

University of Michigan Journal of Law Reform

Volume 3

1970

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Recommended Citation

Meredith A. Nelson, *California Family Law Act*, 3 U. MICH. J. L. REFORM 425 (1970).

Available at: <https://repository.law.umich.edu/mjlr/vol3/iss2/8>

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CALIFORNIA FAMILY LAW ACT

I. Introduction

California's Family Law Act¹ has been heralded as the first major change in the State's divorce provisions in one hundred years.² The Act is an attempt to remedy two major criticisms of current divorce practice both in California and throughout the United States. First, those advocating reform believe that laws controlling the granting of divorces are in conflict with modern concepts of marriage and divorce.³ Many divorce laws impose punitive sanctions in an attempt to deter those who would otherwise seek a divorce. Second, notwithstanding their intent, divorce laws have not, in fact, reduced the frequency of divorce.⁴ The inability of current divorce laws to help solve family problems

¹CAL. CIV. CODE §§ 4000-5138 (Deering Supp. 1970). The Act grew out of the work of former California Governor Edmund Brown's Commission on the Family, which was charged with the task of reconciling the laws controlling divorce with the actual causes and effects of marital breakdown. The Commission was also to propose means through which the causes of the rising rate of divorce could be analyzed and the numbers of those seeking divorces diminished. (REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY, Dec. 1966 at 1) [hereinafter cited as REPORT.] The Commission premised its studies on the view that the family was the basic unit of society which courts had the responsibility of protecting, and set as its goal the furtherance of family stability by "preventing divorce where it is not warranted, and . . . reducing its harmful effects where it is necessary." See REPORT at 5, 7, 26-31.

²Grunsky, *The Family Law Act*, 19 THE BRIEFCASE 2, (Nov.-Dec. 1969); San Francisco Examiner, July 28, 1969, at 1, col. 3.

³See notes 14 and 15 *infra*.

⁴STATISTICAL ABSTRACT OF THE U.S., 1969, Table 54, "Live Births, Deaths, Marriages, and Divorces: 1910 to 1968," at 47. While the national rate leveled off in the fifties, it increased from 2.2% in 1960 to 2.9% in 1968 and during the same period in California the rate rose from 3.1% to 3.7%. In 1960 there were 393,000 divorces; in 1968, 582,000. See Table 78 "Marriages, 1950, 1960, and 1968 and Divorces 1960 and 1966." "Number and Rate by State" at 61. However, Hammer, *Divorce Reform in California*, 9 SANTA CLARA LAWYER 32, 34 (1968) comments that while the absolute number of divorces has increased, the rate has remained "relatively constant" and should not be described as "soaring."

and lower the divorce rate, the growing concern with the increasing numbers of children affected by divorce,⁵ and the inability of the courts to deal adequately with the heavy load of divorce cases have all contributed to the impetus for divorce law reform.

Proposals for divorce reform have been advanced by numerous judges who feel that the legal system must provide the means for helping couples solve their marital problems. In the past, judges have often refused to assume the role of marriage counselor in the belief that this was not a proper court function. This tendency has diminished, however, with the growing realization that many individuals who come before the courts do not actually desire a divorce but do seek counseling. Indeed, a number of judges today believe that a large percentage of couples resort to the legal system because they are unwilling to make use of formal or informal marital services available outside the courts.⁶ The courts' lack of success in providing assistance to these couples has contributed to the growing desire for reform.

While a few states have modified their divorce laws,⁷ California

⁵NATIONAL CENTER FOR HEALTH STATISTICS, DEPT. H.E.W. DIVORCE STATISTICS ANALYSIS, U.S., 1962, 1965 at 3,27. The percentage of divorces in which children are involved grew 15% from 1953 to 1962 and the average number of children involved in each such divorce also increased. The report indicates that the increasing involvement of children was primarily due to the growth of the proportion of divorces with children and to a lesser extent an increase in the ratio of children per divorce. The percentage of decrees with children rose from 45.5% in 1953 to 60.2% in 1962. The ratio of children per divorce with children increased only from 1.86 to 2.14. An attendant problem involving children of divorced parents is the higher rate of juvenile delinquency. REPORT at 5.

