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COMMENTS

DIVORCE REFORM IN TEXAS — THE PATH OF REASON

William L. Morrow

The divorce system in Texas is a failure. The legal procedures prescribed by the statutes provide a completely ineffective answer to the critical problems of contemporary family life.

Divorce, in many respects, is our number one social problem. The marriages of recent decades have been falling apart in astonishingly large numbers. Broken homes, quarreling parents, and emotionally disturbed children have become commonplace in a restless society that lacks steadfastness in purpose or attachment. "The dull statistics [of divorce] tell the dramatic story of the disappearing permanence of American marriage."¹ Today more and more couples, upon reaching some crisis in their lives, look to the divorce courts for a solution to their troubles.

The tragic truth, however, is that our courts offer no solution. One would reasonably expect our laws on marriage and divorce, wherein the state and society have such overwhelming interests, to reflect keen analysis of the complex problems of family disorganization. But this is far from the case. The Texas law of divorce exists in a curious world of legalistic make-believe. Statutes governing the problems of the family, rather than being firmly grounded upon modern social and psychological thought, are based upon ancient ecclesiastical dogma of medieval Europe. Divorce procedures are absurdly interwoven with "fact and fiction, reality and myth, truth and perjury."² By shackling our statutes to antiquated, incongruous doctrines of another era, our courts are able to offer no alternative to assembly line divorce.

Under present Texas laws divorce is available for the asking through compliance with certain required formalities. It is common knowledge that divorce proceedings are nothing but brief rituals of legal hocus-pocus designed to dramatize the defendant's guilt and hence justify marriage dissolution. The statutory grounds, itemized in article 4629,³ are merely artificial technicalities that serve as bases for what is in effect divorce by consent. Furthermore, the statutes provide no facilities that enable the courts to conduct a realistic inquiry into the family dispute or even into such vitally important issues of the divorce as custody and support of the children.

¹ Ploscowe, *The Truth About Divorce* 2 (1955).

² *Id.* at 247.

³ *Tex. Rev. Civ. Stat. Ann. art. 4629* (1960).

If a spark of life remains in the marriage after the couple has sought judicial resolution of their conflict, the courts are helpless. The Texas laws provide no means or procedures to determine if the marriage could be saved or if something other than divorce might solve the marital dispute. As one jurist, a noted authority on matrimonial matters, has written: "The result [of the traditional divorce laws] is that many divorces are granted when marriages could be saved. No discrimination is made between a marriage that is merely sick and needs help and a marriage that has become intolerable for both of the parties and is really dead."⁴

The Texas divorce statutes render a distinct disservice to the family life of this state. The time is long overdue for a major overhaul of these anachronistic relics of medieval ages. This Comment is dedicated to the task of examining the historical basis of the law as it now exists and the essential criteria which should govern its reform.

I. THE THORNY PATH OF HISTORY

Consensual divorce has its roots in the remote past. The prevailing thought of the early civilizations was that marriage, since based upon mutual affection, could be dissolved when affection ceased.⁵ However, the Biblical accounts of the teachings of Jesus profoundly altered pagan divorce practices. A Pharisee, according to the Gospel of Matthew, challenged Jesus as to the lawfulness of the Jewish divorce system. The reported reply has caused centuries of theological dispute: "What therefore God has joined together, let no man put asunder. . . . And I say to you: whoever divorces his wife, except for unchastity, and marries another, commits adultery."⁶ The passage is plainly ambiguous. The statement could be interpreted authoritatively to forbid all divorce, to permit divorce only for the cause of adultery, to forbid remarriage after divorce, or even to permit divorce because of any sin or violation of the marriage contract for which "unchastity" might symbolize.⁷ Nevertheless, the Roman Catholic Church has until this day been committed to the uncompromising interpretation of the passage by St. Augustine: marriage is a holy bond that lasts a lifetime and can be dissolved only by the death of one of the parties.⁸

For centuries the law of the Church governed Europe as to all

⁴ Ploscowe, *op. cit. supra* note 1, at 256-57.

⁵ See generally 2 Howard, *A History of Matrimonial Institutions* 12-19 (1904).

⁶ *Matthew* 19: 3-9 (Revised Standard Version). See also *Matthew* 5: 31-32; *Mark* 10: 2-12; *Luke* 16: 18; 1 *Corinthians* 7: 10-16; *Romans* 7: 2-3.

