

UNIFORM MARRIAGE AND DIVORCE ACT *

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

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WITH PREFATORY NOTE AND COMMENTS

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UNIFORM MARRIAGE AND DIVORCE ACT

Prefatory Note

When the National Conference of Commissioners on Uniform State Laws was formed in 1892, two of the major subjects named as appropriate for uniform laws were commercial paper and marriage and divorce. A law on the former was soon achieved; it was not until August 6, 1970, when the Conference first promulgated this Act, that agreement was reached on a measure combining the latter two subjects. In the intervening years, some dozen statutes were approved dealing with various aspects of one or the other. None of them received substantial acceptance by the states.

The activity resulting in the present draft started with the 1965 report of the Special Committee on Uniform Divorce and Marriage Laws, co-chaired by Leonard G. Brown and Bernard Hellring, recommending exploration of the possibility of non-fault divorce laws, the procurement of financial resources to finance research and the recruitment of advisors from all relevant areas of society. The Conference received this proposal with great favor. The next year was devoted to a search for funds and to other promotional work. The Conference continued its approval. Grants in aid were secured from the Ford Foundation and from the United States Department of Health, Education and Welfare. Professor Robert J. Levy of the University of Minnesota was engaged as reporter to supervise research and preliminary drafting. In 1967, Professor Herma H. Kay of the University of California was added as co-reporter. On the request of the Committee, in accordance with the established requirement of consultation with appropriate American Bar Association authorities, the Family Law Section of that Association appointed a Liaison Committee, consisting of Honorable Morris N. Hartman, Chairman, Clarence Kolwyck, Esq., later Chairman [while dissenting from the product, he made many valuable contributions], Honorable Florence M. Kelley, Professor Henry H. Foster, Jr., James P. Hart, Jr., Esq., Godfrey Munter, Esq. The Committee also had the assistance of a Board of Advisors and of a Board of Consultants who were chosen because of their special experience in areas of family law or because of their training in social and behavioral sciences having a particular relevance to the family. The draft was developed and approved by the Conference in light of the advice given by these qualified and experienced Advisors and Consultants, in 1970, and certain alterations were made in 1971, as the result of additional helpful suggestions from representatives of the Family Law Section of the American Bar Association.

A review of the legal and nonlegal literature on marriage and divorce suggests that, although the experts may be divided on other issues, there is virtual unanimity as to the urgent need for basic reform in both areas: not only of specific provisions but of the entire conceptual structure. The traditional conception of divorce based on fault has been singled out particularly, both as an ineffective barrier to marriage dissolution which is regularly overcome by perjury, thus promoting disrespect for the law and its processes, and as an unfortunate device which adds to the bitterness and hostility of divorce proceedings. In recent years, persistent demands for reform finally have been heeded. Statutory reform has been accomplished in countries so diverse as England and Italy and in a number of American states as well. Although less attention

has been given to the anachronisms of marriage law, the need for modernization of state regulatory patterns in the light of a new approach to divorce is undeniable.

Without undermining the state's interest in the stability of marriages, the Act greatly simplified pre-marital regulation. In addition, the list of "prohibited" marriages has been greatly reduced. Most important, the Act changes the traditional sanctions applied to such marriages. At present, most state regulatory statutes enforce marriage prohibitions by permitting one of the parties (or a parent, in case of youthful marriage) to a prohibited marriage to seek an annulment. It has long been recognized, however, that annulments often are sought for personal or family reasons typically having nothing to do with the purpose the marriage prohibition was designed to serve. The marriage prohibitions therefore serve mainly to provide a legal device alternative to divorce under appropriate conditions. But because annulled marriages are considered "void ab initio," annulments have retroactively deprived spouses of financial support and status. An even harsher sanction, the designation of some prohibited marriages as "void," often deprives innocent spouses of social insurance benefits, workmen's compensation claims, wrongful death recoveries, and the financial benefit of property passing as part of the deceased spouse's estate. This Act has eliminated completely the notion of "void" marriages; has minimized the number of prohibited marriages; and, while permitting a declaration of invalidity in circumscribed cases, has created a procedure which permits courts to refuse to make the decree retroactive. The Act's simplified marriage regulations and circumscribed annulment doctrines require most spouses who desire the termination of their marriage to proceed under the dissolution provisions of the Act rather than the invalidity provisions. This result is proper; if the complaint is that the marriage is no longer viable, termination rather than a declaration of invalidity is the appropriate remedy.

In its provisions on dissolution of marriage, the Act has totally eliminated the traditional concept that divorce is a remedy granted to an innocent spouse, based on the marital fault of the other spouse which has not been connived at, colluded in, or condoned by the innocent spouse. Consideration was given to alternative methods of creating a non-fault device for terminating marriages, including the ground of voluntary separation for a period of time, now recognized by many states. The Conference came finally to the conclusion, also reached in England, California and Iowa, (and, since the Act was promulgated, in a number of other states) that the legal dissolution of a marriage should be based solely on a finding that factually the marriage is irretrievably broken. This standard will redirect the law's attention from an unproductive assignment of blame to a search for the realities of the marital situation.

The Act's elimination of fault notions extends to its treatment of maintenance and property division. The distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership. The Act authorizes the division of the property belonging to either spouse, or to both spouses, as the primary means of providing for the future financial needs of the spouses, as well as of doing justice between them. Where the property is insufficient for the first purpose, the Act provides that an award of maintenance may be made to either spouse under appropriate circumstances to supplement the available property. But, because of its property division

provisions, the Act does not continue the traditional reliance upon maintenance as the primary means of support for divorced spouses. Standards are set up to guide the court in apportioning property and in awarding maintenance.

The custody and support provisions of the Act emphasize the interest of children rather than the wishes of their parents. Fault notions, which occasionally have decided both custody and financial issues, were deliberately and expressly excised. The custody provisions of the Act restate and clarify existing law, both substantive and procedural, and seek to discourage continuing litigation involving children. Provision is made, under appropriate circumstances, for the appointment of an attorney to represent the child's interest in litigation affecting him directly.

Throughout the Act an effort has been made to reduce the adversary trapping of marital litigation. Thus procedural modifications have been introduced affecting the title of the proceedings and the form of the pleadings; the parties are permitted to file a joint petition for dissolution and the basis chosen for dissolution does not lend itself to recriminatory disputes; and the parties are encouraged to make amicable settlements of their financial affairs and voluntary provisions for the custody of their children.

Although the Conference itself decided not to provide, as part of the Act, a uniform system of obtaining statistical information, consideration of the Act should provide the occasion for each state to make a fresh examination of the legislation, recommended by the Bureau of Vital Statistics, which would permit the gathering of uniform national statistics on marriage and divorce. See U.S. Department H.E.W., *Marriage Statistics Analysis 35* (Statistical Series 21, No. 16, 1968); Jacobson, *American Marriage and Divorce* 16 (1959).

The Uniform Marriage and Divorce Act is promulgated as one interlocking and interdependent piece of legislation. Because of the terms upon which resources were granted, and, still more, because of the interrelationships involved, the draft presents a unified proposal for a code of marriage and divorce. However, it is realized that local statutory structure, or varied views as to policy may lead some legislatures to prefer to deal with the two subjects in separate bills. The structure of the Act in separable parts facilitates such a separation. Thus a state which desired to enact the marriage portion separately could change the short title (§ 101) to "Uniform Marriage Act." In § 102 (b), it could use only purposes (1) and (2). The state then would enact Part V (§§ 501-505) as are appropriate. Likewise, if enactment of the dissolution provisions alone were desired, the appropriate short title would be the "Uniform Divorce Act," and in § 102 (b) the purpose clauses (3), (4) and (5) of § 102 (b) would be used. The parts to be adopted would be III, IV, and so much of V as would be appropriate.

It should be kept in mind that the by-lines preceding each section are bracketed, since many states' legislative rules do not permit the incorporation of such material in bills that are presented for introduction. Each draftsman will have to follow the rule prevailing in his own state.

UNIFORM MARRIAGE AND DIVORCE ACT

PART I

GENERAL PROVISIONS

§ 101. [Short Title]

This Act may be cited as the "Uniform Marriage and Divorce Act."

COMMENT

This is the customary "short title" clause, which may be placed in such order in the bill for enactment as the legislative practice of the state prescribes. Note, also, that it may be adjusted, as necessary, if parts of the measure are introduced as separate bills, in accordance with the statement in the prefatory note.

§ 102. [Purposes: Rules of Construction]

This Act shall be liberally construed and applied to promote its underlying purposes, which are to:

- (1) provide adequate procedures for the solemnization and registration of marriage;
- (2) strengthen and preserve the integrity of marriage and safeguard family relationships;
- (3) promote the amicable settlement of disputes that have arisen between parties to a marriage;
- (4) mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage;

(5) make reasonable provision for spouse and minor children during and after litigation; and

(6) make the law of legal dissolution of marriage effective for dealing with the realities of matrimonial experience by making irrevocable breakdown of the marriage relationship the sole basis for its dissolution.

COMMENT

This sets forth the underlying purposes and objectives of the measure, as a foundation for construction of the Act. As indicated in the prefatory note, the enumeration of underlying purposes of the Act which are appropriate to legislation on marriage or divorce, respectively, may be utilized separately, if it is desired to place the marriage or divorce parts of the act in different divisions of the state statutes. On the use of such purpose provisions as guides to statutory construction, see Merrill, *Uniformly Correct Construction of Uniform Laws*, 49 *Am.Bar Assoc.Jour.* 545, 546 (1963) with citation of cases. None of the enumerations of purposes is intended to exclude, in construction and application, the consideration of other purposes spelled out in provisions of the Act.

§ 103. [Uniformity of Application and Construction]

This Act shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

COMMENT

This is the standard Conference provision on uniformity and construction in aid thereof. This means that, once a provision has been judicially construed, courts of other states should follow that construction unless convinced by overwhelming demonstration that the pristine rendition unquestionably was in error. See *Commercial Nat. Bank v. Canal-Louisiana Bank*, 1916, 35 S.Ct. 194, 197, 239 U.S. 520, 528, 60 L.Ed. 417, 421.

PART II
MARRIAGE

§ 201. [Formalities]

Marriage is a personal relationship between a man and a woman arising out of a civil contract to which the consent of the parties is essential. A marriage licensed, solemnized, and registered as provided in this Act is valid in this State. A marriage may be contracted, maintained, invalidated, or dissolved only as provided by law.

COMMENT

The effect of this section is to validate all marriages performed in the enacting state in accordance with its provisions. The provision does not necessarily invalidate marriages performed in the state which are not "licensed, solemnized, and registered" in accordance with this Act. For example, although an applicant for a marriage license may have given a false name to the clerk [see section 202(a)], the general policy favoring the validity of marriages would require that the marriage be held valid. This position is in accord with the case law. See *Clark, Domestic Relations* 41 (1968). Indeed, because Section 208 narrowly circumscribes the traditional annulment remedy, formal errors committed during the licensing, solemnization, or registration process could not be raised under that section. In accordance with established usage, marriage is required to be between a man and a woman. These terms refer to all persons authorized by the Act to marry, and are not confined to those who have attained the legal age of majority. *Cochran v. State*, 91 Ga. 763, 185 S.E. 16 (1893); *Thomas v. Novas*, 47 Haw. 605, 393 P.2d 645 (1964); *State v. Burt*, 75 N.H. 64, 71 A. 30, Ann.Cas.1912A, 232 (1908); *Kenyon v. Peo.*, 26 N.Y. 203, 84 Am.Dec. 177 (1863) (per Baltron, J.); *Blackburn v. State*, 22 Ohio St. 102 (1971); *Massa v. State*, 37 Ohio App. 532, 175 N.E. 219 (1930); *State v. Seiler*, 106 Wis. 346, 82 N.W. 167 (1908). The general course of decision holds that not every deviation from formal prescribed procedures renders a marriage subject to successful attack. Substantial compliance, in the light of attendant circumstances and statutory policy, results in a sustainable marriage. *Wallace v. Screws*, 227 Ala. 183, 149 So. 226 (1923); *Russell v. Tagliavere*, 153 So. 44 (La.App.1934); *Knapp v. Knapp*, 149 Md. 263, 131 A. 329 (1925); *Johnson v. Johnson*, 214 Minn. 462, 8 N.W.2d 620 (1943); *Hartman v. Valier & Spies Milling Co.*, 356 Mo. 424, 202 S.W.2d 1 (1947); *Christensen v. Christensen*, 144 Neb. 763, 14 N.W.2d 613 (1944); *Ponina v. Leland*, 454 P.2d 16 (Nev.1969); *Portwood v. Portwood*, 109 S.W.2d 515 (Tex.Civ.App.1937) (writ of error dismissed or refused). As to attacks on marriages which, though performed in accordance with the formal requirements of the Act, are either prohibited or are not permitted by the regulatory provisions of Section 202-207, consult Section 208, and comment thereto.

This section additionally emphasizes the legal concept of marriage as a civil contractual status, in distinction from any religious significance also attached thereto. In prescribing that a "marriage may be contracted, maintained, invalidated or dissolved only as provided by law," it does not preclude giving effect to the statutes and decisions of jurisdictions other than the enacting state.

