of trained specialists. In the larger courts it comprises the pediatrician, nurse, psychiatrist, clinical psychologist, psychometrist, psychiatric caseworker, social caseworker (usually called probation officer or counselor), marriage counselor, group worker, teacher, etc. In addition, the court regularly invokes the services of the legal profession, the church, school, private agency, public agency (police, recreation department, etc.) and all available community and institutional resources. The family court we envision for marital problems would be similarly staffed (except as to child specialists) and would avail itself of the same outside resources.

No court has a staff of this size or variety for use in divorce cases. A few courts have small specialized staffs for investigation and counseling purposes. Most courts, even in cities with a population of over 100,000, have none. Few of the persons now working on divorce cases are trained and skilled social workers, psychiatric social workers, marriage counselors, psychiatrists, or psychologists. In Oregon there is only one such

81 For the relation of clinics to juvenile courts, see Relation of the Clinic to the Delinquent Child, 1937 Yearbook of the Nat. Probation Ass'n 297.
84 Or. Laws 1951, c. 644.
person assigned to a court for work in divorce cases. The Domestic Relations Department of the Multnomah County Circuit Court has a full-time family consultant who conducts investigations and does counseling in domestic-discord cases. The present family consultant is an experienced psychiatric social worker. She works on three kinds of cases: child custody, child-visitation rights, and voluntary requests for marriage counseling. Her work on child-custody cases consists of an intensive investigation of particularly difficult cases assigned to her by the court. She submits written reports and recommendations to the court after completion of the investigations. She also makes investigations and holds conferences in some cases after a controversy has arisen over the terms of or compliance with child-visitation provisions of divorce decrees. Usually the parties come to her voluntarily in these cases without referral by the court. Many controversies are settled by agreement without court action.

The family consultant’s marriage-counseling work is done only in marital-discord cases in which one or both spouses request her assistance. Cases in which an attorney has been retained are not taken unless the attorney requests it. This marriage-counseling service is rarely granted after divorce proceedings have been started. Even though the counseling service is comparatively unpublicized, there is greater demand for it than can be met. Little time is spent on any cases except those in which both spouses are desirous of saving their marriage. The family consultant carries an average case load of twelve to fifteen of these cases on a long-term therapy basis. In each case she confers with one or both spouses on an average of once a week for from three to eighteen months. In addition, group-therapy sessions are regularly held with six to eight married couples selected from among those cases in which at least one spouse is receiving individual therapy. Many requests for marriage counseling are now turned down by the court family consultant. Some are referred to private psychiatrists. When the marriage-counseling service of the new Portland family-service agency is opened, the court family consultant will probably refer most counseling requests to this agency.

Social workers are used by some divorce courts in Ohio to try to effect reconciliations. They also do counseling and conduct investigations in nonsupport, custody, and child-visitation cases. Some courts use probation officers, usually overworked and inadequately trained, as marriage counselors, to make reconciliation attempts in divorce cases.

86 On this group-therapy program, see Drake and Sullivan, Is Your Divorce Necessary?, THE SUNDAY ORGONIAN MAGAZINE (Sept. 2, 1951) p. 6.
87 Fiedler, Social Services in a Divorce Court, 1948 YEARBOOK OF THE NAT. PROBATION AND PAROLE ASS’N 96.
88 Ibid.
This is being done in Washington under the new Family Court Act.89

In Detroit, a divorce-court official known as the “friend of the court” claims to have had considerable success in reconciliation attempts. The friend of the court also makes investigations in connection with support and custody orders, and his office is the collection and disbursement center for alimony and support payments.90 This office was set up in 1918 to enforce alimony decrees and the duties have gradually been increased.

Many Anglo-American courts have assistants to aid in uncovering collusion and other defenses in divorce proceedings.91 In Oregon, this function is supposed to be performed by the local district attorneys who represent the state in all divorce cases and appear and defend in uncontested divorce suits.92 In England and some American states, a court investigator or proctor makes independent investigations to discover possible divorce defenses.93 Investigative efforts of this nature have had no material effect on the number of divorces filed or granted; and with the growth of the family-court idea, they will probably be abandoned.

Family courts having extensive investigation and counseling services to handle marital-discord cases can do something to increase family stability. They can also do a far better job of adjusting differences between members of broken and discordant families than can the conventional courts. Their advantage lies in broad jurisdiction, large skilled staffs, and centralized control. But nowhere in the United States has the family court been expanded to the point where anything close to its full potential is realized.

Serious difficulties stand in the way of establishing effective family courts. These difficulties may be so great as to make their general adoption impossible, even in larger cities. It may be that those interested in decreasing marital discord by group action would achieve more by leaving the judicial system alone and directing their energies elsewhere.

