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DIVORCE LAW REFORM IN MICHIGAN

*B. H. Lee**

I. HISTORICAL BACKGROUND

Few social questions touch the individual so intimately and foster such widely divergent views as the question of divorce. From those who regard marriage as a perpetual and indissoluble bond instituted by God to those who consider it a terminable contract between a man and a woman, every shade of opinion can be found. The subject of marital breakdown is neither new nor peculiar to our age. As one author has said: "The breakdown of marriage with provisions for divorce and remarriage is a phenomenon widely recognized in Babylonian, Hebrew, Greek and Roman law."¹ Nevertheless, ever since Christianity established a new ideal of life-long marriage, the concept of an indissoluble union has been prevalent in the western world.

From the 12th to the 17th centuries the English ecclesiastical courts in effect had exclusive jurisdiction over marriage and divorce in England.² These courts consistently held that a valid marriage was indissoluble.³ Although at the end of the 17th century a divorce could be obtained by a private act of parliament, the process was both slow and expensive, and only the rich could afford it.⁴ The 1857 Matrimonial Causes Act of England⁵ for the first time specifically allowed divorce and transferred all jurisdiction over matrimonial matters from the ecclesiastical courts to a

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¹ J. DOMINIAN, *MARITAL BREAKDOWN* 9 (1968).

² O. MCGREGOR, *DIVORCE IN ENGLAND* 1 (1957). The civil law of England and Scotland simply had no official doctrine concerning jurisdiction over marriage and divorce. However, Holdsworth indicates the means by which civil courts passed upon the validity of marriages in cases involving dower, inheritance, etc., and reached conclusions quite contrary to the letter of canon law. W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 622 (7th ed. 1956).

³ W. HOLDSWORTH, *supra* note 2, at 621-23. McGregor points out, however, that under certain conditions even the ecclesiastical court found ways of granting the practical equivalent of divorce while at the same time maintaining the indissolubility of the marriage bond. O. MCGREGOR, *supra* note 2, at 3.

⁴ O. MCGREGOR, *supra* note 2, at 10-16, and W. HOLDSWORTH, *supra* note 2, at 623-24. Moreover, divorce by private act could only be obtained by men whose wives were adulterous. W. HOLDSWORTH, *supra* note 2, at 11.

⁵ Matrimonial Causes Act, 20 & 21 Vict., c. 85 (1857).

new Court for Divorce and Matrimonial Causes.⁶ From the outset, divorce was fault oriented and could be obtained only upon a showing of the commission of a "matrimonial offense"⁷ by one spouse against the other. The law recognized as a complete defense to the granting of a divorce a showing that the party seeking the dissolution had been guilty of such an offense. The curious result of this law was to grant a divorce when one party was guilty of a marital offense, but to deny a divorce when both parties were guilty.⁸

The development of divorce law in the United States has been heavily influenced by English divorce law⁹ which was largely based on medieval ecclesiastical law. The core of the notion has always been that people, although they voluntarily enter marriage, cannot voluntarily dissolve it. The church, and later society and the state, asserted an interest in the continuation of marriage over and above the wishes of the parties involved and traditionally gave courts the power to dissolve marriages only on specified statutory grounds.¹⁰ Consequently, most jurisdictions in the United States adopted this "matrimonial offense" or "fault" ground for divorce. Professor Kay summarized the traditional approach this way:

The State's interest in marital stability, thus delegated to the courts, was presumably to be guarded by the judge's diligence in requiring that plaintiff's evidence clearly established the ground relied on for a divorce, that defendant had no valid defense to the plaintiff's suit, and that the parties had not conspired to put on a false case in order to obtain relief. Divorce was thus cast in the traditional common law model of an adversary procedure; plaintiff's success depended on

⁶ O. MCGREGOR, *supra* note 2, at 17, and W. HOLDSWORTH, *supra* note 2, at 624.

⁷ O. MCGREGOR, *supra* note 2, at 18, describes the grounds for divorce under this act. These grounds included adultery, cruelty of either spouse, and desertion without cause for two years. Furthermore, it was somewhat easier for a husband to obtain a divorce than the wife.

⁸ For a discussion of the "recrimination" defense to a divorce action, as well as the defenses of "connivance," "collusion," and "condonation," see Note, *Marital Fault v. Irremediable Breakdown: The New York Problem and the California Solution*, 16 N.Y.L. F. 119, 125-27 (1970).

⁹ See Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 35-39 (1966), for a concise history of the development of American divorce law from its English heritage. Other useful sources discussing the development of divorce law are: H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 280-85 (1968); McCurdy, *Divorce—A Suggested Approach with Particular Reference to Dissolution for Living Separate and Apart*, 9 VAND. L. REV. 685 (1956); and Rheinstein, *Trends in Marriage and Divorce Law of Western Countries*, 18 LAW & CONTEMP. PROB. 3 (1953).