⁷ See Blake, *The Road to Reno* 11 (1962).

⁸ *Id.* at 12; 2 Howard, *op. cit. supra* note 5, at 26-27.

matters pertaining to marriage. Under the Catholic canon law there was no divorce in the modern sense. The ecclesiastical courts did, however, grant what was called *divortium a mensa et thoro* (divorce from bed and board), which was a restricted form of divorce without privilege of remarriage or, in effect, judicial separation.⁹ The only matrimonial offenses recognized by the canon law as serious enough to justify separation were adultery, "spiritual adultery" or heresy, and such cruelty as endangered the life of the other spouse.¹⁰

The Protestant revolt from the Roman Catholic Church failed to reform the dogma of marriage and divorce. The ecclesiastical courts of the Protestant Church of England continued to apply, with only slight modifications, the basic doctrines of the canon law.¹¹ Accordingly, except for occasional parliamentary actions, there was no divorce in England; until the middle of the 19th century the only remedy was judicial separation.¹²

Time and circumstances permitted a much freer scope in the execution of Protestant doctrine in colonial America than had been possible in England itself. This was manifested by early enactment of laws secularizing marriage and authorizing divorce.¹³ Nevertheless, the impact of the canon law upon American legislation was considerable. Although proceeding along diverse lines, after the Revolution most states translated the Church's grounds for judicial separation into statutory grounds for absolute divorce.

The secularization of divorce was achieved in Texas in much the same manner as in the early English colonies. The canon law, as administered by Spain and Mexico, recognized no such thing as dissolution of an originally valid marriage.¹⁴ Following the Texas revolt from Mexican rule, the courts of the Republic began to grant decrees of absolute divorce. The power to hear and determine divorce suits was conferred specifically upon the district courts in 1837 by an

⁹ The ecclesiastical courts also conducted a flourishing business in annulling marriages that were never validly entered into and therefore void from the beginning. One skeptical historian said: "[F]or a sufficient consideration, a canonical flaw could be found in almost any marriage." Thwing, *The Family: An Historical and Social Study* (1887), reprinted in 2 Howard, *op. cit. supra* note 5, at 57; see also Blake, *op. cit. supra* note 7, at 15-17.

¹⁰ 2 Howard, *op. cit. supra* note 5, at 53-54.

¹¹ See 2 *id.* at 71-85; Blake, *op. cit. supra* note 7, at 26.

¹² It was not until 1857 that a civil Court for Divorce and Matrimonial Causes was created in England which finally deprived the ecclesiastical courts of their divorce jurisdiction. 2 Howard, *op. cit. supra* note 5, at 109.

¹³ See generally 2 *id.* at 125-43, 330-66; Blake, *op. cit. supra* note 7, at 34-77.

¹⁴ The Church did, however, permit divorce where one of the spouses entered a convent prior to consummation of a celebrated marriage or where a nonbelieving spouse attempted to divert the other from the faith. See *Sharman v. Sharman*, 3 Tex. 521, 523-24 (1857); 3 Speer, *Marital Rights in Texas* 115 (1961).

Act of the Congress of the Republic.¹⁵ An 1841 Act defined and prescribed the grounds for which divorce could be granted.¹⁶

II. GROUNDS AND DEFENSES: THE PATH OF TRADITION

The criteria for divorce in Texas has changed only slightly since 1841. The underlying concept of our law, as adopted from ecclesiastical court practice, is the notion that before a marriage can be disrupted, or dissolved, a serious matrimonial offense must have been committed by one of the spouses. The statutory itemization of grounds for divorce represents an attempt to specify the offenses or faults serious enough to justify marriage dissolution.

Under the statute now in effect, article 4629,¹⁷ the unholy trinity of adultery, abandonment, and cruelty is the core of the substantive grounds for divorce. In addition to these traditional causes, the statute provides certain "non-fault" grounds, *viz.*, living apart for seven years, imprisonment for felony, and insanity. A companion statute, article 4630,¹⁸ incorporates from the ancient canon law what are generally termed "defenses" to divorce actions—recrimination, condonation, connivance, and collusion.