§ 202. [Marriage License and Marriage Certificate]

(a) The [Secretary of State, Commissioner of Public Health] shall prescribe the form for an application for a marriage license, which shall include the following information:

(1) name, sex, occupation, address, social security number, date and place of birth of each party to the proposed marriage;

(2) if either party was previously married, his name, and the date, place, and court in which the marriage was dissolved or declared invalid or the date and place of death of the former spouse;

(3) name and address of the parents or guardian of each party; and

(4) whether the parties are related to each other and, if so, their relationship.

(5) the name and date of birth of any child of which both parties are parents, born before the making of the application, unless their parental rights and the parent and child relationship with respect to the child have been terminated.

(b) The [Secretary of State, Commissioner of Public Health] shall prescribe the forms for the marriage license, the marriage certificate, and the consent to marriage.

COMMENT

The Act assumes that each state will adapt its existing marriage licensing statute so that it conforms to the substantive regulatory provisions of the Act. Such statutes vary substantially from state to state; and there is no special interest in obtaining uniformity as to the form utilized for marriage licenses and registrations. This section permits the state to forego legislative

regulation by leaving the elaboration of forms to an appropriate state official. States unwilling to break completely with past legislative patterns nonetheless may want to review, modernize, and simplify legislation delineating license and registration forms. The inclusion of social security numbers will facilitate the enforcement of duties of support, if this later becomes necessary. The information regarding prior marriages and their termination similarly will prove helpful in a variety of situations making investigation appropriate. Information as to occupation may be useful to a determination of whether an underage marriage should be approved (Section 205), or in passing on issues as to maintenance, support, property division, or child custody. The name of a party who has been married previously of course should be that which he or she bore during that marriage.

§ 203. [License to Marry]

When a marriage application has been completed and signed by both parties to a prospective marriage and at least one party has appeared before the [marriage license] clerk and paid the marriage license fee of [\$______], the [marriage license] clerk shall issue a license to marry and a marriage certificate form upon being furnished:

(1) satisfactory proof that each party to the marriage will have attained the age of 18 years at the time the marriage license is effective, or will have attained the age of 16 years and has either the consent to the marriage of both parents or his guardian, or judicial approval; [or, if under the age of 16 years, has both the consent of both parents or his guardian and judicial approval;] and

(2) satisfactory proof that the marriage is not prohibited; [and]

[(3) a certificate of the results of any medical examination required by the laws of this State].

COMMENT

To avoid inconvenience when one of the parties to the prospective marriage is residing, temporarily or permanently, outside the state, the Act requires that only one of the parties appear personally before the clerk to provide the information required by this section. Both parties must

have signed the application. It is not intended that the state should create a new office to handle marriage license applications; the title of the official presently charged with the responsibility should be substituted for the bracketed phrase "[marriage license]" clerk wherever it appears in this Part. Each state should insert in the brackets its marriage license fee.

If both parties to the marriage have reached the age of 18, neither parental nor judicial consent is required to obtain a license. A number of states have already adopted this position; and it is consistent with the trend in federal as well as state law to lower to 18 the age at which persons are permitted to vote and to make autonomous decisions about important matters affecting their lives. A party under 18 must have consent of both of his parents to the marriage, if both are living and have capacity to consent. If one of his parents is unavailable, or if either or both of his parents refuses for any reason to consent, judicial approval must be obtained pursuant to the provisions of Section 205. The Act requires judicial as well as parental consent to the marriage if one of the parties is below the age of 16. The provision respecting the issuance of a license for marriage to persons under the age of 16 is bracketed, to signify that states having a policy against marriage by persons so young may omit that provision, without doing violence to the concept of uniformity. The standard governing judicial approval is provided in Section 205.

"Satisfactory proof" of age and of required consent includes such methods as may be prescribed under Section 202(b) in the license form, or any other proof that should satisfy a reasonable official exercising unarbitrary judgment. See *United States v. Lee Huen*, 118 Fed. 442, 457 (N.D.N.Y.1902).

Subsection (3) is bracketed because the Conference concluded that the traditional forms of premarital medical examination, now required by the marriage laws of most of the states, need not be preserved. The premarital medical examination requirement serves either to inform the prospective spouses of health hazards that may have an impact on their marriage, or to warn public health officials of the presence of venereal disease. For the latter purpose, the statutes have been proved to be both avoidable and highly inefficient. See Monahan, *State Legislation and Control of Marriage*, 2 *Journal of Family Law* 30, 34-35 (1962). Moreover, the cursory blood test which satisfies the requirements of most states provides very little service to the prospective spouses themselves. If a state decides to preserve its traditional premarital examination, a reference to its statute should be included in the cross-references to this section.

§ 204. [License, Effective Date]

A license to marry becomes effective throughout this state 3 days after the date of issuance, unless the [_____] court orders that the license is effective when issued, and expires 180 days after it becomes effective.

COMMENT

A relatively short premarital waiting period has been chosen. The information available suggests that longer waiting periods do not discourage potentially unstable marriages; and, at any event, are often waived by judges. The other major function served by a waiting period, to discourage or eliminate the "dare" and "gin" marriages, can be accomplished by the three day delay required by this section. See Ellsey, Marriage or Divorce?, 22 U.Kan.City L.Rev. 9, 17 (1953). Each state should insert in the brackets the name of the appropriate court. The 180 day limit on the effectiveness of the license is for the convenience of engaged couples who need to plan for wedding dates long in advance. Obviously, this limit applies to all licenses.

§ 205. [Judicial Approval]

(a) The [_____] court, after a reasonable effort has been made to notify the parents or guardian of each underaged party, may order the [marriage license] clerk to issue a marriage license and a marriage certificate form:

[(1)] to a party aged 16 or 17 years who has no parent capable of consenting to his marriage, or whose parent or guardian has not consented to his marriage; [or

(2) to a party under the age of 16 years who has the consent of both parents to his marriage, if capable of giving consent, or his guardian].

(b) A marriage license and a marriage certificate form may be issued under this section only if the court finds that the underaged party is capable of assuming the responsibilities of marriage and the marriage will serve his best interest. Pregnancy alone does not establish that the best interest of the party will be served.

(c) The [_____] court shall authorize performance of a marriage by proxy upon the showing required by the provisions on solemnization.

COMMENT

The court given responsibility for approving youthful marriages should be identified in the statute. Many states, continuing existing practice, will assign this to the juvenile court; in other states, the probate court is used and in still others the designated court is a family court or the trial court of general jurisdiction. In accordance with the decision taken in Section 203, in respect to marriages of persons under 16 years of age, the provision concerning issuance to such persons has been bracketed.

The Act deliberately avoids detailing procedural rules to govern the judicial proceedings it establishes unless some special procedural device is essential to accomplish a substantive result sought by the Act. Thus, subsection (a) requires only that the court make a "reasonable effort" to notify the parents that an underaged party has sought judicial approval of a marriage license. (As to what constitutes reasonable effort to notify a person, see Merrill on Notice, Chapters 13, 14 and 19.) Since a party under the age of 16 years needs the consent of both his parents, if they are alive and have capacity to consent, as well as judicial approval, the court clerk will have to notify both parents when the judicial proceeding is commenced. But when a person aged 16 or 17 seeks judicial approval because one of his parents refuses to consent, the court can approve the application if the parent cannot be located or even if a recalcitrant parent avoids receiving formal notification.

The legal standard for judicial approval requires the judge to estimate the capacity of the underaged party to assume the responsibility of marriage and to determine whether the marriage would serve the best interest of that party. The judge obviously will want to obtain personal information about the other party to the prospective marriage as well; but the statute does not permit the judge to refuse his approval because he believes the marriage would not serve the best interest of the party over 18. The substantive standard necessarily is somewhat vague. Nonetheless, a number of considerations are implicit in the language and structure of the subsection: since judicial approval is a substitute for parental consent for 16 and 17 year old applicants, such applicants cannot be denied judicial approval solely because a parent or parents have refused to consent to the marriage; although the prospective wife's pregnancy is not alone a sufficient ground for judicial approval, neither does the subsection mean that the judge may withhold approval solely because the prospective wife (whether she or her prospective spouse is the applicant) is pregnant. Pregnancy is one, but only one, of the relevant considerations the judge will weigh in determining the applicant's best interest. Although the standard is the same whether the applicant is between the ages of 16 and 18 or is under the age of 16, the judge no doubt will investigate younger applicants more thoroughly. The provision indicates that the judge would be abusing his discretion if he were to decide that no 16 or 17 year old is mature enough to marry.

§ 206. [Solemnization and Registration]

(a) A marriage may be solemnized by a judge of a court of record, by a public official whose powers include solemnization of marriages, or in accordance with any mode of solemnization recognized by any religious denomination, Indian Nation or Tribe, or Native Group. Either the person solemnizing the marriage, or, if no individual acting alone solemnized the marriage, a party to the marriage, shall complete the marriage certificate form and forward it to the [marriage license] clerk.

(b) If a party to a marriage is unable to be present at the solemnization, he may authorize in writing a third person to act as his proxy. If the person solemnizing the marriage is satisfied that the absent party is unable to be present and has consented to the marriage, he may solemnize the marriage by proxy. If he is not satisfied, the parties may petition the [_____] court for an order permitting the marriage to be solemnized by proxy.

(c) Upon receipt of the marriage certificate, the [marriage license] clerk shall register the marriage.

(d) The solemnization of the marriage is not invalidated by the fact that the person solemnizing the marriage was not legally qualified to solemnize it, if neither party to the marriage believed him to be so qualified.

COMMENT

Subsection (a) lists the officials permitted to solemnize marriage. The clause, "no individual acting alone", was designed to take account of the increasing tendency of marrying couples to want a personalized ceremony, without traditional church, religious or civil trappings. This provision authorizes one of the parties to such a marriage ceremony to complete the marriage certificate form and forward it to the appropriate official for registration. The phrase "Native Group", was added to take account of indigenous or other aboriginal cultural groups who do not consider themselves to be Nations or Tribes, such as some of the native groups found in Alaska and Hawaii.

Subsection (b) authorizes the solemnization of marriage by proxy. During World War II, special proxy marriage statutes were enacted to facilitate marriages when one of the prospective spouses could not be present because of military responsibilities. Although it is not expected that proxy marriages will be common, there are many reasons why, in individual cases, couples may prefer such a ceremony. So long as the marriage license procedure has been followed and the official performing the ceremony has no reason to doubt the intentions of the absent prospective spouse, there is no reason why a proxy marriage should be prohibited. As to the form of proxy, any written document in the well-known form of a proxy such as is used in other serious transactions suffices. Compare *State v. Anderson*, 239 Ore. 200, 396 P.2d 558 (1964). The proceeding for an order authorizing proxy marriage is special, and may be informal, so long as the two conditions precedent to solemnization by proxy are demonstrated to the court's judicial satisfaction. If the official solemnizing the marriage is not satisfied that the absent party has consented to the marriage, he may refuse to perform the ceremony until the parties obtain a court order authorizing the marriage by proxy. [Section 205(b).]

Subsection (c) does not deal with the subject of procuring a copy of the registration of the marriage. This will be governed by the law of each state as to the procurement of certified copies of public records. A state that does not provide for the registration of marriages should make provision therefor upon adoption of this Act, either through a special statute or by administrative rule.

Subsection (d) states definitely what probably would be the meaning of the section without it. However, it probably is wise to remove any possibility of misconception.

§ 207. [Prohibited Marriages]

(a) The following marriages are prohibited:

(1) a marriage entered into prior to the dissolution of an earlier marriage of one of the parties;

(2) a marriage between an ancestor and a descendant, or between a brother and a sister, whether the relationship is by the half or the whole blood, or by adoption;

(3) a marriage between an uncle and a niece or between an aunt and a nephew, whether the relationship is by the half or the whole blood, except as to marriages permitted by the established customs of aboriginal cultures.

(b) Parties to a marriage prohibited under this section who cohabit after removal of the impediment are lawfully married as of the date of the removal of the impediment.

(c) Children born of a prohibited marriage are legitimate.

COMMENT

The Act eliminates most of the traditional marriage prohibitions and, consistent with the national trend, eliminates all affinity prohibitions. Only bigamous and incestuous marriages are prohibited. The Act follows the recent legislative trend toward permitting first cousin marriages, but uncle-niece and aunt-nephew marriages are prohibited unless such marriages are permitted by the established custom of aboriginal cultures. The phrase, "aboriginal cultures", is based on language employed in government documents. It is used to denote a cultural practice recognized by the original or earliest known inhabitants of a region (see Random House Dictionary's illustration: "aboriginal customs"). The intent is to save those special customs of Indian tribes, of Alaskan natives of various ethnic origins, and of Polynesians, which may not accord with the incest taboos of Western culture. Rhode Island, in considering this section, must take into account the effect of R.I.Gen.Laws (1956) § 15-1-4, in order to determine whether the Uniform Act, in this respect, should be conformed to local policy. See *In re May's Estate*, 305 N.Y. 486, 114 N.E.2d 4 (1957). Marriages of brothers and sisters by adoption are prohibited because of the social interest in discouraging romantic attachments between such persons even if there is no genetic risk. The adoption provision is addressed directly to avoiding questions as to the impact of adoption on marriage law, since the adoption statutes in many states have not expressly resolved the issue. Cf. 6 & 7 Eliz., 2 c. 5 § 13(3) (1958). The Act does not prohibit uncle-niece and aunt-nephew marriages where an adoption has created the relationship.