One major difficulty in the way of establishing effective family courts is their expense. Maintaining adequate investigative and counseling staffs would be very costly, probably more costly than maintaining the best present-day juvenile-court staffs. There is a question whether or not local communities would be willing to bear this cost. The problem of

90 Pokorny, “Friend of the Court” Aids Detroit Judges in Divorce Cases, 29 J. AM. JUD. SOC'Y 166 (1946); Pokorny, Observations by a “Friend of the Court,” 10 LAW & CONTEMP. PROB. 778 (1944); Pokorny, Practical Problems in the Enforcement of Alimony Decrees, 6 LAW & CONTEMP. PROB. 274 (1939); Cooper and Dawson, Office of Friend of the Court, 6 DETROIT L. REV. 23 (1935).
91 2 VERNIER, AMERICAN FAMILY LAWS sec. 80 (1932).
92 O. C. L. A. sec. 93-908 (1940).
cost becomes especially acute in smaller cities and rural communities. The circuit-riding family-court staff is a possible answer for these communities.

Another difficulty is the nonexistence of sufficient personnel for even a moderate expansion in family courts. Skilled investigators can be recruited from the social-welfare profession. But there is no available supply of competent counselors. Drastic changes in university and other training programs will be necessary if the number of such persons is to be substantially increased. And then they will have to be shared by many public and private organizations and by the private practice of psychiatry and marriage counseling. Properly qualified family-court judges also will be hard to find. More than a lawyer's training and ordinary judicial experience is needed to properly preside over and administer a family court.

Opposition from the legal profession is likely to be another problem. The private practitioner of law is of little significance in juvenile-court matters. There are those who think that he should play even less of a part in family courts. A Portland City Club committee has suggested that family-counseling agencies might be permitted to represent litigants in divorce proceedings without the intervention of a private attorney. Even the Interprofessional Commission on Marriage and Divorce Laws has "assumed" that the use of adversary procedures in divorce cases should be displaced. If this assumption means anything, it means that the basic approach of the private practitioner of law should be abolished in divorce. It is inherent in his practice that he represent someone against an actual or potential adversary whose interests differ from his client's. If he cannot do this, there is no place for him in marital-discord cases.

The idea of marriage counseling as a divorce-court function has been criticized as coming so late in the history of the average marital controversy as to be ineffectual. It is argued that, after one or both spouses have decided on a divorce, and suit has been filed, counseling can achieve nothing. Statistics on divorce dismissals challenge this argument for at least a sizable minority of divorce cases. Also, the argument is based on the theory that reconciliation is the only purpose of marriage counsel-

---

94 Present marriage-counselor training programs are discussed in Morgan, Course Content of Theory Courses in Marriage Counseling, 12 Marriage and Family Living 95 (1950).

95 Divorce and Children of Divorce, 30 Portland City Club Bull. 347, 354 (1949).

96 A Los Angeles domestic-relations judge has had a favorable response to an offer, made by him at the opening of his court each day, to assist in working out reconciliations. Cunningham, Education—Conciliation in Divorce and Domestic Relations 46 (1950), a compilation of the "Dicta" in Va. L. Weekly (1949-50).
ing. Adjusting spouses to the fact of separation and divorce is perhaps as important. Further, it should be realized that relatively few husbands or wives having marital trouble seek marriage counseling before divorce. This is true even in cities where good counseling services exist. One reason may be ignorance of the available services. But another is an inclination to postpone any crisis-making decision concerning marital discord until the situation becomes so desperate that a divorce is decided upon. Family-court counseling during divorce proceedings may be the only possible place for counseling in many cases of discord. And family-court counseling may be particularly effective because divorce usually involves an emotional crisis to the parties; and this, together with the formality and strain of the judicial proceedings, is conducive to successful counseling.

Admittedly, many parties to divorce proceedings will not want to have anything to do with a counseling service. This raises the question of compulsory counseling. It would be cheaper and easier to restrict family-court marriage counseling to cases in which one or both spouses seem agreeable to it. But some experienced counselors claim that they can make great headway with a large percentage of those spouses who initially are very opposed to the counseling idea.

The issue of compulsory counseling also raises the moral question of the right of the state to pry into the personality structures of parties involved in litigation. Some will claim that the state has no such right. These same people are likely to resist family courts as showing an unnecessary and overly solicitous concern by the state with the affairs of the individual.

The merit of consolidating juvenile-court and divorce jurisdiction in one family court is questioned by some persons active in juvenile-court work. They feel that this may be to the disadvantage of juvenile-court programs by centering attention and personnel on the innumerable and dramatic problems of divorce. Thus, opposition to family courts may even come from within the court organization itself.