¹⁰ See Walker, *Disarming the Litigious Man: A Glance at Fault and California's New Divorce Legislation*, 1 PACIFIC L.J. 182, 184-98 (1970), for a concise discussion of the "theoretical concept of fault" and the various grounds and defenses to divorce in the United States.

proving defendant's fault; both parties, assumed to be at odds and dealing at arm's length, were expected to bring forth all the relevant facts about their marriage and its disintegration to be assessed by the judge in reaching his decision.¹¹

In Michigan, a matrimonial offense remained the sole ground for divorce for over a century.¹² Despite the fact that the system could produce unsatisfactory results in particular situations, the fault procedure may have been continued simply because the alternatives—divorce by consent, divorce by compulsion of an innocent party, or no divorce at all—were considered more injurious to the interests of society.¹³

In recent years, fault oriented divorce has received widespread criticism, both from public bodies¹⁴ and from legal scholars.¹⁵ Some of the arguments against the traditional fault approach have been summarized as follows:

The adversary nature of the pleading was often criticized as causing further polarization of the parties rather than encouraging reconciliation. Subject to greater criticism, however, was the necessity of establishing some matrimonial offense in order to obtain a divorce. This requirement forced the court to concentrate upon a superficial "pigeonholing" of the parties' relationship into one of the statutory grounds, and impeded the court's inquiry into the real causes of marital breakdown. In addition, the marital fault doctrine was felt to be unrealistic in its attempt to place the blame for the breakdown entirely on the individual committing the specified act.¹⁶

¹¹ Kay, *A Family Court: The California Proposal*, 56 CAL. L. REV. 1205, 1212-13 (1968).

¹² For an early statute setting forth the grounds for divorce in Michigan, see Act of April 4, 1833, § 1, [1833] Mich. (Ter.) Laws 334.

¹³ See Turner, *Retreat From 'Fault'? An English Lawyer's Views*, 46 NEB. L. REV. 64, 72-81 (1967), for a discussion of reasons supporting the retention of the "fault" grounds.

¹⁴ See, e.g., Report of the Governor's Commission on the Family (Cal. 1966), which was largely responsible for reform of California laws; Report of a Group Appointed by the Archbishop of Canterbury, *Putting Asunder: A Divorce Law for Contemporary Society* (S.P.C.K. 1966) (commonly referred to as the Mortimer Commission Report). The latter English report is discussed at length in Paulsen, *Divorce—Canterbury Style*, 1 VALPARAISO L. REV. 93 (1966).

¹⁵ See, e.g., Kay, *supra* note 11, 1215-20; Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 U.C.L.A. L. REV. 1306, 1307-14 (1970); Couch, *Toward a More Realistic Divorce Law*, 43 TUL. L. REV. 243, 254-61 (1969); Cannell, *Abolish Fault-Oriented Divorce in Ohio—As a Service to Society and to Restore Dignity to the Domestic Relations Courts*, 4 AKRON L. REV. 92, 93-106 (1971); Wadlington, *supra* note 9, at 81-84; Beamer, *The Doctrine of Recrimination in Divorce Proceedings*, 10 U. KAN. CITY L. REV. 213 (1942); and Bradway, *The Myth of the Innocent Spouse*, 11 TUL. L. REV. 377 (1937). For a listing of recent critics, see Tenney, *Divorce Without Fault: The Next Step*, 46 NEB. L. REV. 24, 32-34 (1967).

¹⁶ Note, *California Family Law Act*, 3 U. MICH. J.L. REF. 425, 428 (1970).

Moreover, several authors have pointed out the gap between the theory and application of the law, with courts in fact granting divorces even when the literal requirement of a statute could not have been met had one of the parties contested the divorce.¹⁷

But the fact remains that in dealing with divorce the law is faced with a dilemma—if divorce is made too easy, the institution of marriage may be weakened; if it is made too difficult, the cost to the happiness of the individual may be great. The legal system must strike a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has entirely broken down.

II. MICHIGAN NO-FAULT DIVORCE

The concept of no-fault divorce is not new. In 1850 Kentucky adopted a statute which authorized a kind of no-fault divorce subsequent to a five year period of separation.¹⁸ Wisconsin enacted a similar provision in 1866,¹⁹ and Rhode Island followed in 1893.²⁰ More recently, at least thirteen jurisdictions have enacted analogous provisions,²¹ and California,²²

¹⁷ See, e.g., Paulsen, *supra* note 14; Note, *A Divorce Reform Act*, 5 HARV. J. LEGIS. 563, 568-69 (1968); and Kay, *supra* note 11, at 1217-20.

¹⁸ Ch. 498, [1850] Ky. Laws 54-55. The statute provided that the couple had to be physically separated for five years in order to obtain a divorce.

¹⁹ Ch. 37, § 1, [1866] Wis. Laws 40. The Wisconsin statute provided that a divorce could be granted if the parties had voluntarily lived apart for five years.

²⁰ Ch. 1187, § 1, [1893] R.I. Laws 237. The Rhode Island statute required that the parties live apart for at least ten years.