Subsection (b) is intended to cure a defect arising under the laws of many states. For one reason or another, many persons, whose marriages are invalid because of prohibitions, neglect to contract formal marriages after the impediment is removed. If they reside in a state where common law marriage is recognized, there is no problem. But, in other jurisdictions, serious harm can result to legitimate interests of the surviving partner, of a sort which the legislators very likely would not have sanctioned had the possibility occurred to them. This subsection is intended to protect those interests.

Subsection (c) enacts the general modern trend to treat the offspring of prohibited marriages as legitimate.

§ 208. [Declaration of Invalidity]

(a) The [_____] court shall enter its decree declaring the invalidity of a marriage entered into under the following circumstances:

(1) a party lacked capacity to consent to the marriage at the time the marriage was solemnized, either because of mental incapacity or infirmity or because of the influence of alcohol, drugs, or other incapacitating substances, or a party was induced to enter into a marriage by force or duress, or by fraud involving the essentials of marriage;

(2) a party lacks the physical capacity to consummate the marriage by sexual intercourse, and at the time the marriage was solemnized the other party did not know of the incapacity;

(3) a party [was under the age of 16 years and did not have the consent of his parents or guardian and judicial approval or] was aged 16 or 17 years and did not have the consent of his parents or guardian or judicial approval; or

(4) the marriage is prohibited.

(b) A declaration of invalidity under subsection (a)(1) through (3) may be sought by any of the following persons and must be commenced within the times specified, but in no event may a declaration of invalidity be sought after the death of either party to the marriage:

(1) for a reason set forth in subsection (a)(1), by either party or by the legal representative of the party who lacked capacity to consent, no later than 90 days after the petitioner obtained knowledge of the described condition;

(2) for the reason set forth in subsection (a)(2), by either party, no later than one year after the petitioner obtained knowledge of the described condition;

(3) for the reason set forth in subsection (a)(3), by the underaged party, his parent or guardian, prior to the time the underaged party reaches the age at which he could have married without satisfying the omitted requirement.

Alternative A

[(c) A declaration of invalidity for the reason set forth in subsection (a)(4) may be sought by either party, the legal spouse in case of a bigamous marriage, the [appropriate state official], or a child of either party, at any time prior to the death of one of the parties.]

Alternative B

[(c) A declaration of invalidity for the reason set forth in subsection (a)(4) may be sought by either party, the legal spouse in case of a bigamous marriage, the [appropriate state official] or a child of either party, at any time, not to exceed 5 years following the death of either party.]

(d) Children born of a marriage declared invalid are legitimate.

(e) Unless the court finds, after a consideration of all relevant circumstances, including the effect of a retroactive decree on third parties, that the interests of justice would be served by making the decree not retroactive, it shall declare the marriage invalid as of the date of the marriage. The provisions of this Act relating to property rights of the spouses, maintenance, support, and custody of children on dissolution of marriage are applicable to non-retroactive decrees of invalidity.

COMMENT

This section is designed to replace the traditional law of annulment of marriage. Some of the common grounds for annulment, such as fraud, have been abolished completely. Others have been restated to avoid unnecessary overlap with the dissolution sections.

This section states the circumstances under which the marriage may be terminated by a "declaration of invalidity," and establishes the "defenses" to each of the bases for a declaration.

Subsection (b) states a general policy against declarations of invalidity after the death of either party to the marriage, and subsection (e) states a policy in favor of applying the dissolution provisions of Part III to the spouses' financial affairs following a declaration of invalidity.

Subsection (a)(1) states that declaration of invalidity may be obtained where there is proof that one of the parties to the marriage lacked capacity to consent to the marriage because of emotional illness or other mental disturbance or because of the incapacitating effect of alcohol or drugs. In the case of drugs and alcohol, the court is entitled to be somewhat skeptical about a claim of incapacity because of the protective features of the three day waiting period required by Section 204. Courts construing the "lacks capacity to consent" language of Subsection (a)(1) will undoubtedly continue to apply existing stringent standards by holding that a declaration of invalidity is appropriate only if the petitioner offers clear and definite evidence that one of the spouses lacked "sufficient mental capacity to understand intelligently the marriage contract ... and the obligations it imposed upon him." *Ertel v. Ertel*, 40 N.E.2d 85, 313 Ill.App. 326 (1942). The proceeding must be commenced within ninety days after petitioner discovered the existence of the condition. [Subsection (b)(1).] If a party was incapacitated by drugs or alcohol, the "statute of limitations" would of necessity begin to run shortly after the ceremony; thus, most claims of invalidity on such grounds will be stale a few months after the marriage. A declaration of invalidity may come later if one of the spouses is mentally retarded, has other mental infirmity, or is emotionally unstable; but the court would properly be skeptical if the petitioner asserted, after a substantial period of cohabitation, that he had discovered, only within the preceding three months, his spouse's lack of capacity, on their wedding day, to consent.

Subsection (a)(2) authorizes a declaration of invalidity if one of the spouses was unable to consummate the marriage by sexual intercourse, so long as the other spouse did not know of the condition at the time of the ceremony and if the proceeding is instituted within a year after the petitioner obtains knowledge of the condition. The one year period is provided to permit couples some time to try to adjust to a marriage under these circumstances without running that risk that a declaration of invalidity would be precluded. Since the marriage cannot be invalidated after the death of either spouse, and since the spouses' finances can be adjusted as if a divorce had been granted under subsection (e), there is no reason to compel the spouses to make a more rapid decision about continuing the marriage. In the absence of proof of extraordinary circumstances, such as a marriage by proxy or some enforced separation of the spouses prior to cohabitation, the court would be warranted in assuming that the one year period begins shortly after the ceremony rather than at some later date.

The phrase, "obtained knowledge of the described condition," in subsection (b)(1) and (2), is intended to mean awareness of the event, including information from a reliable source. In light of the public interest favoring promptness in bringing the petition, "knowledge" should be construed to include the possession of information sufficient to arouse inquiry concerning the existence of the condition. See *Merrill*, Notice § 4 (1952).

Subsection (a)(3) provides that, if one of the spouses was under the age of 18 at the time of the ceremony and married without satisfying the consent requirements of Section 203 or

Section 205, that party or his parent or guardian may obtain a declaration of invalidity. There are, however, two important limitations to this ground for a declaration of invalidity: (1) a party to the marriage who was over 18, or a party under the age of 18 who had fulfilled the requirements of Section 203 or Section 205, is not entitled to a declaration of invalidity because there is no reason to permit that party to invalidate a marriage he was authorized to contract; (2) the underaged party or his representative is not entitled to a declaration of invalidity when he reaches the age of 18 (or 17, if he had parental consent and lacked only approval from the appropriate judicial officers). The brackets about the provision concerning persons aged under 16 carry out the option extended under Section 203.

The provisions of subsection (b), stating that no declaration of invalidity may be "sought" after the death of either party is intended to prohibit such a collateral attack upon the marriage, in lieu of a declaration, in all proceedings, including probate proceedings. Moreover, the use of the word "sought" rather than "commenced" implies that the death of a party to the marriage at any time before the entry of final judgment would terminate a proceeding attacking the marriage. The underlying policy reasons for this principle are clear: the traditional "void marriage" doctrine often imposed unwise and unfair penalties on innocent "spouses" in stable family situations long after the questioned marriage had occurred. The penalties serve no effective deterrent purpose, but cause severe economic dislocations; a spouse may be denied workmen's compensation and social security benefits, or even a share in a spouse's estate, after the marriage has been terminated by the death of the other spouse, despite the fact that the surviving spouse had no reason to suspect the invalidity of the marriage.

Alternative A of subsection (c) applies this principle to marriages prohibited by Section 207. A declaration of invalidity of a prohibited marriage may be obtained by either party to the marriage, by the legal spouse in bigamous marriages, by the appropriate state official, or by a child of one of the parties-but only prior to the death of one of the parties to the marriage. Alternative B would permit a declaration of invalidity by the same parties at any time up to five years after the death of either party to the marriage. A state considering the adoption of Alternative B should consider whether authorizing post-death collateral attacks on prohibited marriages is worth whatever deterrent effect the provision may have, when the only consequence of a successful attack will be to disturb settled financial relationships.

Subsection (e) authorizes the court to treat declarations of invalidity as what they have in fact become-substitutes for divorce. After considering all relevant circumstances, especially the impact of a retroactive decree upon the spouses, their children and other third parties, the court may make the decree not retroactive and may then apply the provisions of Part III in distributing the parties' property and in determining maintenance and child support. Even if the decree is made retroactive, the court may have to distribute property acquired by the spouses during the marriage. In the past this has been accomplished by analogy to partnership law. Cf. N.H.Rev.Stat. Ann. § 458:19 (1955); Clark, Domestic Relations 136 (1968).

§ 209. [Putative Spouse]

Any person who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminates his status and prevents acquisition of further rights. A putative spouse acquires the rights conferred upon a legal spouse, including the right to maintenance following termination of his status, whether or not the marriage is prohibited (Section 207) or declared invalid (Section 208). If there is a legal spouse or other putative spouses, rights acquired by a putative spouse do not supersede the rights of the legal spouse or those acquired by other putative spouses, but the court shall apportion property, maintenance, and support rights among the claimants as appropriate in the circumstances and in the interests of justice.

COMMENT

The best known method used by the courts to protect the "marital" interests of persons who have established a stable family relationship which cannot be recognized as a marriage (a marriage which is labelled "void" under current law, perhaps, or parties who have cohabited as husband and wife without marrying ceremonially) is the common law marriage doctrine. See Section 211. But a variety of other equitable doctrines have also been utilized—one or another can be found in almost every state—to preserve if not the status, the financial incidents of valid marriage in such circumstances. See, e.g., Weyrauch, *Informal and Formal Marriage—An Appraisal of Trends in Family Organization*, 28 U.Chi.L.Rev. 88 (1960); *Danes v. Smith*, 104 A.2d 455, 30 N.J.Super. 292 (1954). In the absence of doctrines such as these, many persons who in good faith consider themselves married, and who have established and maintained over a long period a stable family relationship, would be denied both the economic and status incidents of marriage. This section makes it clear that the Act was not intended to abolish such doctrines. In addition, it codifies one of the equitable doctrines which has proved, in California and other experience, to be especially useful. For illustrations of the application of the putative spouse doctrine in California, see Comment, *Rights of the Putative and Meretricious Spouse in California*, 50 Calif.L.Rev. 866 (1962). Cases from other jurisdictions illustrative of the putative spouse concept include *Walker v. Walker*, 47 N.W.2d 633, 330 Mich. 332 (1951) and annotation; *Chrismond v. Chrismond*, 52 So.2d 624, 211 Miss. 746 (1951); *Barone v. Barone*, 294 P.2d 609, 207 Ore. 26 (1956); *Brandt v. Brandt*, 333 P.2d 887, 215 Ore. 423 (1958); *Buck v. Buck*, 427 P.2d 954, 19 Utah 2d 161 (1967).

It is possible for a person to have more than one putative spouse at the same time, since good faith is the test. In addition, a putative spouse and a legal spouse may be able to claim from a single estate or from other funds legally available to a spouse. A common situation of the latter type might involve a bigamous marriage in which the second spouse was never married or had been divorced. In such cases, the court is instructed to apportion property and the other financial incidents of marriage between the legal and the putative spouse, or among putative spouses. A fair and efficient apportionment standard is likely to be the length of time each spouse cohabited with the common partner. For illustrative cases, see *Estate of Ricci*, 201 Cal.App.2d 146; 19 Cal.Rptr. 739 (1962); *Sousa v. Freitas*, 10 Cal.App.3d 660; 89 Cal.Rptr. 485 (1970). Because the codification of any particular equitable doctrine designed to protect the financial interests of innocent parties is bound to be controversial, this section has been bracketed. Passage of the Act without this section should not, therefore, be taken to imply a legislative judgment adverse to continuing development of this or similar doctrines by the case law.

The adoption of this section is most desirable (1) to provide legislative foundation for achieving the obviously just results provided by the putative spouse doctrine; (2) to spell out specifically the rights conferred upon a putative spouse; (3) to state specifically when the status of putative spouse terminates; (4) to eliminate any distinction which some courts might attempt between prohibited marriages and those which merely are subject to declaration of invalidity; (5) to provide specifically for equitable apportionment, on the basis of justice and the special circumstances of each case, either where there are a legal spouse and a putative spouse, or where there are several putative spouses. Some judges have expressed difficulties in this regard, but the standard is a workable one which the courts are accustomed to apply in many fields, and there is a body of available authority to afford guidance, as indicated previously in this Comment.

§ 210. [Application]

All marriages contracted within this State prior to the effective date of this Act, or outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicil of the parties, are valid in this State.