⁶McIntyre, *Conciliation of Disrupted Marriages By or Through the Judiciary*, 4 J. Fam. L. 117, 118 (1964).

⁷The following are a few of the states that have made changes in their divorce laws: New York, which had previously only allowed divorce on grounds of adultery, in 1969 changed its laws to permit divorce on grounds recognized by most states, N.Y. DOM. REL. LAW § 170 (Supp. 1969). North Carolina, (N.C. GEN. STAT., § 50-5 (4) (1965)) and Virginia, (VA. CODE ANN. § 20-91(9) (1964)) have enacted non-fault separation statutes. Oklahoma, (OKLA. STAT. ANN. tit. 12, § 1271(7) (1961)) added incompatibility as a ground for divorce. Texas has also attempted to reform its divorce laws. Basically, the non-fault ground of "insupportability" was added to the previous law, although this was cast in the form of a unification of law relating to the family. TEX. FAM. CODE §§ 1.01-5.86 (Vernon Supp. 1969). Under the new Texas divorce law, then, there exists a dual standard for divorce: the old fault grounds and the new ground of insupportability. Unless the fault grounds are eliminated, this dual standard will just result in the perpetuation of the hypocrisy that has existed. For an analysis of

is the first state to completely revise its divorce legislation. The Family Law Act makes significant changes both in the substantive laws governing the granting of divorce and in the procedures to be followed in obtaining it. The changes enacted, reflect a new approach to divorce which may at least partially answer much of the criticism leveled at current divorce practice.

II. Pre-1970 Divorce

In the past, California followed the "marital fault" doctrine in divorce proceedings and granted divorces only to the "innocent party" after a showing of specific acts of misconduct by the offending spouse. The theory behind the fault doctrine is that

certain acts are regarded as being fundamentally incompatible with the undertakings entered into at marriage; the commission of these acts by one party to the marriage gives to the other party an option to have the marriage terminated by divorce.⁸

The grounds usually included under the doctrine—adultery, extreme cruelty, wilful desertion, wilful neglect, habitual intemperance, conviction of a felony—were specified by statute.⁹ A party seeking a divorce was required to file a lengthy, accusatory "complaint", in which the "plaintiff" alleged acts committed by the "defendant."¹⁰ The latter, in contesting the divorce action, could allege as a complete defense connivance, condonation, recrimination or laches.¹¹

the Texas act, *see* McKnight, *Recodification and Reform of the Law of Husband and Wife*, 33 TEX. B.J. 34 (1970).

⁸REPORT OF ROYAL COMMISSION ON MARRIAGE AND DIVORCE, (Comd. 9678) para. 56.

⁹CAL. CIV. CODE, § 92 (repealed 1970). The only non-fault ground specified was incurable insanity.

¹⁰CAL. CIV. CODE § 92, *see* form included therein. (Repealed 1970.)

¹¹CAL. CIV. CODE § 111-33 (repealed 1970). Connivance is the passive permission of the acts alleged, when done with intent to procure the acts committed. CAL. CIV. CODE §§ 112, 113 (repealed 1970). Collusion is the agreement by spouses that one of them shall commit or claim to have committed acts which are grounds for divorce for the purpose of enabling the other to obtain a divorce. CAL. CIV. CODE § 114 (repealed 1970). Condonation is the forgiveness of a marital offense. CAL. CIV. CODE § 115-121 (repealed 1970). Recrimination is a showing by the defendant of any cause of divorce against the plaintiff. CAL. CIV. CODE § 122 (repealed 1970).

The adversary nature of the pleading was often criticized as causing further polarization of the parties rather than encouraging reconciliation.¹² Subject to even 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.¹³ 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.¹⁴

In practice, the courts applied a broad interpretation of the statutory grounds. The ground of extreme cruelty was broadened almost beyond recognition.¹⁵ Yet, despite such interpretation, the requirement of fitting within one of the grounds continued to pose a substantial hurdle to many divorce-seekers. To obtain a divorce, some parties were forced to stage hotel scenes, commit perjury,

¹²REPORT at 18.