²¹ Alabama, ALA. CODE tit. 34, § 22 (1959); Arizona, ARIZ. REV. STAT. ANN. § 25-312(7) (1956); Arkansas, ARK. STAT. ANN. § 34-1202(7) (Supp. 1965); Colorado, COLO. REV. STAT. ANN. § 46-1-1(j) (1963); Florida, FLA. STAT. ANN. § 61.041(10) (Supp. 1971); Idaho, IDAHO CODE ANN. § 32-610 (1963); Kentucky, KY. REV. STAT. ANN. § 403.020(1)(b) (1963); Louisiana, LA. REV. STAT. ANN. § 9:301 (1965); Nevada, NEV. REV. STAT. § 125.010 (1969); New York, N.Y. DOM. REL. LAW § 170 (McKinney Supp. 1971); Rhode Island, 3A R.I. GEN. LAWS ANN. § 15-5-3 (1970); Virginia, VA. CODE ANN. § 20-91(9) (Supp. 1964); Washington, WASH. REV. CODE § 26.08.020(9) (1958); and Puerto Rico, P.R. LAWS ANN. tit. 31, § 321(9) (1955).

Of course, each statute varies as to its definition of "no-fault" divorce. While it is, therefore, difficult to generalize, Professor Wadlington has described the bulk of the statutes as providing that:

- (1) either spouse may bring the action for divorce on . . . a [no-fault] ground;
- (2) the separation need not have been voluntary on the part of both spouses;
- (3) there must have been a continuous separation of a specific duration immediately preceding the filing of the petition; and (4) traditional fault defenses are inapplicable.

Wadlington, *supra* note 9, at 63-64.

Professor Walker, in his excellent article discussing the new California no-fault divorce law, *supra* note 10, at 199-204, describes some early "incompatibility" statutes, as well as the separation statutes listed above.

²² CAL. CIV. CODE § 4506 (West 1970). The California statute provides two grounds

Iowa,²³ and Texas²⁴ have within the last three years approved more liberal no-fault statutes without the separation requirement. Also, the Divorce Reform Act of 1969 brought no-fault divorce to England and Wales.²⁵

These enactments prompted a recommendation by the Michigan Law Revision Commission for similar reform in Michigan. The recommendation stated:

Michigan currently employs the traditional fault grounds for divorce. This means the complaining spouse must show that he or she is the 'innocent party' who has been wronged by the other spouse in a manner which gives legal grounds for divorce. The most frequently used ground in Michigan and most other states is extreme cruelty, a vague term which can be applied loosely by liberal judges and strictly by those who believe in the indissolubility of marriage. The evidence used at trial consists of a recital by the plaintiff of a wide variety of the spouse's misdeeds which may range from physical abuse to such minor things as constant nagging and criticism. The present divorce statute creates much hardship, unfairness and incongruity because:

- (1) Since one spouse is seldom significantly more at fault than the other, the proceeding is often based on fiction rather than fact.
- (2) In order to assure the granting of divorce, the avoidance of a contested hearing and the delays incident thereto, divorce participants are often pressured to make unfair and unreasonable concessions as to child custody, alimony, child support or property division.
- (3) A recital of the defendant's alleged cruel acts results in increased hostility between the spouses, making reconciliation more improbable and the resulting bitterness impedes the working out of suitable arrangements for

for dissolution of the marriage: "(1) Irreconcilable differences, which have caused the irremediable breakdown of the marriage; and (2) Incurable insanity." Enactment of a new divorce law was but part of a general revision of that state's family law in 1969. Family Law Act of 1969, ch. 1608, [1969] Cal. Stats. 3314-44. There is an excellent symposium discussing the new California law at 1 PACIFIC L.J. 147 (1970).

²³ IOWA CODE ANN. § 598.17 (1971) provides that a marriage can be dissolved when the evidence shows "breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no likelihood that the marriage can be preserved."

²⁴ A 1969 revision of the Texas Family Code adds to the traditional fault grounds for divorce a separate no-fault ground where "the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marriage relationship and prevents any reasonable expectation of reconciliation." TEX. FAMILY CODE ANN. tit. 1, § 301 (Supp. 1969).

²⁵ Divorce Reform Act 1969, c. 55, §§ 1-2. For a discussion of the English act, see B. PASSINGHAM, THE DIVORCE REFORM ACT 1969 (1970); and B. LEE, DIVORCE LAW REFORM IN ENGLAND (1970).

custody of the children, visitation rights, alimony, child-support and property settlement.

- (4) The most significant issue, whether the parties can have viable marriage, is generally ignored.²⁶

The Commission then indicated three possible ways to achieve reform of the Michigan divorce law: (1) a complete revision of the family laws and the elimination of fault grounds for divorce; (2) the addition of a non-fault ground to existing fault grounds; or (3) the substitution of one non-fault ground for the present fault grounds.²⁷

Iowa and California had recently adopted the first sweeping approach, eliminating fault grounds within a comprehensive statutory reform of all family law statutes. The Commission thought that while the comprehensive approach might be the ideal method, "its implementation is not deemed feasible because of the time involved in drafting an entirely new family code as well as in resolving the legislative disputes that [might arise] as to many varied sections of the code."²⁸

The Commission next pointed out that Texas in adopting the second method of divorce reform had merely added a no-fault ground to the existing fault grounds. This approach was also rejected by the Commission:

Although this allows parties to use the more honest and less traumatic approach, it does not guarantee that they will do so. To have a statute allowing both approaches creates a philosophical inconsistency which is difficult to justify.²⁹

The Commission finally opted for the third approach:

Since it is possible by a very simple piece of legislation to eliminate the existing fault grounds and replace them with a single non-fault ground, this seems to be the wisest course of action at the present time. It quickly eradicates the most offensive portion of our divorce law and in no way precludes a future, comprehensive revision of our laws affecting the family.³⁰

Realizing the need for clarity and simplicity, the Commission recommended the adoption of the language used in the Iowa reform which permits divorce where "there has been a break-

²⁶ MICHIGAN LAW REVISION COMMISSION, FIFTH ANNUAL REPORT 7-8 (1970) [hereinafter cited as COMMISSION].

²⁷ *Id.* at 8.

²⁸ *Id.* at 9. See notes 22-23 *supra* for a description of the California and Iowa reforms.

²⁹ COMMISSION, *supra* note 26, at 9. See note 24 *supra* for a description of the Texas reform.

³⁰ COMMISSION, *supra* note 26, at 9.

down of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.'³¹ The Commission ended its recommendation by emphasizing that divorce reform would not increase family breakdowns, but make the legal procedure fairer and less traumatic for all involved.³²

Michigan legislators, prompted by the reforms made in other states and by the recommendation of the Law Revision Commission, enacted a provision for no-fault divorce in the summer of 1971,³³ which took effect in January 1972. The major change is the elimination of specific fault grounds for divorce.³⁴ Under the new law the plaintiff need do no more than allege in the complaint "that there has been a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved."³⁵ The defendant may in his answer simply admit or deny the allegations of the complainant, and need give no further explanation.³⁶ The court may enter a judgment dissolving the bonds of matrimony as long as there is some evidence supporting the complaint.³⁷ An action for separate maintenance may be filed in a circuit court in a similar fashion,³⁸ in which case the court may enter a judgment dissolving the marriage, if a counterclaim for divorce has been filed, or a judgment of separate maintenance, if such a counterclaim has not been filed.³⁹ The statute is silent on the issues of alimony, property settlement and custody rights.

III. UNDERLYING CONSIDERATIONS IN MICHIGAN

Reformers and supporters of no-fault divorce in Michigan emphasized several defects in the old divorce statute and benefits to be gained from a no-fault system.⁴⁰ First, as the Michigan Law

³¹ *Id.* at 10.

³² *Id.* at 11.

³³ Pub. A. No. 75 (3 Michigan Legislative Service 126 (1971)).

³⁴ The prior Michigan law provided several grounds for divorce, including adultery, physical incompetence at the time of marriage, imprisonment, desertion for two years and habitual drunkenness. A divorce from bed and board could be granted under the prior law for extreme cruelty and utter desertion for two years. Both provisions are superseded by the new law.

³⁵ Pub. A. No. 75, § 1 (3 Michigan Legislative Service 126 (1971)) (to be codified MICH. COMP. LAWS ANN. § 552.6(1)).

³⁶ *Id.* (to be codified MICH. COMP. LAWS ANN. § 552.6(2)).

³⁷ *Id.* (to be codified MICH. COMP. LAWS ANN. § 552.6(3)).

³⁸ *Id.* (to be codified MICH. COMP. LAWS ANN. § 552.7(1)).

³⁹ *Id.* (to be codified MICH. COMP. LAWS ANN. § 552.7(4)(a) & (b)).

⁴⁰ Two articles which discuss at length both the rationale and probable effects of the new law appeared in the *Michigan State Bar Journal* after the divorce reform was enacted. See Honigman, *What 'No-Fault' Means To Divorce*, 51 MICH. ST.B.J. 16 (1972) and Snyder, *Divorce Michigan Style—1972 and Beyond*, 50 MICH. ST.B.J. 740 (1971). Mr.

Revision Commission stated, the old divorce statute created much "hardship, unfairness and incongruity," because in this area of delicate human relationships total guilt on the part of one spouse and total innocence on the part of the other is rare.⁴¹ Second, to meet the all-or-nothing criteria of the old law, the proceeding was often based on fiction rather than fact; testimony could easily be faked or exaggerated to comply with the statutory fault standards.⁴² Third, accusations made in court did not help to promote a reconciliation between the parties.⁴³ Also, this adversary setting and resulting hostility was hardly conducive to reasonable alimony, child support, and property settlements. Fourth, in order to avoid a contested hearing and to obtain a divorce in a minimum of time, one party often had to "barter for his freedom at the cheapest price obtainable," that price being either "excessive or inadequate alimony or property settlement, or in custodial rights not necessarily geared to the best interests of the child."⁴⁴ Finally, the whole divorce proceeding was not only slow, humiliating and costly,⁴⁵ but often ignored the basic issue of whether the marriage had broken down to the point where all hope of reconciliation was gone.⁴⁶ In addition to noticing these defects in the old law which could be ameliorated by a no-fault divorce law, proponents of the reform stressed the right of parties to a marriage beyond repair to obtain their freedom as quickly and efficiently as possible.⁴⁷

The opinions expressed by the opponents of the bill varied in origin and emphasis. Some were purely religious objections,⁴⁸ while others were social⁴⁹ and procedural.⁵⁰ The critics of divorce

Honigman is Chairman of the Michigan Law Revision Commission which proposed the new divorce law, and Mr. Snyder is Chairman of the Family Law Committee of the State Bar of Michigan.