COMMENT

This section serves two purposes. It insures that the Act's marriage regulations will not be used to invalidate marriages contracted before it takes effect. More importantly, it codifies the emerging conflicts principle that marriages valid by the laws of the state where contracted should be valid everywhere, even if the parties to the marriage would not have been permitted to marry in the state of their domicil. See Restatement Second of Conflict of Laws, Section 283

[Proposed Official Draft (1969)]. However, the section expressly fails to incorporate the "strong public policy" exception of the Restatement and hence may change the law in some jurisdictions. This section will preclude invalidation of many marriages which would have been invalidated in the past.

The Conference has withdrawn its approval of the Uniform Marriage Evasion Act. This section and the provisions of Section 207 are inconsistent with that Act. A state adopting this Act should repeal the earlier one, if it exists therein.

Alternative A

§ 211. [Validity of Common Law Marriage]

Common law marriages are not invalidated by this Act.]

Alternative B

§ 211. [Invalidity of Common Law Marriage]

Common law marriages contracted in this State after the effective date of this Act are invalid.]

COMMENT

These alternatives are presented because the line of cleavage in the states, between those which consider the common law marriage to be a highly useful social institution and those which insist that all marriages *de jure* should be contracted in accordance with prescribed statutory formalities, proved impossible to erase. In view of this basic conflict as to policy, the Conference concluded that there was no hope of achieving uniformity of enactment, no matter which rule was adopted. Accordingly, the alternative versions of this section permit each state to make its decision in accordance with its own view as to policy, and to change its law at any time desired without destroying the effect of its adoption of the Uniform Act. Alternative A would preserve common law marriage in the form it has already taken by judicial decision. Alternative B would make clear that common law marriages contracted in the adopting state in the future are not to be recognized. The alternatives are a signal to the state legislatures that this issue should be re-examined even if the state is one of those which has already abolished common law marriage.

PART III
DISSOLUTION

§ 301. [Application of [Rules of Civil Practice] to Proceedings under this Act]

(a) The [Rules of Civil Practice] apply to all proceedings under this Act, except as otherwise provided in this Act.

(b) A proceeding for dissolution of marriage, legal separation, or declaration of invalidity of marriage shall be entitled "In re the Marriage of _____ and _____." A custody or support proceeding shall be entitled "In re the (Custody) (Support) of _____."

(c) The initial pleading in all proceedings under this Act shall be denominated a petition. A responsive pleading shall be denominated a response. Other pleadings, and all pleadings in other matters under this Act, shall be denominated as provided in the [Rules of Civil Practice].

(d) In this Act, "decree" includes "judgment."

(e) A decree of dissolution or of legal separation, if made, shall not be awarded to one of the parties, but shall provide that it affects the status previously existing between the parties in the manner decreed.

COMMENT

The basic philosophy of this part of the draft is to utilize the procedural systems of the several states, so far as possible, in divorce litigation. However, in certain respects, the change from "fault" to "no-fault" basis dictates the use of terms and of procedures different from those which have become thoroughly associated with fault-orientation, in order to impress bench and bar with the break from past concepts.

The internal brackets in the catchline and the bracketing of "Rules of Practice" throughout the section indicate the bill draftsman's responsibility to use whatever term fits his state's procedural law.

Subsection (a) makes the state's normal procedural rules applicable to proceedings under this Act, except where it specifically provides otherwise. Procedural provisions in the Act include subsections (b) and (c) of Section 301; Section 304; Section 311; Section 314; Section 316; Section 403; Section 406; and Section 410.

Subsection (b) incorporates suggestions made by several writers that substitution of a neutral case title ("In re the Marriage of _____ and _____") for the customary adversary title ("_____ v. _____"), will help to reduce the hostile atmosphere of marital actions. The Act adopts this suggestion and extends it to independent custody and support proceedings. A custody or support proceeding commenced as part of a proceeding for dissolution or legal separation need not be separately entitled.

Subsection (c), like subsection (b), is intended to reduce the adversary trappings of family cases by substituting a "proceeding" for the customary "action" and denominating the pleadings "petition" and "response" rather than "complaint" and "answer." Similar provisions are West's Ann.Calif.Civ.Code (1970) §§ 4503, 4504; Iowa General Assembly, 1970 Regular Session H.F. 1156. The practice in states that already use a "petition" for the initial pleading in all civil cases will not be affected by this subsection.

Subsection (d) is designed to prevent any confusion from variance in terms.

Subsection (e) emphasizes the nonadversary philosophy by providing, in accordance with the practice of some states, that decrees of dissolution or separation shall not be awarded to either party. Instead they are to specify the change in the status of the parties.

Since the Rules of Civil Practice are made applicable to proceedings under the Act, such procedural tools as discovery procedures, bills of particulars, etc., may be required in proper cases. Obviously, the nonadversary nature of the proceedings make such tools inappropriate to the issue of irretrievable breakdown and the court should not permit their use. In matters of property division, the propriety of separation or maintenance agreements, and of provision for children, these tools may be extremely useful, and are not precluded by the Act, if they are found in the state's arsenal of procedural weapons.

§ 302. [Dissolution of Marriage; Legal Separation]

(a) The [_____] court shall enter a decree of dissolution of marriage if:

(1) the court finds that one of the parties, at the time the action was commenced, was domiciled in this State, or was stationed in this State while a member of the armed services,

and that the domicile or military presence has been maintained for 90 days next preceding the making of the findings;

(2) the court finds that the marriage is irretrievably broken, if the finding is supported by evidence that (i) the parties have lived separate and apart for a period of more than 180 days next preceding the commencement of the proceeding, or (ii) there is serious marital discord adversely affecting the attitude of one or both of the parties toward the marriage;

(3) the court finds that the conciliation provisions of Section 305 either do not apply or have been met;

(4) to the extent it has jurisdiction to do so, the court has considered, approved, or provided for child custody, the support of any child entitled to support, the maintenance of either spouse, and the disposition of property; or has provided for a separate, later hearing to complete these matters.

(b) If a party requests a decree of legal separation rather than a decree of dissolution of marriage, the court shall grant the decree in that form unless the other party objects.

COMMENT

Subsection (a) lists the three findings that a court must make before it has jurisdiction to enter a decree of dissolution of marriage: first, it must find that one party to the marriage has established an appropriate connection with the state; second, it must find that the marriage is irretrievably broken; and finally, to the extent it has jurisdiction to do so, it must have considered and passed on the issues of custody, support, maintenance, and property disposition. If the court lacks jurisdiction to act upon any of the matters listed in subsection (a)(3), without acting upon that matter, it may enter a decree of dissolution of marriage. Thus, if the court is acting upon the petition of one spouse only and the other spouse is not subject to the personal jurisdiction of the court, the court lacks jurisdiction to decide issues relating to maintenance, *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 1 L.Ed.2d 1456, 77 S.Ct. 1360 (1957); *Estin v. Estin*, 334 U.S. 541, 92 L.Ed. 1561, 68 S.Ct. 1213 (1948), or the distribution of property not before the court, see *Fall v. Eastin*, 215 U.S. 1, 54 L.Ed. 65, 30 S.Ct. 3, 23 LRANS 924, 17 Ann.Cas. 853 (1909); and may not have jurisdiction, acting alone to decide issues relating to support, consult the Uniform Reciprocal Enforcement of Support Act, or child custody, *May v. Anderson*, 345

U.S. 528, 97 L.Ed. 1221, 73 S.Ct. 840 (1953), consult the Uniform Child Custody Jurisdiction Act. In such a case, the court has jurisdiction only to dissolve the marriage and it may enter its decree of dissolution after making the findings set forth in subsection (a)(1) and (2).

The 90 day period of subsection (a)(1) is intended to be continuous and to apply both to domiciliaries and to members of the armed services. It may be started at any time, but it must exist at the commencement of the action and it must have been maintained for 90 days next preceding the findings by the court. Obviously, dependent upon circumstances, it may commence, effectively, sometime before the initiation of the action. One who has just entered the forum state may commence the proceeding immediately, thus enabling the court to enter such temporary orders as are necessary to protect the rights of the parties. Since the test is domicile, the party need not remain physically present throughout the 90 day period, so long as he has acquired no new domicile. Similarly, a member of the armed forces might be outside the boundary lines, if he remained "stationed" therein. A showing that either party satisfies, the 90 day requirement is sufficient; hence a petitioner may utilize fulfillment of the 90 day period by the respondent.

Subsection (a)(2) embodies the basic shift from fault to no-fault grounds for dissolution of the marriage which is the primary object of this part of the Act. Many terms might have been used to characterize the concept. "Irretrievably broken" was chosen because this has become a term of common use in the literature of divorce reform, and so has gained a significant meaning upon which judges may rely for guidance. It is closely related to the standards recently adopted in California ("irremediable breakdown") and in Iowa ("breakdown of the marriage relationship ... no reasonable likelihood that the marriage can be preserved") and equates to the doctrinal result attained under the concept of incompatibility, *Newman v. Newman*, 391 P.2d 902 (Okla.1964) ("irremediable rift ... such a conflict of personalities as to destroy the legitimate ends of matrimony and the possibility of reconciliation"). Two guidelines are set up for evidence sufficient to support a finding that the marriage is irretrievably broken: (i) that the parties have lived separate and apart for more than 180 days next preceding the commencement of the proceeding for dissolution; (ii) that there exists "serious marital discord adversely affecting the attitude of one or both of the parties toward the marriage." These provisions satisfy the desire of those who wish to have specific guidelines to assist the court in determining what is irretrievable breakdown. At the same time, the second provision retains all the judicial discretion to weigh all the evidence bearing upon the death of the marriage which was envisioned in the original draft of this section as approved by the Conference in St. Louis in 1970.

Subsection (a)(3) prescribes that the court must find specifically either that the conciliation provisions of Section 305 do not apply or that they have been met. This guards against overlooking the Act's policy to encourage conciliation procedures in situations where there is promise of success.

The phrase, "considered, approved, or provided for," in subsection (a)(4) is intended to confer upon the court the authority to refuse to make any award, if the evidence justifies an outright denial, as well as the authority to make such allotment as the facts require. To avoid any

doubt, the court is authorized expressly to provide for a later hearing to complete action on these matters, if necessary. Probably this would be within the general scope of judicial authority in most states.

Subsection (b) means that the court may not grant a decree of legal separation over the objection of one of the parties. In cases where both parties are before the court, if one party requests a decree of legal separation and the other party requests a decree of dissolution, the court lacks jurisdiction to enter a decree of legal separation. If only one party is before the court and the court lacks personal jurisdiction over the other party, the court may enter a decree of legal separation at the petitioner's request. A similar provision is found in the California Family Law Act of 1969, California Civil Code section 4508(b).

§ 303. [Procedure; Commencement; Pleadings; Abolition of Existing Defenses]

(a) All proceedings under this Act are commenced in the manner provided by the [Rules of Civil Practice].

(b) The verified petition in a proceeding for dissolution of marriage or legal separation shall allege that the marriage is irretrievably broken and shall set forth:

(1) the age, occupation, and residence of each party and his length of residence in this State;

(2) the date of the marriage and the place at which it was registered;

(3) that the jurisdictional requirements of Section 302 exist and the marriage is irretrievably broken in that either (i) the parties have lived separate and apart for a period of more than 180 days next preceding the commencement of the proceeding or (ii) there is serious marital discord adversely affecting the attitude of one or both of the parties toward the marriage, and there is no reasonable prospect of reconciliation;

(4) the names, ages, and addresses of all living children of the marriage, and whether the wife is pregnant;

(5) any arrangements as to support, custody, and visitation of the children and maintenance of a spouse; and

(6) the relief sought.

(c) Either or both parties to the marriage may initiate the proceeding.

(d) If a proceeding is commenced by one of the parties, the other party must be served in the manner provided by the [Rules of Civil Practice] and may within [30] days after the date of service file a verified response.

(e) Previously existing defenses to divorce and legal separation, including but not limited to condonation, connivance, collusion, recrimination, insanity, and lapse of time, are abolished.

(f) The court may join additional parties proper for the exercise of its authority to implement this Act.

COMMENT

Subsection (a) provides for commencement of proceedings in whatever way is required by the local practice rules or act.

Subsection (b) lists the necessary allegations of the petition. Other appropriate allegations may be included at the pleader's discretion. Residence, of course, has the meaning "domicil," as this is made the basis of jurisdiction in Section 302(a)(1) and the comment thereto. If a petitioner is a member of the armed services, the allegation of residence in the state is satisfied by an allegation of the length of time petitioner has been stationed within the state as provided in Section 302(a)(1). "Occupation" means vocation, not avocation. If the petitioner has grounds for relying upon both (i) and (ii) in support of the allegation of irretrievable breakdown, he may allege them conjunctively, and, if the proof supports either one, he will be entitled to his decree under Section 302. Subsection (b)(5) does not require the parties to allege their arrangements as to property division, since, under Section 306, they may choose to keep these arrangements private. In such cases, the court's duty under Section 302(a)(3) to consider, approve, or make provision for property disposition may be satisfied by inquiring of both parties whether they have freely arrived at a mutually satisfactory disposition of their property.

Subsection (c) permits joint initiation of the proceeding by both spouses, thereby shifting from the traditional doctrine of the law forbidding so-called collusive divorce.

Subsection (d) provides for service of process, petition, or notice, as the case may be, in the manner prescribed by local practice rules or codes, but requires a verified response, if any, and prescribes its filing within 30 days after date of service. This is another of the procedures designed to affirm the variance of the non-fault divorce procedure from the traditional litigation based on fault grounds.