¹³*Id.*, at 27-30. See also PUTTING ASUNDER, A DIVORCE LAW FOR CONTEMPORARY SOCIETY, The Report of a Group Appointed by the Archbishop of Canterbury (1966) at 28-9, [hereinafter cited as PUTTING ASUNDER]. The Report criticizes the unreasonable reliance of the fault doctrine on the committing of a matrimonial offense. It states that

(t)here are all sorts of other ways in which the situation created by (say) an act of adultery might be dealt with by the two persons concerned. So in reality it is only if they fail to deal with it in any of those other ways that there is a case for divorce; and that means that it is not the matrimonial offence in itself that should be the reason for dissolving the marriage, but only the ultimate failure of the relationship between the two to bear the stress put upon it.

¹⁴Couch, *Toward a More Realistic Divorce Law*, 43 TULANE L. REV. 243 (1969). Couch comments that most divorce laws "are designed to give an innocent party a right against a guilty party. Though a few cases may fall within this posture, we know that many factors, conscious and unconscious, expressed and unexpressed, are generally involved in the breakdown of a marriage . . . (and) usually . . . both parties are at fault," at 255. See also *A Divorce Reform Act* 5 HARV. J. LEG. 563, 564, 568 (1968); Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 35-39 (1966); and PUTTING ASUNDER at 30-1.

¹⁵REPORT at 30-1. "96% of California's divorces are sought and granted on the grounds of extreme cruelty, 94% of these hearings are uncontested." these facts indicate that many courts have probably been granting divorces on a less stringent standard than might be apparent under the statute.

or seek their divorce in another forum solely because their actions did not come within one of the statutory categories.¹⁶

Furthermore, there existed a significant dissimilarity between the theory and the application of the divorce laws.¹⁷ According to a literal reading of the prior statute, divorce was to be denied if the court found both parties "guilty" of acts against the marriage, or if they had colluded in seeking the action.¹⁸ In practice, however, the parties were not precluded from obtaining a divorce. The rule followed was stated by Justice Traynor in *Deburgh v. Deburgh*:¹⁹

(P)ublic policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed.²⁰

Rather than denying a divorce, a "marital breakdown" test was applied when both parties had committed one of the specific acts, and the courts thereby deftly avoided the literal mandate of the statute.²¹

To remedy these problems, the Governor's Commission on the Family recommended changes in both law and court procedures. The State Assembly agreed with the Commission's recommendations, and decided to establish a criteria which, hopefully, would

¹⁶Couch, *supra* note 14, at 254. He comments that

(I)t is doubtful if strict divorce laws are actually much of a deterrent; if a couple's marriage has failed, but for reasons which do not come within the rigid categories by the divorce law of their state, they will probably get a divorce in any case, but their state's law will simply limit the alternatives open to them: they can stay in their own state and collude and commit perjury as to grounds . . . (or) one of them can go to a quickie divorce state and there commit perjury as to domicile and possibly as to grounds; if they cannot afford this, the husband can simply abandon the wife.

¹⁷Kay, *A Family Court: The California Proposal*, 56 CAL. L. REV. 1205, 1219 (1968), PUTTING ASUNDER at 30, and REPORT at 29.

¹⁸Wadlington, *supra* note 15, at 38-39.

¹⁹*DeBurgh v. DeBurgh*, 39 Cal. 2d 858, 250 P. 2d 598 (1952).

²⁰39 Cal. 2d at 864, 250 P. 2d at 601.