The arguments made in support of divorce reform in Michigan did not differ substantially from the arguments that have been made in support of no-fault divorce in other states. For a collection of recent writings on the subject, see notes 14-17 *supra*.

⁴¹ COMMISSION, *supra* note 26, at 7; 774 PARL. DEB., H.C. (5th ser.) 2050 (1968).

⁴² COMMISSION, *supra* note 26, at 7; and Honigman, *supra* note 40, at 22.

⁴³ COMMISSION, *supra* note 26, at 7-8; and Honigman, *supra* note 40, at 20.

⁴⁴ Honigman, *supra* note 40, at 17. See also, COMMISSION, *supra* note 26, at 7.

⁴⁵ Honigman, *supra* note 40, at 16.

⁴⁶ COMMISSION, *supra* note 26, at 8.

⁴⁷ Honigman, *supra* note 40, at 17; and COMMISSION, *supra* note 26, at 11.

⁴⁸ There appears to have been little public pressure against divorce liberalization in Michigan, contrary to the experience in England and Italy.

⁴⁹ See Honigman, *supra* note 40, at 17. The Michigan Inter-Professional Association on Marriage, Divorce and the Family, Inc., an informal research and discussion group, composed of members of the bench, bar, clergy, social workers, psychologists, psychiatrists and physicians, opposed the divorce reform.

⁵⁰ See, e.g., Campbell, *Children's Rights in Divorce Without Fault*, 50 MICH. ST.B.J. 73 (1971), in which Judge Campbell stressed the right of a minor child to the "continuation of its parents' marriage during the period of both physical and emotional growth and development of the child until he reaches an age where separation from the parent who leaves home will not substantially damage the growth and development of the child." *Id.* at 74. The Family Law Committee of the Michigan Bar Association also opposed the no-fault divorce law. See 50 MICH. ST.B.J. 537 (1971).

reform argued that liberalization would not only burden the courts with more divorce proceedings, but would also contribute to a weakened marriage institution.⁵¹ Since there was no opinion poll or referendum taken on the issue, it is difficult to postulate how the people of Michigan reacted toward the divorce law reform. Nonetheless, the absence of a significant opposition movement by religious groups and the relative ease with which the bill was enacted⁵² are substantial indications that there were few strong opponents to the reform.

In retrospect it is clear that the changing status of women, increasing permissiveness in social attitudes generally, and the fact that not only divorce by consent but also unilateral divorce (by either cruelty or desertion) was already obtainable in the courts, all prepared the ground for reform. Moreover, awareness on the part of lawyers, courts, and legislators of the defects of the fault-oriented law no doubt contributed to the sentiment for reform.

⁵¹ A statement made by Senator Fleming, a Catholic, was representative of such views:

[F]irst and foremost, this bill, if signed into law by the governor, will officially place the State of Michigan on record as favoring the easy breakup of marriages.

Second, the State will be providing a quick procedure for the destruction of marriages when the emphasis should be placed on preservation of the family as the basic unit of our state and nation.

Third, this bill goes far beyond the provisions of any form of "No-fault" divorce legislation passed in three other states—in fact, it is the most radical proposal ever put forth. . . .

Fourth, this bill will actually encourage divorces and broken homes by sanctioning immorality and irresponsibility by husband or wife. . . .

Undisputed in debate on this bill, was the fact that in California where a form of "No-fault" divorce was enacted, more divorces have been filed, more granted and the courts have experienced an enormous increase in trials. . . .

Sixth, this "No-fault" divorce bill does not eliminate rancor and bitterness between competing parties based on the California experience and in fact has increased it and meant a further court log jam in pending cases as well as additional costs to the State for more judges and court personnel to handle the large increase in divorce litigation. . . .

Seventh, this State should be placing greater emphasis on the education of people to marital responsibility prior to issuance of a marriage license—not on the ease by which it can be dissolved. . . . We can expect our divorce rate to zoom if and when this bill becomes law, we can expect to see more immorality and irresponsibility on the part of the parties to a marriage, we can expect more children to be on A.D.C. . . .

The basic philosophical issues of modern society and we have chosen the philosophy of irresponsibility. When the divorce rate sky-rockets, when immorality becomes commonplace, when the taxpayers revolt in disgust at the ever increasing A.D.C. and welfare rolls caused by broken homes, when our court systems become even further behind in handling huge case loads of custody, support and property disputes caused by this bill, do not say you were not warned of the consequences—for surely society as a whole will pay dearly for the passage of this bill here today. . . .

91 MICH. S. JOUR. 1396-71 (1971).

⁵² The reform bill passed the Michigan House by a vote of 72-22, 55 MICH. H. JOUR. 1100 (1971), and passed the Senate by a vote of 23-12, 91 MICH. S. JOUR. 1368 (1971).