Subsection (e) abolishes the traditional defenses to divorce and legal separation. A state that recognizes other defenses should add those to the list in this subsection and again in the specific repealer, Section 504(3). The intention is that the sole defense, other than jurisdictional defenses, to dissolution of marriage or legal separation will be that the marriage is not irretrievably broken.

Subsection (f) is designed to insure to the court full authority to cause additional parties to be joined, whenever necessary to the complete effectuation of any of its duties or functions in administering the Act. Under the procedures of some states, it appears that it is necessary to provide expressly for this authority. The method for serving these new parties will be any method available under the state's general procedural rules or statutes.

§ 304. [Temporary Order or Temporary Injunction]

(a) In a proceeding for dissolution of marriage or for legal separation, or in a proceeding for disposition of property or for maintenance or support following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, either party may move for temporary maintenance or temporary support of a child of the marriage entitled to support. The motion shall be accompanied by an affidavit setting forth the factual basis for the motion and the amounts requested.

(b) As a part of a motion for temporary maintenance or support or by independent motion accompanied by affidavit, either party may request the court to issue a temporary injunction for any of the following relief:

(1) restraining any person from transferring, encumbering, concealing, or otherwise disposing of any property except in the usual course of business or for the necessities

of life, and, if so restrained, requiring him to notify the moving party of any proposed extraordinary expenditures made after the order is issued;

(2) enjoining a party from molesting or disturbing the peace of the other party or of any child;

(3) excluding a party from the family home or from the home of the other party upon a showing that physical or emotional harm would otherwise result;

(4) enjoining a party from removing a child from the jurisdiction of the court; and

(5) providing other injunctive relief proper in the circumstances.

(c) The court may issue a temporary restraining order without requiring notice to the other party only if it finds on the basis of the moving affidavit or other evidence that irreparable injury will result to the moving party if no order is issued until the time for responding has elapsed.

(d) A response may be filed within [20] days after service of notice of motion or at the time specified in the temporary restraining order.

(e) On the basis of the showing made and in conformity with Sections 308 and 309, the court may issue a temporary injunction and an order for temporary maintenance or support in amounts and on terms just and proper in the circumstance.

(f) A temporary order or temporary injunction:

(1) does not prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding;

(2) may be revoked or modified before final decree on a showing by affidavit of the facts necessary to revocation or modification of a final decree under Section 316; and

(3) terminates when the final decree is entered or when the petition for dissolution or legal separation is voluntarily dismissed.

COMMENT

Subsection (a) permits motions for temporary maintenance and temporary support in three kinds of proceedings, (1) dissolution of marriage; (2) legal separation; and (3) independent proceedings for maintenance, support, or property disposition following an *ex parte* dissolution of the marriage granted in another, earlier proceeding. Motions for temporary custody are covered by Section 403.

Subsection (b) is intended to permit the court to restrain either spouse or a third party, including a bank or other institutional holder of property, from dealing with the property in the manner specified, or to take other action which might involve serious mental or physical harm to a party or to one of the children. It also is intended to authorize the court to prevent the removal of a child from its jurisdiction, and to grant any other injunctive relief necessary to proper judicial functioning under the Act. In some states, the local rules of practice may require that third parties be made parties to the proceeding in order to accomplish this goal.

Subsection (c) authorizes a limited *ex parte* practice which permits the court, upon a showing that irreparable injury would otherwise result, to issue a temporary restraining order without notice to the other party. The order becomes effective upon service on the other party and will remain effective until discharged by the court. It is anticipated that an early hearing date will be set on an order to determine whether the temporary restraining order should be continued or made permanent so that the other party may be heard as soon as possible on the merits. A provision similar to subsections (b) and (c) appears in the California Family Law Act of 1969 (California Civil Code, section 4359, as amended, 1970).

Each state should insert its own time limit in subsection (d), bearing in mind that the matter should be handled with dispatch and that the court may make an order shortening time on a proper showing.

Subsection (f)(1) is intended to make clear that the amount established for temporary support or maintenance will not prejudice the parties at later hearings held to determine the amount of permanent support or maintenance. If the parties and their attorneys are able to agree on amounts for temporary payments without having to worry that those amounts will establish a precedent of need or ability to pay at later hearings, much adversary maneuvering and its consequent result of suspicion and bitterness may be avoided.

§ 305. [Irretrievable Breakdown]

(a) If both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken, or one of the parties has so stated and the other has not denied it, the court, after hearing, shall make a finding whether the marriage is irretrievably broken.

(b) If one of the parties has denied under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to filing the petition and the prospect of reconciliation, and shall:

(1) make a finding whether the marriage is irretrievably broken; or

(2) continue the matter for further hearing not fewer than 30 nor more than 60 days later, or as soon thereafter as the matter may be reached on the court's calendar, and may suggest to the parties that they seek counseling. The court, at the request of either party shall, or on its own motion may, order a conciliation conference. At the adjourned hearing the court shall make a finding whether the marriage is irretrievably broken.

(c) A finding of irretrievable breakdown is a determination that there is no reasonable prospect of reconciliation.

COMMENT

This section, with others, embodies a new approach to dissolution of marriage. It provides that the only basis upon which a marriage may be dissolved is that a court has found that the marriage has broken down irretrievably. The traditional grounds for divorce, which assumed that one party had been at fault by committing an act giving rise to a cause of action for divorce, are abolished. The legal assignment of blame is here replaced by a search for the reality of the marital situation: whether the marriage has ended in fact. The public policy embodied in this section was recognized in *DeBurgh v. DeBurgh*, 250 P.2d 598, 601, 39 Cal.2d 858, 863-44 (1952) (Traynor, J.): "when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted." California, Iowa, and other states have adopted the non-fault approach to marriage dissolution proposed by this section.

This section makes the determination of whether the marriage is irretrievably broken, in all cases, a matter for determination by the court, "after hearing," which means "upon evidence." *Shields v. Utah Idaho Central R.R. Co.*, 59 S.Ct. 160, 305 U.S. 177, 83 L.Ed. 111 (1938); *Juster Bros. v. Christgau*, 7 N.W.2d 501, 214 Minn. 108 (1943); *State ex rel. Ellis v. State Road Com.*, 131 S.E. 7, 100 W.Va. 531 (1925). In procedural terms, it distinguishes two types of cases. In the group of cases covered by subsection (a), the only evidence presented to the court supports the allegation of the petition that the marriage is irretrievably broken. Either both parties have so stated whether in the petition or by oral or written testimony before the court, or one party has done so without objection from the other. In this group of cases, the court must make a finding, after hearing, whether the marriage is irretrievably broken. The Conference concluded, even as to this category of cases, that the determination of breakdown should be a judicial function rather than a conclusive presumption arising from the parties' testimony or from the petition. This decision accords with the position taken in California and in Iowa. The alternative of adjournment, provided by subsection (b) for cases in which there is a dispute as to whether the marriage is irretrievably broken, is not available in these cases. In most cases falling under the terms of subsection (a), it is anticipated that the court will find that the marriage is irretrievably broken because there will be no evidence before the court that might support a contrary finding. In rare cases, however, the court may not find the evidence credible. In such cases, the court normally will permit the parties to produce other evidence that the court may find persuasive. For this purpose, normal practice will permit the parties to request that the hearing be continued for a short time. Power to continue is implicit in the power to hear.

Subsection (b) covers the situation in which the parties are in dispute as to whether their marriage is irretrievably broken. In these circumstances, the court is directed to consider the factors relevant to marital breakdown, including the petitioner's reasons for seeking a dissolution of the marriage and the prospect that the parties may achieve a reconciliation, and to decide forthwith or at an adjourned hearing whether the marriage is irretrievably broken.

Because the defense of recrimination and other concepts associated with fault are abolished by the Act (sections 303(e) and 503), the court may not refuse to find that the marriage has broken down irretrievably merely because of petitioner's conduct during the marriage. If the court decides to adjourn the matter as provided in subsection (b)(2), it may suggest that the parties seek counseling during the period of adjournment. The waiting period must be no shorter than thirty days and, if possible in light of the court's calendar, no longer than sixty days after the previous hearing. The court must make its final decision as to whether the marriage is irretrievably broken at the adjourned hearing. The section does not contemplate more than one adjourned hearing, although certainly a hearing not completed at one session may be continued. The power of either party, or of the court, to require a conciliation conference, is in aid of the policy to encourage conciliation, and, in appropriate cases, resort to counseling, without invoking the controversial tool of compulsory counseling.

Section 305 intentionally makes no distinction between childless marriages and those with minor children. If the parties establish that their marriage has broken down irretrievably, the court is not authorized to make a contrary finding because of the impact of a dissolution of

the marriage upon the minor children. Under former law, if the parties established the existence of a ground for divorce and no defenses existed, the court lacked jurisdiction to deny the divorce simply because of its views about divorce or the impact of divorce on minor children. There is no intention to change this rule. The court's power in this regard is limited to seeing that provision has been made for the custody and support of minor children as contemplated by Section 302(a)(3).

Because it is expected that the parties themselves will be the primary source of evidence as to irretrievable breakdown, the Act has eliminated any requirement of corroboration.

The Conference took no position as to whether a family court should be established as an adjunct to the Act, because it felt that the subject was one in which uniformity was not essential, and, indeed, that uniformity by statute would be impossible, in view of differing state constitutional provisions. The Act does not forbid the creation of a family court, or the use of a family court division within a court having jurisdiction over divorce and related subjects.

Subsection (c) insures that the court, in finding irretrievable breakdown, will consider whether there is any *reasonable* prospect of reconciliation. The remedy for a determination of any relevant fact issue, contrary to the evidence, is afforded by the usual channels of appeal.

§ 306. [Separation Agreement]

(a) To promote amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for disposition of any property owned by either of them, maintenance of either of them, and support, custody, and visitation of their children.

(b) In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the support, custody, and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.

(c) If the court finds the separation agreement unconscionable, it may request the parties to submit a revised separation agreement or may make orders for the disposition of property, maintenance, and support.

(d) If the court finds that the separation agreement is not unconscionable as to disposition of property or maintenance, and not unsatisfactory as to support:

(1) unless the separation agreement provides to the contrary, its terms shall be set forth in the decree of dissolution or legal separation and the parties shall be ordered to perform them, or

(2) if the separation agreement provides that its terms shall not be set forth in the decree, the decree shall identify the separation agreement and state that the court has found the terms not unconscionable.

(e) Terms of the agreement set forth in the decree are enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms.

(f) Except for terms concerning the support, custody, or visitation of children, the decree may expressly preclude or limit modification of terms set forth in the decree if the separation agreement so provides. Otherwise, terms of a separation agreement set forth in the decree are automatically modified by modification of the decree.

COMMENT

An important aspect of the effort to reduce the adversary trappings of marital dissolution is the attempt, made by Section 306, to encourage the parties to reach an amicable disposition of the financial and other incidents of their marriage. This section entirely reverses the older view that property settlement agreements are against public policy because they tend to promote divorce. Rather, when a marriage has broken down irretrievably, public policy will be served by

allowing the parties to plan their future by agreeing upon a disposition of their property, their maintenance, and the support, custody, and visitation of their children.

Subsection (b) undergirds the freedom allowed the parties by making clear that the terms of the agreement respecting maintenance and property disposition are binding upon the court unless those terms are found to be unconscionable. The standard of unconscionability is used in commercial law, where its meaning includes protection against one-sidedness, oppression, or unfair surprise (see section 2-302, Uniform Commercial Code), and in contract law, *Scott v. U.S.*, 12 Wall (U.S.) 443 (1870) ("contract ... unreasonable and unconscionable but not void for fraud"); *Stiefler v. McCullough*, 174 N.E. 823, 97 Ind.App. 123 (1931); *Terre Haute Cooperage v. Branscome*, 35 So.2d 537, 203 Miss. 493 (1948); *Carter v. Boone County Trust Co.*, 92 S.W.2d 647, 338 Mo. 629 (1936). It has been used in cases respecting divorce settlements or awards. *Bell v. Bell*, 371 P.2d 773, 150 Colo. 174 (1962) ("this division of property is manifestly unfair, inequitable and unconscionable"). Hence the act does not introduce a novel standard unknown to the law. In the context of negotiations between spouses as to the financial incidents of their marriage, the standard includes protection against overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other.

In order to determine whether the agreement is unconscionable, the court may look to the economic circumstances of the parties resulting from the agreement, and any other relevant evidence such as the conditions under which the agreement was made, including the knowledge of the other party. If the court finds the agreement not unconscionable, its terms respecting property division and maintenance may not be altered by the court at the hearing.

The terms of the agreement respecting support, custody, and visitation of children are not binding upon the court even if these terms are not unconscionable. The court should perform its duty to provide for the children by careful examination of the agreement as to these terms in light of the standards established by Section 309 for support and by Part IV for custody and visitation.

Subsection (c) envisages that, if the court finds the agreement unconscionable, it will afford the parties the opportunity to negotiate further. If they are unable to arrive at an agreement that is not unconscionable, the court, on motion of either party, may decide the issues of property disposition, support, and maintenance in light of the standards established in Sections 307 through 309. The court's power to make orders for the custody and visitation of the children is set forth in Part IV.