²¹Kay, *supra* note 18, at 1216-1217.

more accurately reflect the actual reasons underlying marital breakdowns.²²

III. The Family Law Act of 1970

The Family Law Act of 1970 adopts new terms, procedures, and standards in its attempt to deal properly with family problems. Indeed, even terminology has been made less adversarial in an effort to eliminate unnecessary rancor between the parties.²³

The procedural requirements generally have been simplified. In contrast to the complex complaint required under the prior law, for example, all proceedings under the Family Law Act are commenced with the filing of a simple petition which stipulates one of the statutory grounds sufficient for the cause of action.²⁴ The Act reduces the residency requirements from one year to six months,²⁵ and the interlocutory period to six months.²⁶ Since a non-resident will still be required to wait a year before he receives a divorce, these time reductions assist California residents in obtaining a divorce without transforming California into an easy divorce state for nonresidents.

During the proceedings, the court has discretion to issue a continuance of up to thirty days if it feels that reconciliation of the parties is possible.²⁷ The court also has authority to issue orders restraining the transfer or encumbrance of property, excluding one party from the home, providing for the temporary support of either party or any children, and other appropriate temporary orders.²⁸ It is, however, the revision of substantive standards which marks the Act as a significant reform of law.

²²CAL. ASSEMBLY J., Aug. 8, 1969 at 8057.

²³The term "divorce" has been completely eliminated and the term "dissolution of marriage" is substituted. To make the pleadings less adversarial, a "petition" is filed instead of a "complaint," and the other party is now the "respondent" rather than the "defendant." The terms "voidable marriage" or "judgment of nullity" have been substituted for the word "annulment." Also the Act uses "legal separation" and "support" instead of "separate maintenance" and "alimony."

²⁴CAL. CIV. CODE §§ 4450; 4503 (Deering Supp. 1970). In those counties which have established a conciliation court, the parties are also required to file the marriage questionnaires. *See* CAL. CIV. CODE § 4505.

²⁵CAL. CIV. CODE § 4530 (a) (Deering Supp. 1970).

²⁶CAL. CIV. CODE, § 4514.

²⁷CAL. CIV. CODE, § 4508.

²⁸CAL. CIV. CODE, §§ 4516, 4518.

A. *Dissolution of Marriage*

Dissolution of marriage will be granted only on two grounds: "irreconcilable differences, which have caused the irremediable breakdown of the marriage," and "incurable insanity."²⁹ The grounds are to be pleaded generally and, in most cases, evidence of specific acts of misconduct will not be admitted.³⁰ These changes were mainly premised on the hope that such proceedings would not generate a bitterness that might destroy a marriage which could otherwise be saved.³¹ Following this same philosophy, the need for a corroborative witness has been eliminated³² and eavesdropping evidence will no longer be permitted.³³

While the new Act's emphasis is directed toward determining dissolution through an investigation of the overall condition of the marriage rather than the mere showing of matrimonial offenses, the test to be used in determining whether irreconcilable differences exist is unclear. The statute defines irreconcilable differences as "those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved."³⁴ This definition, possibly the result of a compromise made during negotiations on the bill, is circular and of little practical assistance.³⁵ Such a standard, though, was what was desired, for it

²⁹CAL. CIV. CODE, § 4506. Under prior law, a person seeking divorce on grounds of insanity had to wait for his incompetent spouse to be confined to an institution for three years before a divorce action could be initiated; CAL. CIV. CODE, § 108, (repealed 1970). Now, all the petitioner need show is that the spouse was incurably insane at the time the petition was filed and remains so at the time of the hearing. CAL. CIV. CODE § 4510 (Deering Supp. 1970). These same two grounds will also permit the legal separation of the parties but only where both of them consent to the order, see § 4508(b). Legal separation was not viewed with favor by the Commission which felt that it prolonged an uncertain marital status and led to the "promotion of illicit relationships" and "the evasion of support obligations." See REPORT at 33.

³⁰CAL. CIV. CODE § § 4509, 4506. (Deering Supp. 1970).

³¹Dinkelspiel & Gough, *The Case for a Family Court*, 1 FAM. L. Q. sec. 3, 70 at 74 (1967).

³²CAL. CIV. CODE § 130 (repealed 1970).

³³CAL. CIV. CODE, § 4520 (Deering Supp. 1970).