**Conclusions and Recommendations**

A high divorce rate in the United States will continue indefinitely. Large-volume divorce has become an established institution in American life.

The law has not been primarily responsible for the great increase in divorce; it has merely reacted to more fundamental forces that have produced a demand for divorce. Because of these forces, the legal system is not going to be able to do much in the way of reducing and prevent-
ing divorce. It can do something, it can probably do more than what it is now doing, but at best its capacity is limited.

Too much attention is concentrated on the problem of divorce. The basic problem is marital discord. More consideration should be given to ways of preventing marital discord; but, on this problem as well, what the legal system can do is very restricted.

Marital discord is a complex matter. There are many reasons for it; and there are many ways in which interested groups, including the state, can act so as to reduce the amount of such discord and its harmful results. The most effective way is by a coordinated program. The American Bar Association apparently realizes this and should be given great credit for sponsoring a competently staffed interprofessional commission that is now studying marriage and divorce problems. The commission's membership has been drawn from the fields of law, religion, psychology, sociology, marriage counseling, medicine, and psychiatry.97

When limited personnel and limited state and charitable funds are available for dealing with marital-discord problems, they should be used where they will do the most good. A coordinated program of action will help greatly in deciding where this is.

The following steps are recommended for dealing with the problems of marital discord and divorce. The recommendations are made in the hope that they will contribute somewhat to current discussion by indicating points at which attention should be focused, rather than with the idea that they merit unquestioned adoption.

**Divorce Grounds.** The hypocrisy, misrepresentation, and perjury in divorce proceedings should be eliminated, if possible. This means bringing the law closer to the realities of existing divorce practice. Adultery should never be the sole ground for divorce. Incompatibility, separation for a fixed number of months or years, and separation for a fixed period, plus agreement of the parties on a divorce, should be generally adopted as legal grounds. The special hardship grounds of impotency, incurable insanity, and conviction of a felony should also be generally adopted. As a deterrent to taking marriage and divorce too lightly, there should be a restriction on filing for divorce, except in the most unusual cases, until the parties have been married for at least one year. A requirement of this sort should be accompanied by steps to prevent evasion by abuse of annulment laws.

**Fault as an Element in Divorce.** Fault should be eliminated from the law so far as the issues of terminating the marriage and support and

---

97 Alexander, *The Interprofessional Commission*, id. at 119; and releases by the commission.
Custody of minor children are concerned. Consideration should be given to eliminating fault even on alimony and property-division issues, leaving to the criminal law the function of punishing wrongful conduct by one spouse against the other.

**Divorce Proceedings.** All divorce proceedings and court records should be confidential until after a final decree is entered. Hearings in divorce cases should be closed to the public. This would make it easier for the court to obtain a full and accurate factual picture. It would also make it easier to effect reconciliations after a suit has been filed, because the starting of divorce litigation would be less of a final renunciation of the marriage in the minds of the parties.

**Custody of Minor Children.** In making custody awards in divorce cases, courts should give more attention to the psychological well-being of the children concerned. Awards are too frequently made to a neurotic mother whose influence adversely affects her children's emotional development. And parents' reprehensible conduct in matters not concerning their children is too often a decisive consideration in granting custody. Greater awareness of these dangers by judges is needed. More custody investigations by qualified court staff members also would help.

**Marriage.** The mental and physical restrictions on persons who may marry should be revised in the light of present medical knowledge. The minimum age for valid marriage should be no lower than sixteen. Restrictions on remarriage of persons who have been granted final divorce decrees should be abolished after the time for appeal in the divorce proceedings has passed. Marriage-license laws should be revised in accordance with the suggestions of Richmond and Hall. Fewer persons should be qualified to perform civil marriages, and an effort should be made to give civil-marriage ceremonies more dignity and grandeur. Many persons are deeply impressed by elaborate ritual, and bringing more of this to the civil ceremony will tend to make such persons take marriage more seriously.

**The Legal Profession.** Too many able lawyers avoid divorce cases. Efforts should be made to increase the number of proficient lawyers who handle these matters. Closer surveillance of the bar in divorce matters, especially in large cities, is also needed.

Juvenile and domestic cases require so much knowledge and skill of a nonlegal sort that many judges are ill-equipped to handle them. There is a need for training facilities that judges specializing in juvenile and domestic matters can take advantage of. For example, a three-month course tailored to the needs of these judges and given jointly by the law and medical schools and the social-work, psychology, and sociology de-
departments of some large American university would be valuable. Per-
manent careers as judges of juvenile and domestic-relations courts
should be encouraged. Young lawyers interested in this work should be
hired as probation officers and domestic-relations referees with the pos-
sibility of being advanced to the bench. The practice of rotating judges
for short periods of juvenile-court and divorce-court service should be
discouraged. If possible, full-time judges for juvenile, divorce, and fam-
ily courts should be selected from a panel of lawyers who are excep-
tionally qualified for service in these courts.