Subsection (d) permits the parties, in drawing the separation agreement, to choose whether its terms shall or shall not be set forth in the decree. In the former event, the provisions of subsection (e), making these terms enforceable through the remedies available for the enforcement of a judgment, but retaining also the enforceability of them as contract terms, apply. This represents a reversal of the policy of the original 1970 Act, which required a choice between "merging" the agreement in the judgment and retaining its character as a contract.

Strong representations as to the undesirability of such a choice, in the light of foreign doctrines as to the enforceability of judgments, as compared with contract terms, in this area of the law, made by persons and groups whose expertise entitled them to respect, led the Conference, in 1971, to change its former decision.

There still remains a place for agreements the terms of which are not set forth in the decree, if the parties prefer that it retain the status of a private contract, only. In this instance, the remedies for the enforcement of a judgment will not be available, but the court's determination, in the decree, that the terms are not unconscionable, under the ordinary rules of *res adjudicata*, will prevent a later successful claim of unconscionability. Such an agreement, unless its terms expressly so permit, will not be modifiable as to economic matters. Other subjects, relating to the children, by subsection (b) do not bind the Court.

Subsection (f) allows the parties to agree that their provisions as to maintenance and property division will not be modifiable or can be modified only in accordance with the terms of the agreement, even though those terms are included in the decree. If the court finds that these are not unconscionable, it may include them in its decree. The effect of including in the decree a provision precluding or limiting modification of the terms respecting maintenance or property division is to make the decree nonmodifiable or modifiable only in the limited way as to those terms. Subsection (f) thus permits the parties to agree that their future arrangements may not be altered except in accord with their agreement. Such an agreement maximizes the advantages of careful future planning and eliminates uncertainties based on the fear of subsequent motions to increase or decrease the obligations of the parties. However, as stated in the subsection, this does not apply to provisions for the support, custody, or visitation of children.

Concerning the effect of a decree as a lien on the property of the spouse against whom it is rendered, the Conference took the position that the general laws of the state, as to judgment liens, would apply. However, in jurisdictions with special statutes respecting the liens created by decrees for support, maintenance, and the like, care should be taken in preparing the repealer section not to disturb provisions it is desired to retain.

Alternative A

[§ 307. [Disposition of Property]

(a) In a proceeding for dissolution of a marriage, legal separation, or disposition of property following a decree of dissolution of marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, without regard to marital misconduct, shall, and in a proceeding for legal

separation may, finally equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both. In making apportionment the court shall consider the duration of the marriage, and prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit.

(b) In a proceeding, the court may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent children of the parties.]

Alternative B

[§ 307. [Disposition of Property]

In a proceeding for dissolution of the marriage, legal separation, or disposition of property following a decree of dissolution of the marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's separate property to that spouse. It also shall divide community property, without regard to marital misconduct, in just proportions after considering all relevant factors including:

(1) contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;

(2) value of the property set apart to each spouse;

(3) duration of the marriage; and

(4) economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for a reasonable period to the spouse having custody of any children.]

COMMENT

Alternative A, which is the alternative recommended generally for adoption, proceeds upon the principle that all the property of the spouses, however acquired, should be regarded as assets of the married couple, available for distribution among them, upon consideration of the various factors enumerated in subsection (a). It will be noted that among these are health, vocational skills and employability of the respective spouses and these contributions to the acquisition of the assets, including allowance for the contribution thereto of the "homemaker's services to the family unit." This last is a new concept in Anglo-American law.

Subsection (b) affords a way to safeguard the interests of the children against the possibility of the waste or dissipation of the assets allotted to a particular parent in consideration of being awarded the custody or support of a child or children.

Alternative B was included because a number of Commissioners from community property states represented that their jurisdictions would not wish to substitute, for their own systems, the great hotchpot of assets created by Alternative A, preferring to adhere to the distinction between community property and separate property, and providing for the distribution of that property alone, in accordance with an enumeration of principles, resembling, so far as applicable, to those set forth in Alternative A.

§ 308. [Maintenance]

(a) In a proceeding for dissolution of marriage, legal separation, or maintenance following a decree of dissolution of the marriage by a court which lacked personal jurisdiction

over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

(1) lacks sufficient property to provide for his reasonable needs; and

(2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(b) The maintenance order shall be in amounts and for periods of time the court deems just, without regard to marital misconduct, and after considering all relevant factors including:

(1) the financial resources of the party seeking maintenance, including marital property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(3) the standard of living established during the marriage;

(4) the duration of the marriage;

(5) the age and the physical and emotional condition of the spouse seeking maintenance; and

(6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

COMMENT

Section 308(a) authorizes the court to order maintenance to either spouse in three kinds of proceedings: (1) dissolution of marriage; (2) legal separation; and (3) independent proceedings for maintenance following an earlier proceeding for dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse and thus could not affect

maintenance [see comment to Section 302(a)]. In all three kinds of proceedings the court may award maintenance only if both findings listed in (1) and (2) are made. The dual intention of this section and Section 307 is to encourage the court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance. Only if the available property is insufficient for the purpose and if the spouse who seeks maintenance is unable to secure employment appropriate to his skills and interests or is occupied with child care may an award of maintenance be ordered.

Assuming that an award of maintenance is appropriate under subsection 308(a), the standards for setting the amount of the award are set forth in subsection 308(b). Here, as in Section 307, the court is expressly admonished not to consider the misconduct of a spouse during the marriage. Instead, the court should consider the factors relevant to the issue of maintenance, including those listed in subdivisions (1)-(6).

§ 309. [Child Support]

In a proceeding for dissolution of marriage, legal separation, maintenance, or child support, the court may order either or both parents owing a duty of support to a child to pay an amount reasonable or necessary for his support, without regard to marital misconduct, after considering all relevant factors including:

- (1) the financial resources of the child;
 - (2) the financial resources of the custodial parent;
 - (3) the standard of living the child would have enjoyed had the marriage not been dissolved;
 - (4) the physical and emotional condition of the child and his educational needs;
- and
- (5) the financial resources and needs of the noncustodial parent.

COMMENT

This section does not set forth the conditions under which a parent owes a duty of support to a child. Principles affecting duties of support occur elsewhere in the Act, as well as in the

other statutes or the common law of the State. Rather, the intent is merely to indicate the factors which a court should consider in setting the amount of support to be paid by either the mother or the father or both. The provision authorizing an order requiring either or both parents to pay child support permits the court to order the custodial parent to contribute to the child's support as well, or to insure that property or payment set aside to the custodial parent for child support are used for that purpose. "Child" includes any child recognized by the laws of the state as "living" or "in being", and, also, a child by adoption. The Section authorizes the issue of child support to be raised in independent proceedings for dissolution of marriage or legal separation.

§ 310. [Representation of Child]

The court may appoint an attorney to represent the interests of a minor or dependent child with respect to his support, custody, and visitation. The court shall enter an order for costs, fees, and disbursements in favor of the child's attorney. The order shall be made against either or both parents, except that, if the responsible party is indigent, the costs, fees, and disbursements shall be borne by the [appropriate agency].

COMMENT

This section authorizes the court to appoint an attorney to represent a minor or dependent child in a proceeding for the dissolution of marriage, legal separation, or any other proceeding which involves the child's support, custody, or visitation. The attorney is not a guardian ad litem for the child, but an advocate whose role is to represent the child's interests. The section intentionally does not authorize the child or his attorney to be heard on the issue of whether the marriage of his parent or parents has broken down irretrievably. The appointment may be made by the court on motion of either parent or by the court on its own motion. It is expected that the authority given the court by this section will be exercised primarily in contested cases, but rare or unusual circumstances may make the appointment appropriate in formally uncontested matters.

§ 311. [Payment of Maintenance or Support to Court]

(a) Upon its own motion or upon motion of either party, the court may order at any time that maintenance or support payments be made to the [clerk of court, court trustee, probation officer] as trustee for remittance to the person entitled to receive the payments.

(b) The [clerk of court, court trustee, probation officer] shall maintain records listing the amount of payments, the date payments are required to be made, and the names and addresses of the parties affected by the order.

(c) The parties affected by the order shall inform the [clerk of court, court trustee, probation officer] of any change of address or of other condition that may affect the administration of the order.

(d) If a party fails to make a required payment, the [clerk of court, court trustee, probation officer] shall send by registered or certified mail notice of the arrearage to the obligor. If payment of the sum due is not made to the [clerk of court, court trustee, probation officer] within 10 days after sending notice, the [clerk of court, court trustee, probation officer] shall certify the amount due to the [prosecuting attorney]. The [prosecuting attorney] shall promptly initiate contempt proceedings against the obligator.

(e) The [prosecuting attorney] shall assist the court on behalf of a person entitled to receive maintenance or support in all proceedings initiated under this section to enforce compliance with the order. The person to whom maintenance or support is awarded may also initiate action to collect arrearages.

(f) If the person obligated to pay support has left or is beyond the jurisdiction of the court, the [prosecuting attorney] may institute any other proceeding available under the laws of this State for enforcement of the duties of support and maintenance.

COMMENT

This section establishes a procedure for payment of support or maintenance orders through a court officer and for enforcement by the appropriate prosecuting attorney. The section is modeled on similar provisions in North Dakota, Wisconsin, and other states and is intended to make use of the state's remedy of civil contempt as an effective device for the enforcement of support and maintenance. Under subsection (f), the person to whom a decree for maintenance or support is awarded also may initiate action to collect arrearages. In this action the person might be represented by personal counsel, by a legal aid society or other public agency, or, by a "friend of the court" as envisaged by the Uniform Reciprocal Enforcement of Support Act. Subsection (f) correlates this procedure with the Uniform Reciprocal Enforcement of Support Act so that enforcement can be obtained even though the obligor is beyond the jurisdiction of the court.

§ 312. [Assignments]

The court may order the person obligated to pay support or maintenance to make an assignment of a part of his periodic earnings or trust income to the person entitled to receive the payments. The assignment is binding on the employer, trustee, or other payor of the funds 2 weeks after service upon him of notice that it has been made. The payor shall withhold from the earnings or trust income payable to the person obligated to support the amount specified in the assignment and shall transmit the payments to the person specified in the order. The payor may deduct from each payment a sum not exceeding [\$1.00] as reimbursement for costs. An employer shall not discharge or otherwise discipline an employee as a result of a wage or salary assignment authorized by this section.

COMMENT

This section is modeled on similar provisions in Wisconsin and California and provides an additional method of assuring that obligations for support and maintenance will be met when due. The Section goes beyond existing law in authorizing an assignment of trust income as well as periodic earnings. In states which permit spendthrift trusts, for purposes of support and maintenance, to be attacked, this section will also apply to spendthrift trusts. Each state should insert in the bracket the sum it deems sufficient to meet the cost to the payor of deducting the sums due from each payment. The validity of the obligation imposed on the payor of funds is

clearly supported by analogy to garnishment, and to cases such as *Day-Brite Lighting, Inc. v. Missouri*, 72 S.Ct. 405, 342 U.S. 421, 96 L.Ed. 469 (1952).

§ 313. [Attorney's Fees]

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this Act and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

COMMENT

The purpose of this section is to authorize the payment of costs and a reasonable fee by one party to the other party's attorney if the court, after considering the financial resources available to both parties, determines the order to be necessary. The section extends authority to make several orders for costs and fees at different stages of the proceedings, and permits an attorney to enforce the order directly.

§ 314. [Decree]

(a) A decree of dissolution of marriage or of legal separation is final when entered, subject to the right of appeal. An appeal from the decree of dissolution that does not challenge the finding that the marriage is irretrievably broken does not delay the finality of that provision of the decree which dissolves the marriage beyond the time for appealing from that provision, and either of the parties may remarry pending appeal.

(b) No earlier than 6 months after entry of a decree of legal separation, the court on motion of either party shall convert the decree to a decree of dissolution of marriage.

(c) The Clerk of Court shall give notice of the entry of a decree of dissolution or legal separation:

(1) if the marriage is registered in this State, to the [marriage license] clerk of the [county, judicial district] where the marriage is registered who shall enter the fact of dissolution or separation in the [Registry of Marriage]; or

(2) if the marriage is registered in another jurisdiction, to the appropriate official of that jurisdiction, with the request that he enter the fact of dissolution in the appropriate record.

(d) Upon request by a wife whose marriage is dissolved or declared invalid, the court may, and if there are no children of the parties shall, order her maiden name or a former name restored.

COMMENT

Subsection (a) abolishes interlocutory periods in those states which have them. The decree of dissolution or separation will be effective when entered, subject to the right of appeal. The second sentence of subsection (a) is intended to authorize an appeal from a decree of dissolution which does not challenge the decree insofar as it is based on a finding that the marriage is irretrievably broken. In such cases, either party is free to remarry as soon as the time for taking appeal has expired, despite the fact that an appeal which does not challenge the dissolution may be pending.

Subsection (b) permits either party to a proceeding for legal separation to move, six months after entry of the decree, to convert the decree of legal separation into a decree of dissolution of marriage. The section does not authorize the court to deny the motion. In such cases, the court will enter its order that the original decree be deemed a decree of dissolution of marriage, as of the date the motion for conversion is made.