³⁴CAL. CIV. CODE, § 4507.

³⁵CALIF. CONTINUING EDUCATION OF THE BAR, ATTORNEY'S GUIDE TO FAMILY LAW ACT PRACTICE, at 120 (1970). [hereinafter cited as ATTORNEY'S GUIDE].

would give the courts the broad discretion needed to determine whether a particular marriage should be dissolved.

It seems likely that the procedure, as well as the substantive allegations, to be used in determining the existence of irreconcilable differences, will depend upon whether the proceeding is contested. One commentator has suggested that when the divorce is uncontested, all the court need do is ask the petitioner whether he believes his marriage has broken down. If the petitioner so testifies, dissolution will be ordered and conciliation will no longer be an alternative.³⁶ Where the divorce is contested, additional proof may be necessary to show that there are substantial grounds for dissolution. Even in this situation, however, the legislative hearings indicate that the absolute, unilateral refusal of one spouse to live with the other constitutes an irreconcilable difference, notwithstanding a conciliatory attitude of the other party.³⁷ If courts pay heed to the legislature's suggestion in contested proceedings, proof of irreconcilable differences should be considerably simplified.³⁸

B. Child Custody and Support

The court may authorize a custody investigation in any proceeding in which child custody is involved.³⁹ Normally, custody will be awarded to one of the parents, but the court is authorized to award custody to a third party upon a finding that an award to a parent would be detrimental to the child's best interests.⁴⁰

³⁶*Id.*, at 129-30.

³⁷CAL. ASSEMBLY J., Aug. 8, 1969 at 8058.

³⁸See ATTORNEY'S GUIDE at 132.

³⁹CAL. CIV. CODE § 4602 (Deering Supp. 1970). The investigator's report, however, is to be considered by the court in making its custody decision only upon stipulation of all interested parties.

⁴⁰In awarding custody of a child of "tender years," the maternal preference has been maintained, while the paternal preference for an older child has been abolished. Also, the child's own wishes will be taken into account if he is deemed "old enough to indicate an intelligent preference." CAL. CIV. CODE § 4600 (Deering Supp. 1970).

California's previous rule denied a parent custody only upon a finding of unfitness. See Hammer, *supra* note 4, at 51. There is some speculation that the new standard for awarding custody, the detriment test, may result in more awards to third parties on the belief that a lesser finding of parental fault is now required. See ATTORNEY'S GUIDE at 171-172.

The enforcement remedies available for child support orders have been increased to better protect the child's interest. For example, when either party has been ordered to provide child support, the court may implement this order by assigning a portion of that person's wages.⁴¹

Furthermore, when the parent receiving child support payments is also receiving welfare, the court is required to direct court supervision for the enforcement of the support payments.⁴² Both of these measures should assure greater adherence to child support obligations and should alleviate at least some of the economic problems faced by children of divorced parents.

C. Property Rights of the Parties

Several significant changes have been made in the provisions for support of the former spouse. Either party now may be required to pay support⁴³ whereas previously only the party against whom the decree was granted could be so ordered.⁴⁴

By making support payments less of a penalty and more dependent on the spouse's actual needs, it is hoped that the courts will be able to reconcile the parties to the award and thereby reduce post-dissolution conflict.⁴⁵ It is, of course, questionable whether a mere change in theory can realistically accomplish a significant change in human behavior.

The Family Law Act continues prior law⁴⁶ in permitting the trial court to base its support award on the circumstances of the parties. The statute explicitly states two factors to be considered by the court: the duration of the marriage and the ability of the supported spouse to engage in gainful employment without interfering with the interests of any children of the parties in the custody of such spouse.⁴⁷

⁴¹CAL. CIV. CODE, § 4701 (Deering Supp. 1970).

⁴²CAL. CIV. CODE, § 4702(a).

⁴³CAL. CIV. CODE, § 4801.

⁴⁴CAL. CIV. CODE, § 139, (repealed 1970). In practice, this prior rule had been mitigated in *Deburgh v. Deburgh*, *supra* note 20, where the court permitted even a guilty party to receive support when the decree was granted to both parties.