Traditional attachment to a long standing social institution and practical political considerations have often been the most difficult obstacles to overcome in enacting legal reforms.⁵³ Indeed, one of the recurring themes in the history of legal thought is the debate between the historical and analytical approaches. The controversy is between those who believe that law is found not made and therefore should essentially follow, not lead (and that it should do so slowly in response to clearly formulated social sentiments), and those who believe that the law is the will of the state and therefore should be a determined agent in the creation of new norms. Both sides would probably agree that the law has to be constantly reassessed against the social framework in order to meet the changing social needs of the people. Yet, in the constant and complex battle of social forces on which man's future depends, the law is but one of many molding elements. The Michigan divorce law reform contains in microcosm many of the basic dilemmas of the modern legislative process. Law reform is not exclusively a legal problem but a social, political and moral problem as well.

IV. IMPACT OF THE REFORM

It is too early to assess the full impact of the 1971 Michigan divorce law. A major determinative factor will be the manner in which the courts interpret the terse language of the act. It may be inappropriate to assume that a court will merely accept at face value an allegation that there has been a "breakdown of marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no likelihood that the marriage can be preserved."⁵⁴ Since the act does not further define this language⁵⁵ the Michigan courts will have to critically examine the phrases "breakdown of marriage relationship,"⁵⁶ "objects of mat-

⁵³ For a short argument in favor of retaining established laws and traditions, see Turner, *supra* note 13, at 72-73.

⁵⁴ Pub. A. No. 75, § 1 (3 Michigan Legislative Service 126 (1971)) (to be codified MICH. COMP. LAWS ANN. § 552.6(3)). This same section requires that "evidence be taken in open court." Snyder, *supra* note 40, at 742-43, notes that while the legislature has expressly provided that an agreement that the marital relationship has broken down is not binding on the court, it should be given great weight and that "there is *and should be* a different standard of proof for the uncontested case than there is for the contested case."

⁵⁵ Unlike section 2(1) of the English Divorce Reform Act of 1969 which lists five sets of facts, at least one of which must be met before the marriage can be said to have "irretrievably" broken down, the Michigan statute gives the courts little definitional help. Honigman, *supra* note 40, at 17-20, forcefully argues for the simpler, Michigan "common sense" approach and gives several examples of how the Michigan standard should be applied to specific fact situations.

⁵⁶ This first phrase is apparently the heart of the factual question, and a court presumably would find a marital breakdown and hence a basis for divorce, only if the two subordinate phrases which follow have been met.

rimony,"⁵⁷ and "no reasonable likelihood that the marriage can be preserved,"⁵⁸ and develop some kind of evidentiary guidelines.

While applying the "marital breakdown" standard should not present insurmountable difficulties, the new statute does raise certain basic questions. One is whether the Michigan standard is objective or subjective—whether there must be hard observable facts of breakdown or whether the "marital breakdown" is merely a state of mind. The California statute apparently contemplated that observable acts and occurrences need not be present.⁵⁹ Another problem may arise when courts are asked to grant a divorce when only one spouse feels there is no hope of reconciliation. While several authorities suggest the standard should be a unilateral one,⁶⁰ the question is not free from doubt.⁶¹ Moreover, one can imagine a judge, whose commitment to the institution of marriage is deeper than that of the immediate parties, denying a divorce for a single act of adultery, cruelty or desertion,⁶² even though he would have been bound under the old law to grant a divorce upon a showing that such a marital offense had been committed. Instances may well arise where the judge denies a divorce when both parties want it, simply because he feels a breakdown has not occurred.⁶³ Most troublesome, however, is the degree to which proof of misconduct, with its tendency to produce bitterness and hostility, is still necessary in divorce proceedings. Although such evidence should as a general rule not be required, the contrary may be true in adjudicating custodial rights, property settlements, and other financial questions.⁶⁴ Indeed, the new law may shift the focus of litigation from the divorce itself to wrangl-

⁵⁷ Snyder, *supra* note 40, at 742, lists several discernible objects of marriage:

Bearing and rearing children, economic goals, the status attached to being husband or wife, acceptance within the section of society within which one functions, sexual fulfillment, mutual kindness, affection and respect, emotional support—the list may indeed be endless. Any statutory definition should start with those objects which the community—or at least the overwhelming majority—would agree must be present in any marriage.

⁵⁸ This last test serves as a check on granting divorce when the marriage breakdown is only temporary and not permanent as contemplated by the law. In facing this fact question, Honigman, *supra* note 40, at 18, suggests that courts look at "circumstances surrounding the termination of the marriage relationship, the length of time it has continued and the conduct of the parties since separation."

⁵⁹ Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, *supra* note 15, at 1319–20.

⁶⁰ *Id.*, Honigman, *supra* note 40, at 18.

⁶¹ See, e.g., Couch, *supra* note 15, at 257.

⁶² This problem is discussed in light of the English experience in Paulsen, *supra* note 14, at 97.