Subsection (c) establishes a procedure for the registration of a decree of dissolution of marriage or of legal separation in the place where the marriage was originally registered. The purpose of this subsection is to aid in the often difficult problem of proving whether a marriage has been terminated.

Subsection (d) expressly authorizes restoration of the maiden name or any former name of a wife, upon dissolution of a marriage or declaration of its invalidity. By the better authority, this power exists in the court without express provision. *Reinken v. Reinken*, 351 Ill. 409, 639

(1933); *W. v. H.*, 103 N.J.Super. 24, 240 A.2d 501 (1968); *Day v. Day*, 1 P.2d 123, 137 Ore. 159 (1931); *Hartman v. Chumley*, 266 S.W.2d 444 (Tex.Civ.App.1924). This provision removes all doubt as to judicial power. Whether the provision as to the power being exercised "upon request by the wife" precludes action by the court upon its own initiative in a proper instance may be a matter for judicial construction. One ill-reasoned opinion so holds, as to the words if the wife "so desires". *Terrell v. Terrell*, 352 S.W.2d 195 (Ky.1961). The less preemptive language of this provision, in connection with the general principle of the Act that the rules of practice shall govern procedure generally, point to the conclusion that, in an appropriate instance, the court might exercise a proper judicial discretion to order restoration of name without wifely request.

§ 315. [Independence of Provisions of Decree or Temporary Order]

If a party fails to comply with a provision of a decree or temporary order or injunction, the obligation of the other party to make payments for support or maintenance or to permit visitation is not suspended; but he may move the court to grant an appropriate order.

COMMENT

This section is intended to abolish self-help remedies, now all too common in family litigation, whereby one party withholds support or maintenance payments to force the other party to comply with visitation orders and vice-versa. Disputes of this kind should be settled by the court. The "he" in the last clause of the section refers to the "other party."

§ 316. [Modification and Termination of Provisions for Maintenance, Support and Property Disposition]

(a) Except as otherwise provided in subsection (f) of Section 306, the provisions of any decree respecting maintenance or support may be modified only as to installments accruing subsequent to the motion for modification and only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

(b) Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance.

(c) Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child but not by the death of a parent obligated to support the child. When a parent obligated to pay support dies, the amount of support may be modified, revoked, or commuted to a lump sum payment, to the extent just and appropriate in the circumstances.

COMMENT

Subsection (a) makes each installment under an order for periodic support or maintenance final and non-modifiable when it falls due. The accrued installments cannot be modified retroactively, and future installments can be modified only as to those falling due after a motion for modification has been filed. The purpose of thus making each installment final and non-modifiable when it becomes due is to give each past due installment the status of a final judgment entitled to full faith and credit in other states pursuant to the decisions of the Supreme Court in *Lynde v. Lynde*, 21 S.Ct. 555, 181 U.S. 183, 45 L.Ed. 810 (1901); *Sistare v. Sistare*, 30 S.Ct. 682, 218 U.S. 1, 54 L.Ed. 905, 28 LRANS 1068, 20 Ann.Cas. 261 (1910); *Barber v. Barber*, 65 S.Ct. 137, 323 U.S. 77, 89 L.Ed. 82 (1944); and *Griffin v. Griffin*, 66 S.Ct. 556, 327 U.S. 220, 90 L.Ed. 635 (1945). The Supreme Court has not yet held that future installments are entitled to full faith and credit, but at least one state court has done so [*Light v. Light*, 147 N.E.2d 34, 12 Ill.2d 502 (1958)] and another state has extended voluntary recognition to future installments [*Worthley v. Worthley*, 283 P.2d 19, 44 Cal.2d 465 (1955)]. See the comment to Section 306(d) with respect to international enforcement.

Except where the decree, incorporating the agreement of the parties, provides to the contrary [see Section 306(f)], future installments may be modified, but the person seeking modification must show that circumstances have changed since the date of the original order so that the order is unconscionable at the time the motion is made and will continue to be unconscionable unless modified. This strict standard is intended to discourage repeated or insubstantial motions for modification. In accordance with presently existing law, the provisions of the decree respecting property disposition may not be altered unless the judgment itself can be reopened for fraud or otherwise under the laws of the state. There is no intention to change this law. If the judgment was rendered by another state, normal full faith and credit law would allow it to be reopened in the forum state if it can be reopened under the laws of the rendering state.

Subsection (b) authorizes the parties to agree in writing or the court to provide in the decree that maintenance will continue beyond the death of the obligor or the remarriage of the obligee. In the absence of such an agreement or provision in the decree, this section sets the termination date for the obligation to pay future maintenance.

Subsection (c) is designed to permit the parties to agree in writing or the court to provide in the decree that the obligation of each parent to support the child will extend beyond the child's emancipation and to permit parents, on occasion of a legal separation or dissolution of marriage, to agree that the child support provisions of the decree will terminate upon the death of a parent who has provided for the child in his will. In the absence of such an agreement or provision in the decree, this section terminates the obligation of a parent to support a child, only upon the child's emancipation. The parent's death does not terminate the child's right to support, and the court may make an appropriate order establishing the obligation of the deceased parent's estate to the child. Section 316(c), read in connection with Section 309, authorizes a support order against the estate of a parent who had received property for the child's support if that property was not actually used for the child's support or did not accrue to the child's benefit by virtue of the parent's death.

To avoid indefinite delay in the settlement of estates, there may be modification or commutation to a lump sum payment "to the extent just and appropriate in the circumstances." Any person interested, including a creditor or an attorney for the child (Section 310), may move the court for the appropriate order.

PART IV
CUSTODY

§ 401. [Jurisdiction; Commencement of Proceeding]

(a) A court of this State competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reason, and a parent or person acting as parent continues to live in this State; or

(2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(3) the child is physically present in this State and (i) has been abandoned or (ii) it is necessary in an emergency to protect him because he has been subjected to or threatened with mistreatment or abuse or is neglected or dependent; or

(4)(i) no other state has jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2) or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine custody of the child, and (ii) it is in his best interest that the court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

(d) A child custody proceeding is commenced in the [_____] court:

(1) by a parent, by filing a petition

(i) for dissolution or legal separation; or

(ii) for custody of the child in the [county, judicial district] in which he is permanently resident or found; or

(2) by a person other than a parent, by filing a petition for custody of the child in the [county, judicial district] in which he is permanently resident or found, but only if he is not in the physical custody of one of his parents.

(e) Notice of a child custody proceeding shall be given to the child's parent, guardian, and custodian, who may appear, be heard, and file a responsive pleading. The court, upon a showing of good cause, may permit intervention of other interested parties.

COMMENT

The provisions of the Act concerning custody adjudication are integrated with the provisions of the Uniform Child Custody Jurisdiction Act, promulgated by the Conference in 1968. The latter Act deals with judicial jurisdiction to adjudicate a custody case when more than one state has an interest in the litigation. The Uniform Marriage and Divorce Act governs the substantive and procedural aspects of custody adjudication once the court has decided that it can and should hear the case on the merits. States considering the adoption of this Act should also consider adopting the Uniform Child Custody Jurisdiction Act. If that Act is adopted in the state, subsections (a), (b) and (c), which are intended to track the interstate jurisdictional sections of that Act, should be omitted, and the remaining subsections should be relettered, accordingly.

The court authorized to hear custody cases has not been identified. In many states the legislature will want to consider the establishment of a Family Court for these purposes; in other states the trial court of general jurisdiction will be named.

Subsection (d) makes an important distinction between custody disputes commenced by parents and those commenced by some other person interested in a particular child. A custody proceeding is commenced automatically whenever one of the parents files for a dissolution of legal separation under Part III. Also, a parent may commence a custody proceeding without filing a petition for dissolution or legal separation. On the other hand, subsection (d)(2) makes it clear that if one of the parents has physical custody of the child, a non-parent may not bring an action to contest that parent's right to continuing custody under the "best interest of the child" standard of Section 402. If a non-parent (a grandparent or an aunt or uncle, perhaps) wants to acquire custody, he must commence proceedings under the far more stringent standards for intervention provided in the typical Juvenile Court Act. In short, this subsection has been devised to protect the "parental rights" of custodial parents and to insure that intrusions upon those rights will occur only when the care the parent is providing the child falls short of the minimum standard imposed by the community at large—the standard incorporated in the neglect or delinquency definitions of the state's Juvenile Court Act. Once a custody proceeding is commenced, the court should be able to hear the views of all interested persons; Subsection (d) therefore authorizes the judge to permit intervention by relatives who would not have been allowed to commence an action.

§ 402. [Best Interest of Child]

The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school, and community; and
- (5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

COMMENT

This section, excepting the last sentence, is designed to codify existing law in most jurisdictions. It simply states that the trial court must look to a variety of factors to determine what is the child's best interest. The five factors mentioned specifically are those most commonly relied upon in the appellate opinions; but the language of the section makes it clear that the judge need not be limited to the factors specified. Although none of the familiar presumptions developed by the case law are mentioned here, the language of the section is consistent with preserving such rules of thumb. The preference for the mother as custodian of young children when all things are equal, for example, is simply a shorthand method of expressing the best interest of children-and this section enjoins judges to decide custody cases according to that general standard. The same analysis is appropriate to the other common presumptions: a parent is usually preferred to a nonparent; the existing custodian is usually preferred to any new custodian because of the interest in assuring continuity for the child; preference is usually given to the custodian chosen by agreement of the parents. In the case of modification, there is also a specific provision designed to foster continuity of custodians and discourage change. See Section 409.

The last sentence of the section changes the law in those states which continue to use fault notions in custody adjudication. There is no reason to encourage parties to spy on each other in order to discover marital (most commonly, sexual) misconduct for use in a custody contest. This provision makes it clear that unless a contestant is able to prove that the parent's behavior in fact affects his relationship to the child (a standard which could seldom be met if the parent's behavior has been circumspect or unknown to the child), evidence of such behavior is irrelevant.

§ 403. [Temporary Orders]

(a) A party to a custody proceeding may move for a temporary custody order. The motion must be supported by an affidavit as provided in Section 410. The court may award temporary custody under the standards of Section 402 after a hearing, or, if there is no objection, solely on the basis of the affidavits.

(b) If a proceeding for dissolution of marriage or legal separation is dismissed, any temporary custody order is vacated unless a parent or the child's custodian moves that the proceeding continue as a custody proceeding and the court finds, after a hearing, that the circumstances of the parents and the best interest of the child requires that a custody decree be issued.

(c) If a custody proceeding commenced in the absence of a petition for dissolution of marriage or legal separation under subsection (1)(ii) or (2) of Section 401 is dismissed, any temporary custody order is vacated.

COMMENT

Subsection (a) encourages trial courts to issue temporary custody orders without formal hearing whenever possible. Since the hearing itself may be a traumatic event for both parents (and therefore for their children, indirectly), the trial court is authorized to make temporary orders on the basis of affidavits alone unless one of the parties files formal objection to that procedure. In most cases, it is expected that trial judges will award temporary custody to the existing custodian so as to minimize disruption for the child.

Subsection (b) states an important principle designed to foster values supporting family privacy. If a petition for dissolution or legal separation is dismissed voluntarily, there is no reason for the court to hold a special hearing and make a special (and extraordinary) finding before making any substantive custody decision. In most cases, then, if the dissolution petition is dismissed, the parties, whether or not they reconcile, will determine for themselves who should be the child's custodian. If the child's circumstances warrant concern for his physical or emotional security, the standard for community intervention expressed in the state's Juvenile Court Act should be the measure applied to the family. The divorce court can always alert juvenile court or welfare department staff informally that a problem may exist.

§ 404. [Interviews]

(a) The court may interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made and to be part of the record in the case.

(b) The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel upon request. Counsel may examine as a witness any professional personnel consulted by the court.

COMMENT

This section, and the two which follow, are designed to permit the court to make custodial and visitation decisions as informally and non-contentiously as possible, based on as much relevant information as can be secured, while preserving a fair hearing for all interested parties.

The general rule is that the judge may interview the child in chambers. It is often important for the judge to discover the attitudes and wishes of the child, and there is no reason to subject the child to the formality of the courtroom and the unpleasantness of cross-examination. This provision does not require the judge to permit counsel to be present at the interview, but he must make some kind of record of the interview (using a court reporter or a tape recorder) so that counsel for all parties will have access to the substance of the interview. Similarly, the judge may call informally on experts in a variety of disciplines without subjecting them, in the first instance, to the formal hearing process. But the experts' advice should be available to counsel for the parties so that the judge's decision will not be based on secret information; and the parties should be able to examine the expert as to the substance of his advice to the judge.

§ 405. [Investigations and Reports]

(a) In contested custody proceedings, and in other custody proceedings if a parent or the child's custodian so requests, the court may order an investigation and report concerning custodial arrangements for the child. The investigation and report may be made by [the court social service agency, the staff of the juvenile court, the local probation or welfare department, or a private agency employed by the court for the purpose].

(b) In preparing his report concerning a child, the investigator may consult any person who may have information about the child and his potential custodial arrangements. Upon order

of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian; but the child's consent must be obtained if he has reached the age of 16, unless the court finds that he lacks mental capacity to consent. If the requirements of subsection (c) are fulfilled, the investigator's report may be received in evidence at the hearing.