⁴⁵REPORT at 47-8.

⁴⁶See CAL. CIV. CODE, § 139 (Deering Supp. 1970) (repealed 1970).

⁴⁷CAL. CIV. CODE § 4801(a) (Deering Supp. 1970).

Under the Act there will be, in most cases, an equal division of community property.⁴⁸ The previous statute had required a "just" division of the property where the grounds for divorce were adultery, incurable insanity, or extreme cruelty.⁴⁹ Not only did this law frequently impose a penalty on a "guilty" spouse through unequal division, but it also tended to promote a system of legalized blackmail through which one party was able to use the threat of revelation of indiscretions to obtain a large property settlement.⁵⁰ The Commission felt that the most equitable division of marital property was unrelated to whatever grounds the parties had for divorce.⁵¹ In accord with this policy, the statute allows an unequal division of the property in only two instances: (1) where the economic circumstances warrant; or (2) where the court finds that there has been a deliberate misappropriation of the property by one party to the exclusion of the community property rights of the other.⁵²

⁴⁸CAL. CIV. CODE § 4800 (Deering Supp. 1970). Whether an equal division of the property will be equitable depends upon the characterization of the spouses' property under California's community property laws. The factors involved in this characterization include time of acquisition (before or during the marriage) and the method of acquisition (e.g., gift, purchase). Property of each spouse may be transferred to the marriage to become community property. Under the involved rules that have developed, such transfer may occur unknowingly, or contrary to one's intent. An equal division of the community property may thus result in a windfall to fortune-hunting spouse who contributes little materially to the marriage. See Knutson, *California's Community Property Laws: A Plea for Legislative Study & Reform*, 39 S. CAL. L. REV. 240 (1966); Note, *Characterization of Property in California When Period of Acquisition Overlaps Creation or Termination of Marital Community*, 17 HAST. L. J. 815 (1966).

⁴⁹CAL. CIV. CODE, § 146 (repealed 1970). While the statute itself says that a "just division" shall be made, this had been interpreted in *Eslinger v. Eslinger*, 47 Cal. 62 (1873) to mean that the injured party was entitled to more than one half of the property. See CAL. CIVIL CODE § 146, note 14, (repealed 1970). See also Knutson, *supra* note 48, at 243, note 18.

⁵⁰California State Senator Grunsky, as quoted in Rose, *Divorce, California Style*, Calif. Living, Nov. 16, 1969; at 24.

⁵¹REPORT at 44-5. See also MacFaden, *California's New Divorce Legislation*, 3 J. BEVERLY HILLS B. ASS'N 31, 34 (Sept. 1969), commenting that the equal division of community property was "simply doing equity since the acquisition of the property has nothing whatsoever to do with the marriage relationship itself or the acts which caused its dissolution."

⁵²CAL. CIV. CODE § 4800(1) & (2) (Deering Supp. 1970). The first exception covers the case where actual division of an asset is impractical or impossible (e.g., a going business), or where equal division of the property would fail to give sufficient protection to one of the parties. See REPORT at 45. The second exception should apply to

IV. Evaluation

California's Family Law Act of 1970 is best evaluated by reference to its stated goals. It was intended that the Act take into account and deal with the actual causes and effects of divorce. This was to be accomplished without sacrificing either of two somewhat conflicting policies: (1) the protection of the parties involved through eliminating arbitrary standards as well as simplifying and shortening the proceedings; (2) the protection of the State's interests in preserving marriage by establishing a standard for granting divorces which would permit dissolution only after a thorough investigation and finding of marital breakdown.