⁶³ Honigman suggests that where both parties agree that the marriage has broken down, the court should rarely require additional testimony to hold the standard satisfied. Honigman, *supra* note 40, at 22.

⁶⁴ *Id.* at 20–21, and Snyder, *supra* note 40, at 743–44.

ing about child custody and property issues, since the act makes no changes in the laws applicable to those areas. This possibility of protracted litigation has led one lawyer to suggest a two-part process for contested divorce actions: one to determine if the "marital breakdown" standard had been met; the other, and presumably more lengthy part, to settle financial and custodial issues.⁶⁵

Nevertheless, a recent California proceeding indicates the liberal manner in which a court may choose to apply a no-fault divorce law. The husband was on the witness stand for less than twenty seconds.

"Have irreconcilable differences developed in your marriage?" his lawyer asked.

"Have those differences brought a breakdown of your marriage?"

"Yes."

"Is there any chance of a reconciliation?"

"No."⁶⁶

That was the extent of the testimony which "dissolved" a 19-year union.

A recurring question is the impact which the newly enacted provision will have on the divorce rate.⁶⁷ While there is a dearth of statistical data on the impact of recent no-fault divorce statutes, figures tend to suggest that the new California statute is producing a small but real increase in the number of divorces.⁶⁸ The exact size of the increase is difficult to determine because of the adjustment that must be made for those Californians getting divorced in

⁶⁵ Honigman, *supra* note 40, at 23-24.

⁶⁶ Chicago Tribune, July 4, 1971, at 9, col. 3.

⁶⁷ Figures compiled by the Washtenaw County Circuit Court in Ann Arbor, Michigan, and by the Wayne County Circuit Court in Detroit, Michigan, show an increase in the number of divorce petitions filed in the first two months of the new Michigan law's operation over the number filed during the corresponding period in previous years. However, it is difficult to generalize from only two months' data.

WASHTENAW COUNTY CIRCUIT COURT

	1969	1970	1971	1972
January	121	97	97	133
February	92	79	110	187

WAYNE COUNTY CIRCUIT COURT

	1969	1970	1971	1972
January	1083	1114	927	1168
February	1104	1083	1044	1209

⁶⁸ Figures were compiled by Dr. Louis F. Saylor, State Director of Public Health in Berkeley, who indicated the divorce ratio was up about 16 percent from 1969 to 1970. National Observer, Jan. 25, 1971, at 17, col. 4.

their home state rather than going to Nevada.⁶⁹ Similarly, one can only speculate on the degree to which any future rise in the Michigan divorce rate is directly attributable to the new law as opposed to other factors such as younger marriage, longer life spans, circumstantial difficulties such as housing shortages and the mood of a "permissive society" as a whole. As one California judge has suggested, there should be less concern about the slight increase in the divorce rate in light of the fact that husbands and wives who have lived together in bitterness and even hatred can now start new lives.⁷⁰

Finally, no-fault divorce laws may decrease the cost of obtaining a divorce. In addition to the usual filing fees and incidental costs, protracted litigation before the reform involved substantial attorneys' fees. While indigents may have escaped this financial burden by the United States Supreme Court's decision in *Boddie v. Connecticut*,⁷¹ which held unconstitutional the denial of a divorce to an indigent because of his inability to pay the necessary fees, and by obtaining some form of free legal service,⁷² a substantial segment of the population may have found the costs high or even prohibitive.⁷³ The new Michigan law still requires a court appearance, with all the attendant expense, but possibly the simplified procedure and fact determination will require far less expense than before. Michigan has not instituted "mail order" divorce,⁷⁴ but the new law may be a first step in making divorce equally available to all citizens, regardless of wealth.

V. CONCLUSION

Lifelong marriage is often considered the only basis of a secure and stable family life and the only way to insure a healthy physi-

⁶⁹ *Id.* At one point in 1970, the number of divorces being granted in Nevada was down approximately 15 percent from 1969, and Nevada officials blamed the new California reform for the decrease. Professor Brody in *California's Divorce Reform: Its Sociological Implications*, 1 PACIFIC L.J. 223, 225-26 (1970), discusses various factors contributing to California's increased divorce rate.

⁷⁰ Statement by Superior Court Justice William Hogoboom in Chicago Tribune, July 4, 1971, at 9, col. 3.

⁷¹ 401 U.S. 371 (1971).

⁷² See Goldberger, *Legal Aid Divorces—A Practical Approach*, 20 AM. U. L. REV. 30 (1970), for a discussion of the plight of poor people who want a divorce.

⁷³ Filing and incidental fees usually are about \$40 and attorneys' fees in Michigan about \$400, provided no special problems, such as property disputes, are involved.

⁷⁴ The new California law provides an even simpler process than Michigan, with the services of an attorney apparently not required. See Johnson, *The Family Law Act: A Guide to the Practitioner*, 1 PACIFIC L. J. 147 (1970), for a step-by-step analysis of how a divorce is to be obtained under the California reform.