(c) The court shall mail the investigator's report to counsel and to any party not represented by counsel at least 10 days prior to the hearing. The investigator shall make available to counsel and to any party not represented by counsel the investigator's file of underlying data, and reports, complete texts of diagnostic reports made to the investigator pursuant to the provisions of subsection (b), and the names and addresses of all persons whom the investigator has consulted. Any party to the proceeding may call the investigator and any person whom he has consulted for cross-examination. A party may not waive his right of cross-examination prior to the hearing.

COMMENT

The Act steers a middle course between those courts which prohibit a custody investigation unless both parties stipulate to it and those statutes which permit the judge to order an investigation in every case. It is obvious that custody investigations, whether made by a member of the court's staff or by a public or private agency employed for that purpose, can be useful aids to the court. But most custody dispositions are consensual decisions of the parents, and there is no reason to permit the judge to order an investigation in such cases unless one of the spouses, although agreeing to the disposition, wants some further inquiry made. Under these circumstances, the court can order an investigation even if the other spouse opposes it. Similarly, in contested cases, where the judge's need for independent investigation is greatest, a custody study can be ordered even if both spouses are opposed.

The provisions of subsections (b) and (c) detail the procedural aspects of custody investigations and reports. They assure that investigations will be conducted with due regard to fair hearing values, while encouraging investigators to provide accurate information to the court.

§ 406. [Hearings]

(a) Custody proceedings shall receive priority in being set for hearing.

(b) The court may tax as costs the payment of necessary travel and other expenses incurred by any person whose presence at the hearing the court deems necessary to determine the best interest of the child.

(c) The court without a jury shall determine questions of law and fact. If it finds that a public hearing may be detrimental to the child's best interest, the court may exclude the public from a custody hearing, but may admit any person who has a direct and legitimate interest in the particular case or a legitimate educational or research interest in the work of the court.

(d) If the court finds it necessary to protect the child's welfare that the record of any interview, report, investigation, or testimony in a custody proceeding be kept secret, the court may make an appropriate order sealing the record.

COMMENT

This section further details procedural aspects of custody hearings. Subsection (c) changes the law in those states which now permit a jury to determine child custody. Subsection (d) authorizes the court to protect the child by preventing unnecessary publicity if it finds that sealing the record is necessary for the child's welfare. Although this authority restricts access to public records, the evil of limitation is clearly outweighed by the public interest in the protection of children.

§ 407. [Visitation]

(a) A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health.

(b) The court may modify an order granting or denying visitation rights whenever modification would serve the best interest of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

COMMENT

With two important exceptions, this section states the traditional rule for visitation rights. The general rule implies a "best interest of the child" standard. Although the judge should never compel the noncustodial parent to visit the child, visitation rights should be arranged to an extent and in a fashion which suits the child's interest rather than the interest of either the custodial or noncustodial parent. The empirical data on post-divorce living arrangements suggests that, if the judge can arrange visitation with a minimum of contest, most parties will eventually reach an accommodation and the bitterness accompanying the divorce will gradually fade. The section does make clear, however, that the judge must hold a hearing and make an extraordinary finding to deprive the noncustodial parent of all visitation rights. To preclude visitation completely, the judge must find that visitation would endanger "seriously the child's physical, mental, moral, or emotional health." These words are intended to mesh with other uniform legislation. See Uniform Juvenile Court Act, Section 47. Although the standard is necessarily somewhat vague, it was deliberately chosen to indicate its stringency when compared to the "best interest" standard traditionally applied to this problem. The special standard was chosen to prevent the denial of visitation to the noncustodial parent on the basis of moral judgments about parental behavior which have no relevance to the parent's interest in or capacity to maintain a close and benign relationship to the child. The same onerous standard is applicable when the custodial parent tries to have the noncustodial parent's visitation privileges restricted or eliminated.

§ 408. [Judicial Supervision]

(a) Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including his education, health care, and religious training, unless the court after hearing, finds, upon motion by the noncustodial parent, that in the absence of a specific limitation of the custodian's authority, the child's physical health would be endangered or his emotional development significantly impaired.

(b) If both parents or all contestants agree to the order, or if the court finds that in the absence of the order the child's physical health would be endangered or his emotional development significantly impaired, the court may order the [local probation or welfare department, court social service agency] to exercise continuing supervision over the case to assure that the custodial or visitation terms of the decree are carried out.

COMMENT

This section states an important rule designed to promote family privacy and to prevent intrusions upon the prerogatives of the custodial parent at the request of the noncustodial parent. In general, the custodial parent should be, and in this section is designated as, the person responsible for post-divorce decisions concerning the upbringing of the child. If the parents agree in writing about a particular problem such as the child's religious upbringing, the court may enforce the agreement subject to constitutional constraints, *Lynch v. Uhlenhopp*, 78 N.W.2d 491, 248 Iowa 68 (1956). But in the absence of parental agreement, the court should not intervene solely because a choice made by the custodial parent is thought by the noncustodial parent (or by the judge) to be contrary to the child's best interest. To justify such an intervention, the judge must find that the custodial parent's decision would "endanger the child's physical health or significantly impair his emotional development"-a standard patently more onerous than the "best interest" test. The standard would leave to the custodial parent such decisions as whether the child should go to private or public school, whether the child should have music lessons, what church the child should attend. The court could intervene in the decision of grave behavioral or social problems such as refusal by a custodian to provide medical care for a sick child.

Subsection (b) pursues the family privacy theme by significantly limiting the judge's authority to order supervision of the child and the custodial parent. To be sure, there are situations in which an objective umpire is needed to facilitate post-divorce adjustment to the custody and visitation decree. But in these situations both parents will usually recognize the need and agree to supervision. If the parents cannot agree to supervision, however, it should not be ordered unless the judge finds some extraordinary need for it. Thus, the provision adopts a more stringent standard than the normal "best interest" standard.

§ 409. [Modification]

(a) No motion to modify a custody decree may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the

child's present environment may endanger seriously his physical, mental, moral, or emotional health.

(b) If a court of this State has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interest of the child. In applying these standards the court shall retain the custodian appointed pursuant to the prior decree unless:

(1) the custodian agrees to the modification;

(2) the child has been integrated into the family of the petitioner with consent of the custodian; or

(3) the child's present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him.

(c) Attorney fees and costs shall be assessed against a party seeking modification if the court finds that the modification action is vexatious and constitutes harassment.

COMMENT

Most experts who have spoken to the problems of post-divorce adjustment of children believe that insuring the decree's finality is more important than determining which parent should be the custodian. See Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 Syracuse L.Rev. 55 (1969). This section is designed to maximize finality (and thus assure continuity for the child) without jeopardizing the child's interest. Because any emergency which poses an immediate threat to the child's physical safety usually can be handled by the juvenile court, subsection (a) prohibits modification petitions until at least two years have passed following the initial decree, with a "safety valve" for emergency situations. To

discourage the noncustodial parent who tries to punish a former spouse by frequent motions to modify, the subsection includes a two-year waiting period following each modification decree. During that two-year period a contestant can get a hearing only if he can make an initial showing, by affidavit only, that there is some greater urgency for the change than that the child's "best interest" requires it. During the two-year period the judge should deny a motion to modify, without a hearing, unless the moving party carries the onerous burden of showing that the child's present environment may endanger his physical, mental, moral, or emotional health.

Subsection (b) in effect asserts a presumption that the present custodian is entitled to continue as the child's custodian. It does authorize modifications which serve the child's "best interest;" but this standard is to be applied under the principle that modification should be made only in three situations: where the custodian agrees to the change; where the child, although formally in the custody of one parent, has in fact been integrated into the family of the petitioning parent (to avoid encouraging noncustodial kidnapping, this ground requires the consent of the custodial parent); or where the noncustodial parent can prove both that the child's present environment is dangerous to physical, mental, moral, or emotional health and that the risks of harm from change of environment are outweighed by the advantage of such a change to the child. The last phrase of subsection (b)(3) is especially important because it compels attention to the real issue in modification cases. Any change in the child's environment may have an adverse effect, even if the noncustodial parent would better serve the child's interest. Subsection (b)(3) focuses the issue clearly and demands the presentation of evidence relevant to the resolution of that issue.

Subsection (c) provides an additional sanction against vexatious and harassing attempts to relitigate custody.

§ 410. [Affidavit Practice]

A party seeking a temporary custody order or modification of a custody decree shall submit together with his moving papers an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceeding, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

COMMENT

This section establishes a procedure for seeking temporary custody or a modification of a custody decree by motion supported with affidavits. The procedure is designed to result in denial of the motion without a hearing unless the court finds that the affidavits establish adequate cause for holding a hearing. The procedure will thus tend to discourage contests over temporary custody and prevent repeated or insubstantial motions for modification.

PART V

EFFECTIVE DATE AND REPEALER

§ 501. [Time of Taking Effect]

This Act shall take effect [_____]

§ 502. [Application]

(a) This Act applies to all proceedings commenced on or after its effective date.

(b) This Act applies to all pending actions and proceedings commenced prior to its effective date with respect to issues on which a judgment has not been entered. Pending actions for divorce or separation are deemed to have been commenced on the basis of irretrievable breakdown. Evidence adduced after the effective date of this Act shall be in compliance with this Act.

(c) This Act applies to all proceedings commenced after its effective date for the modification of a judgment or order entered prior to the effective date of this Act.

(d) In any action or proceeding in which an appeal was pending or a new trial was ordered prior to the effective date of this Act, the law in effect at the time of the order sustaining the appeal or the new trial governs the appeal, the new trial, and any subsequent trial or appeal.

COMMENT

The purpose of this section is to indicate the application of the Act to new and pending proceedings. Subsection (a) makes the Act applicable to new proceedings: all those commenced on or after its effective date.

Subsection (b) states the applicability of the Act to proceedings that were pending at the trial court level prior to its effective date. The Act will apply to all pending actions and

proceedings; but if a judgment has already been entered as to a specific issue, that judgment will not be superseded thereby. For example, if the state recognizes an interlocutory judgment of divorce, in all cases in which interlocutory judgments have been entered prior to the effective date, the interlocutory judgments would not be affected by the Act. The Act would abolish, however, the interlocutory waiting period so that a decree of dissolution of marriage could be entered immediately after its effective date in a pending but undecided action.

The second sentence of subsection (b) makes unnecessary amendment of the pleadings in pending actions for divorce, but the provisions of this Act will apply at any hearing held after its effective date.

Subsection (c) makes the Act applicable to proceedings commenced after its effective date for the modification of orders or judgments entered prior to its effective date only if the previously entered judgment or order would have been modifiable under prior law. Thus, if a prior order for child custody, support, visitation, or maintenance would have been modifiable under the state's prior law, then those orders may be modified under this Act in accordance with the standards established by this Act. But if a prior judgment dividing marital property or awarding lump sum alimony would not have been modifiable under prior law, those judgments are not subject to reopening for change under this Act, even though the standards for property division are different under this Act. In any event, judgments awarding marital property are not modifiable under this Act (see Section 316(a)). On the other hand, an order that would have been modifiable under prior law may cease to be modifiable under this Act. For example, in states where maintenance is retroactively modifiable as to unpaid installments, installments accruing after the effective date of this Act will not be retroactively modifiable under Section 316(a).

Subsection (d) provides that this Act does not apply to appeals that had been perfected and thus were pending at its effective date, to new trials ordered prior to its effective date, or to any subsequent appeals or new trials resulting from these pending appeals or new trials. The purpose of this provision is to allow the correction on appeal or in a new trial of errors made in applying the law in effect at the time of the original hearing pursuant to that law. Changing the rules on appeal or at the new trial seems unfair to the party prejudiced by the error. A similar provision was included in the California Family Law Act of 1969.

§ 503. [Severability]

If any provision of this Act or application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be

given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

§ 504. [Specific Repealer]

The following acts and all other acts and parts of acts inconsistent herewith are hereby repealed: [Here should follow the acts to be specifically repealed, including any acts regulating:

- (1) marriage, including grounds for annulment and provisions for void marriages;
- (2) existing grounds for divorce and legal separation;
- (3) existing defenses to divorce and legal separation, including but not limited to condonation, connivance, collusion, recrimination, insanity, and lapse of time; and
- (4) alimony, child support, custody, and division of spouses' property in the event of a divorce and judicial proceedings designed to modify the financial or custody provisions of divorce decrees].

§ 505. [General Repealer]

Except as provided in Section 506, all acts and parts of acts inconsistent with this Act are hereby repealed.

§ 506. [Laws Not Repealed]

This Act does not repeal: [Here should follow the acts not to be repealed, including any acts regulating or prescribing:

(1) the contents of and forms for marriage licenses and methods of registering marriages and providing for license or registration fees;

(2) the validity of premarital agreements between spouses concerning their marital property rights;

(3) marital property rights during a marriage or when the marriage terminates by the death of one of the spouses;

(4) the scope and extent of the duty of a parent to support a child of the marriage;

(5) custody of and support duty owed to an illegitimate child;

(6) the Uniform Child Custody Jurisdiction Act; and

(7) any applicable laws relating to wage assignments, garnishments, and exemptions other than those providing for family support and maintenance].