The elimination of the fault doctrine is a significant accomplishment insofar as it eliminates both the unnecessary adversarial approach to divorce proceedings and the hypocrisy that existed under the prior system. The effect of the substitution of an irreconcilable differences standard, however, is more difficult to assess. If courts demand only that the petitioner answer a few questions concerning the state of the marriage, obtaining a divorce should be considerably facilitated.⁵³ It is contended that acrimony and bitterness will be reduced; however, it is not clear that a change in terminology alone can accomplish this. While bitterness may be reduced and the process simplified, the procedure itself will give the court no more information concerning the actual status of the parties' marriage than was previously the case. Indeed, to the extent that less time will be spent in divorce proceedings and less substantive corroboration will be demanded,

overt acts of misallocation of the property. It may also apply, however, where the property has been "deliberately squandered" by one spouse, although this interpretation has been questioned. *See ATTORNEY'S GUIDE* at 162 rejecting this position, and *CAL. ASSEMBLY J.*, Aug. 8, 1969 at 8062 supporting it.

The removal of the trial court's discretion to make disproportionate awards, has been regarded by some as a "more significant variance from the old law" than is the "no fault" criteria. This change is premised on the theory that in disposing of property, a dissolution of marriage should be treated like dissolution of a partnership with the economic circumstances or moral conduct of the parties during their union having no effect on the division of assets. *See ATTORNEY'S GUIDE* at 152, 156.

⁵³*PUTTING ASUNDER*, at 43-44. *San Francisco Chronicle*, Dec. 29, 1969, at 8, col. 1. Lawyers who have commented on the statute generally agree that in uncontested cases much of the bitterness which had characterized divorce proceedings, hurting both the parties and their children, will be removed.

the court may well obtain less information. It may therefore be most difficult for the courts to base their decisions on a realistic appraisal of the marriage. The new grounds for divorce may simply replace the fault doctrine with a vague standard for divorce that is based on mutual consent, or even unilateral caprice. Although this result might be desirable, such leniency would run counter to the State's second reformatory goal: preservation of the marriage and reduction of the current divorce rate. If, however, the courts demand substantial evidence of irreconcilable differences, this second goal may be achieved, but only at the cost of the first.

Moreover, some commentators have expressed the view that the exceptions under which evidence of specific acts may be admitted are so broad as to vitiate the goals of the new legislation.⁵⁴ For example, the exception allowing misconduct evidence in determining whether or not a breakdown has occurred is potentially a large loophole.⁵⁵ The policy of the Act may also be subverted by allowing evidence of a party's misconduct under the guise of showing, for child custody purposes, the party's lack of qualifications as a parent. The Act has attempted to answer these problems by prohibiting pleading of specific facts and by authorizing a private hearing on the issue of custody if the court so desires.⁵⁶ Yet, unless the custody proceedings are conducted by another court, it would seem impossible to completely eliminate

⁵⁴CAL. CIV. CODE § 4509 (Deering Supp. 1970). Misconduct evidence will be admitted where:

child custody is in issue and such evidence is relevant to establish that parental custody would be detrimental to the child or at the hearings where it is determined by the court to be necessary to establish the existence of irreconcilable differences.

⁵⁵Goddard, *The Proposal for Divorce upon Petition & Without Fault*, 43 CAL. BAR 90, 95 (1968). See also Caen, *San Francisco Chronicle*, Jan. 5, 1970, at 21, col. 1, for interviews with private detectives who did marital work. While several interviewees indicated that they felt their business would be hampered by the law, another stated that:

"[i]f you have to show irreconcilable differences, what better proof is there than a photo of husband or wife going into a motel with a person who is irreconcilably different from the respective wife or husband."

⁵⁶CAL. CIV. CODE § 4600 (Deering Supp. 1970).

the influence of specific misconduct testimony on the determination of irreconcilable differences.

The adoption of a non-fault standard without provision for counselors may raise a serious problem because the courts will be handicapped by the absence of qualified assistants to aid them in determining whether irreconcilable differences actually do exist.⁵⁷ Much of the impetus behind removal of the fault standard was premised on the belief that counselors would be provided to help administer the new standards. Indeed, at least one commentator has suggested that "the very essence of the breakdown test is the work of the conciliation counselor in attempting to reconcile the parties."⁵⁸ Failure to provide these counselors can in no way be viewed as aiding the court's decision-making.