It appears that one California county, Contra Costa, has initiated a divorce procedure which costs only \$36 and does not require a court appearance. See Detroit Free Press, Nov. 29, 1971, at 9-B, col. 4.

cal and emotional development for children of the marriage. From the early ecclesiastical law to the present, the indissolubility of marriage has been a predominant theme. Yet, the state has through the years recognized that in certain circumstances if a marriage could not be dissolved, it would not only be contrary to public policy, but would also inflict unnecessary hardship on all parties. In those limited situations, the law has provided a procedure for ending the marriage.

The trend toward liberalizing divorce statutes is based on a very practical political consideration, that is, the increasing realization that a state cannot police all religious, ethical and family matters. Law alone cannot create or perpetuate family happiness. A state can refuse to break the bonds of matrimony, but it cannot bind the spouses to love each other or to live together happily. The provisions for care and custody of the children may be carefully guaranteed by the law, but the law cannot preserve the home.

If the aim of divorce law, then, is to offer quick and painless relief to couples suffering a broken marriage, Michigan has taken a giant step forward. The simplified divorce procedure should make divorce less expensive and more equitable for all couples whose marriage is beyond repair.

The effect of this new statute on the marriage institution is less certain. The concept of no-fault divorce is likely to have a greater impact on future generations than on the present one, which continues to be influenced by the traditional social stigma attached to divorce. Future generations growing up under the new system will certainly accept the new formula as the standard form of divorce and their attitudes toward marriage and divorce will be influenced in the process. Yet, the reasons for marital breakdown lie deep in the culture and personalities that society has produced, not in the provisions of a statute.

APPENDIX

Act No. 75
Public Acts of 1971
Approved by Governor
July 29, 1971

An Act to amend sections 6, 7, 19 and 29 of chapter 84 of the Revised Statutes of 1846, entitled "Of divorce," section 19 as amended by Act No. 182 of the Public Acts of 1970, being sections 552.6, 552.7, 552.19 and 552.29 of the Compiled Laws of 1948; and to repeal certain acts and parts of acts.

The People of the State of Michigan enact:

Section 1. Sections 6, 7, 19 and 29 of chapter 84 of the Revised Statutes of 1846, section 19 as amended by Act No. 182 of the Public Acts of 1970, being sections 552.6, 552.7, 552.19 and 552.29 of the Compiled Laws of 1948, are amended to read as follows:

Sec. 6. (1) A complaint for divorce may be filed in the circuit court upon the allegation that there has been a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved. In the complaint the plaintiff shall make no other explanation of the grounds for divorce than by the use of the statutory language.

(2) The defendant, by answer, may either admit the grounds for divorce alleged or deny them without further explanation. An admission by the defendant of the grounds for divorce may be considered by the court but is not binding on the court's determination.

(3) The court shall enter a judgment dissolving the bonds of matrimony if evidence is presented in open court that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.

Sec. 7. (1) An action for separate maintenance may be filed in the circuit court in the same manner and on the same grounds as an action for divorce. In the complaint the plaintiff shall make no other explanation of the grounds for separate maintenance than by use of the statutory language.

(2) The defendant, by answer, may either admit the grounds for separate maintenance alleged or deny them without further explanation. An admission by the defendant of the grounds for

separate maintenance may be considered by the court but is not binding on the court's determination. The defendant may also file a counterclaim for divorce.

(3) If the defendant files a counterclaim for divorce, the allegation contained in the plaintiff's complaint as to the grounds for separate maintenance may be considered by the court but is not binding on the court's determination.

(4) If evidence is presented in open court that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved, the court shall enter:

(a) A judgment of separate maintenance if a counterclaim for divorce has not been filed.

(b) A judgment dissolving the bonds of matrimony if a counterclaim for divorce has been filed.

Sec. 19. Upon the annulment of a marriage, a divorce from the bonds of matrimony or a judgment of separate maintenance, the court may make a further judgment for restoring to either party the whole, or such parts as it shall deem just and reasonable, of the real and personal estate that shall have come to either party by reason of the marriage, or for awarding to either party the value thereof, to be paid by either party in money.

Sec. 29. The legitimacy of all children begotten before the commencement of any action under this act shall be presumed until the contrary be shown.

Section 2. Sections 8, 9d, 10, 18, 24, 40, 41, 42, 44 and 47 of chapter 84 of the Revised Statutes of 1846, as amended, being sections 552.8, 552.9d, 552.10, 552.18, 552.24, 552.40, 552.41, 552.42, 552.44 and 552.46 of the Compiled Laws of 1948, and Act No. 243 of the Public Acts of 1889, being sections 552.301 and 552.302 of the Compiled Laws of 1948, are repealed.

Section 3. The provisions of this amendatory act shall apply to all actions for divorce or separate maintenance commenced on or after the effective date of this act. An action for divorce or separate maintenance pending at the effective date of this act shall be consummated in accordance with and subject to the law in force at the time the action was commenced except that the provisions of this amendatory act shall be made applicable to a pending action for divorce or separate maintenance if either party amends his respective complaint or counterclaim at any time before trial to allege the new grounds for divorce or separate

maintenance by use of the statutory language prescribed in this amendatory act.

Section 4. This act shall take effect January 1, 1972.

This act is ordered to take immediate effect.