Lawyers who take divorce cases should familiarize themselves with
the marriage-counseling facilities in their communities. This would in-
clude becoming acquainted with the ministers, priests, physicians, psy-
chiatrists, psychiatric social workers, and professional marriage coun-
selors who are competent at marriage counseling. A lawyer can then in-
telligently refer a client with marital troubles to these counselors when
either the lawyer or the client questions the desirability of divorce in the
particular case or when divorce proceedings create dangerous anxieties
in the client. Local bar associations can assist by preparing lists of quali-
fied counselors and by developing and working with liaison committees
drawn from the groups having specialized counseling skills and inter-
ests.

If highly developed family courts are adopted, lawyers in private prac-
tice should be encouraged to represent clients involved in domestic-dis-
cord cases before these courts. The private practitioner is essential in
working out property adjustments in divorce cases and in enforcing
property orders and some support orders. On the issues of child cus-
tody and the termination of marriage, the lawyer in private practice also
has something to contribute. He is a protection against inadequate fac-
tual investigations or inaccurate reports by court investigators. His
presence increases the litigant's feeling of having had a fair hearing and
of not just having been arbitrarily processed by a government agency.
He is also a safeguard against misapplication of the law by the court.

Wherever an elaborately staffed family court is set up, lawyers might
increase their value and prevent their exclusion from domestic-relations
practice by establishing a specialized bar. Superior knowledge and abil-
ity would have to be shown before a lawyer could practice before a fam-
ily court.

**Education.** Law students should be given some training in observing
personality characteristics and motivations. They would then be equi-
ped to do a fairly good job of screening out those domestic-relations
clients who could profit by expert counseling, and of determining the
kind of counseling needed. Law-school courses in domestic relations and
criminal law should cover the jurisdiction, structure, objectives, and personnel of juvenile, domestic-relations, and family courts. These matters are now ignored in most law schools.

Courses in marriage and the family should be expanded in colleges and high schools. These courses make for more stable future marriages by supplying background information that can be used in adjusting to marriage and by giving an impetus to more rational mate selection.

*MARRIAGE COUNSELING.* Professional marriage counselors should be examined and licensed by the state. The sooner this is done, the less likelihood that counseling quacks will get a foothold from which it will be difficult to dislodge them. Efforts should be increased to obtain more competent marriage counselors. The time may have arrived for the universities to start separate professional schools of counseling to supply marriage, child-guidance, vocational-guidance, penal-institution, school, and personnel-department counselors. This is another place where state and charitable financial assistance would be valuable in an organized approach to problems of marital discord and divorce.

More funds should be made available to family-service agencies and child-guidance clinics for marriage and family counseling. These agencies deal with families during the formation and early development stages. They are in an excellent position to prevent discord, which may be much easier than to correct it after it has developed.

*Family Courts.* The extension of the family-court idea deserves careful consideration. In part this means research. More study is needed of family-court organization and methods, and of the means of getting such courts established. Careful case studies should be made of the most highly developed courts of domestic relations and family courts now in existence.

One way of testing the merits of various plans would be to establish eight or ten experimental courts in different types of communities, and try out new methods in these courts. Counties could be found willing to cooperate if the courts were subsidized with outside funds. In return for financing, the counties would agree to use the methods and the personnel recommended by some national organization, such as the interprofessional commission, for supervising the experimental projects. Because of the great concern over divorce, private-foundation or government financial support for such experiments could probably be obtained if the plans were well thought through, were properly sponsored, and offered real hope of progress.

Family courts, with adequately developed investigative and counseling services, are the most promising of the currently recommended divorce reforms. They appear to be the best solution offered by the legal
system to reduce marital discord when it becomes serious, and to efficiently, fairly, and wisely terminate the marital status when this becomes necessary. If properly staffed, they also should result in better custody awards, measured by the well-being of the children involved, and more equitable alimony and support orders. A few courts, such as the Court of Domestic Relations in Toledo, Ohio, have begun to fulfill the promise of the family-court idea.

But, as has been seen, there are serious problems to be overcome if family courts are to be generally adopted. It is doubtful if this costly, intimate form of judicial administration can receive the degree of acceptance in all quarters necessary to widespread adoption. It is questionable whether there are not other ways of expending money and skill that will more effectively deal with marital-discord problems. It is debatable that the legal system should be given more duties than it now has in the family-relations sphere.

Some time must pass before these issues will be resolved. Family courts are only in the early experimental stages. But they have enough possibility of success to merit more extensive and genuine experimentation.