In the final analysis, the Act's impact may well depend upon how much and what type of evidence is required by the courts to show irreconcilable differences. With the statutory definition offering little help, a determination that the parties' difficulties constitute irreconcilable differences may prove a more difficult task than anticipated. On the other hand, the vagueness of the statutory definition does allow the court much flexibility and freedom in determining the issue. Should irreconcilable

⁵⁷See REPORT at 18, 82-5. Following the success of the Los Angeles conciliation courts (See Pfaff, *The Conciliation Court of L.A. County*, PROCEEDINGS OF SECTION OF FAMILY LAW, A.B.A., 1960-1, at 35. Judge Pfaff indicates that counselors were reconciling 43% of the couples they saw and 75% of these reconciled couples were living together one year later.) The governor's Commission of the Family had proposed that the family court judge be assisted by a professional staff of trained marriage counselors who would aid the judge by interviewing parties desiring a divorce, counseling them, and submitting recommendations to the court. While the conciliation courts exist in thirteen counties, the statewide counseling provisions proposed by the Commission were deleted by the legislature on the basis of factors such as cost and the difficulty of finding qualified personnel. Additionally, doubt was raised as to both the effectiveness of mandatory counseling and the propriety of imposing it on parties to a marriage as a condition for obtaining a divorce. For comments on the legislative debate, see Grunsky, *supra* note 2, at 3, and San Francisco Examiner, June 19, 1969, at 17, col. 1. Assemblyman Hayes, one of the opponents to this section of the bill, stated that counseling was a "completely unproven method of keeping marriages together." See also Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633, 639 (1956) questioning whether the state should be given the power to attempt the transformation through psychiatry of the personality structure of an individual, "simply because he has failed to make a success out of a marriage with some other individual."

⁵⁸Goddard, *supra* note 55, at 101.

differences prove not to be a triable concept under the new system, the courts may ultimately be forced to fall back on the fault doctrine as the only manageable decisional tool.⁵⁹

V. Conclusion

In recognizing that divorce should not be prohibited where the legitimate objects of the marriage have failed, California's new divorce law reflects a marked change in the State's approach to domestic relations.

California's goal of simplifying the divorce process should be realized under the Act. The answer to divorce reform, however, does not lie solely in making divorce easily obtainable. When a couple experiences marital difficulties, the state should make sure that dissolution is not permitted unless continuance of the marriage is completely untenable. By focusing on the viability of the marriage instead of looking only to see if certain matrimonial offenses have been committed, California's new grounds for dissolution provide a sound basis on which this determination can be made. Yet, in order to assure that dissolution is not granted too hastily when applying this test, the courts should ascertain whether the parties have made an honest attempt at reconciliation.⁶⁰

Whether California is successful in achieving its second goal of lowering the incidence of divorce depends upon its ability to foster reconciliation. California already has conciliation courts successfully functioning in a number of counties. It is recommended that this type of system be expanded both in coverage and scope so that such services become available throughout the State. Use of the family court system should also be further

⁵⁹PUTTING ASUNDER, at 44-45.

⁶⁰Rheinstein, *supra* note 57, at 660. In assessing whether such efforts have been made by the parties, the court should look at both their informal and formal attempts at reconciliation. Because the merits of mandatory counseling are still debated, (*see* note 57, *supra*) parties should not be required to seek outside help as a prerequisite to their divorce; however, voluntary counseling services should be made available to parties both before and after they begin a divorce action.

considered.⁶¹ While the Family Law Act does represent perhaps the first honest look at divorce, it is unlikely that it has really succeeded in reforming the institution of divorce.

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⁶¹The Governor's Commission on the Family had proposed the adoption of a family court system whose judges were interested in working with family problems, and who would receive specialized training to help them in these areas. *See* REPORT at 61-3. Section 004 of the Commission's proposed Family Court Act specified that judges were to be chosen by their prior training, interests, and ability. Section 005 proposed that statewide seminars be conducted regularly to discuss problems in the area. If adopted, such measures would clearly help promote uniformity of standards throughout the state.