The basic assumption of the Texas divorce statutes is that the husband and wife are opposing parties in a legal controversy. However, this doctrinaire view of adversary proceedings has little relationship to the facts of life in matrimonial litigation. The great bulk of our divorces—almost ninety per cent—are not contested.¹⁹ Before a divorce case reaches the court, both the husband and wife usually have agreed as to division of the property and the support and custody of the children; after reaching this agreement, they generally both want a divorce. In order to facilitate award of the divorce decree, the defendant does not present any defense and usually does not even appear to answer the plaintiff's charges.²⁰ Only if negotiations have

¹⁵ Texas Acts (Republic 1837), 1 Gammel, Laws of Texas 1436 (1898).

¹⁶ Texas Acts (Republic 1841), 2 Gammel, Laws of Texas 483 (1898).

¹⁷ Tex. Rev. Civ. Stat. Ann. art. 4629 (1960).

¹⁸ Tex. Rev. Civ. Stat. Ann. art. 4630 (1960).

¹⁹ A recent statistical analysis of United States divorce litigation indicates that answers are filed to less than 15% of all petitions. Jacobson, *American Marriage and Divorce* 120-21 (1959). Of course, the formal contest of the suit often reflects the defendant's desire to secure relatively favorable terms with respect to such matters as disposition of property or child custody rather than genuine controversy over the granting of the decree. *Ibid.*

²⁰ Alexander, *The Follies of Divorce: A Therapeutic Approach to the Problem*, 36 A.B.A.J. 105 (1950), states:

So although in some 90 per cent of the cases the defendant stays carefully away, the plaintiff must, nevertheless, put on an exhibition of shadow-boxing and give the shadow a knockout to the satisfaction of the law. Whoever originated the forms and procedures for divorce litigation little realized that he was setting the stage for a sham battle against the little man who isn't there.

Id. at 107-08.

broken down or if anger and spite have overcome judgment are the presuppositions of the adversary proceedings, with true "grounds" and "defenses," realized. But even though consensual divorce is the norm, it exists in a form that places a premium on make-believe and perjury.

III. WHERE THE PATHS HAVE LED

A. Texas

In certain limited matters the Texas divorce laws have seen some improvements during recent years. The requisite thirty-day waiting period between filing of the petition and the award of the decree was increased to sixty days in 1955.²¹ Negating the purpose of the waiting period, however, is the fact that it is nothing but just that, a waiting period; there are no conciliation procedures available to the estranged couple. The defense of insanity was abolished in 1941 and made, with restrictions, a ground for divorce.²² A 1953 amendment decreased the statutory period of separation under the "living apart" divorce ground from ten to seven years.²³

In 1960 the State Bar of Texas created a Family Law Section to survey the problem of family legislation. The major project of the Section has been a study of the Model Family Court Act as promulgated by the National Probation and Parole Association. At the 1963 State Bar meeting in Dallas, the Section recommended to its membership proposed legislation creating a state-wide system of family courts.²⁴ The family courts, as envisioned by the Section, would replace the present special courts of domestic relations in the larger communities and would have jurisdiction over all family law matters. Such courts would have the dignity and compensation of district courts and would be organized on a district basis throughout the state.

On January 1, 1963, after several months of public hearings, the Interim Study Committee on Divorce of the Texas Legislature reported its findings and recommendations. The Committee viewed divorce as "the number one social problem of our day," but failed to assess the harmful effects of antiquated doctrinaire laws on the problem.²⁵ The recommendations of the Committee, none of which

²¹ Tex. Rev. Civ. Stat. Ann. art. 4632 (1960).

²² Tex. Rev. Civ. Stat. Ann. art. 4629, § 6 (1960). See Note, *Domestic Relations — Insanity as a Ground for Divorce*, 20 Texas L. Rev. 106 (1941).

²³ Tex. Rev. Civ. Stat. Ann. art. 4629, § 4 (1960).

²⁴ See 26 Texas B.J. 612 (1963).

²⁵ See Report of the Interim Study Committee on Divorce to the 58th Legislature of Texas (1963).

were adopted by the past session of the legislature, included a family court system in lieu of the existing courts of domestic relations, creation of child welfare agencies to assist the courts, requisite appearance of the defendant in divorce cases where children are involved, requisite appointment of an attorney *ad litem* to represent the children of divorce, increase of the waiting period from sixty to ninety days, abolishment of common-law marriages, and other minor items.²⁶

A state-wide family court system is a valuable first step in providing rational means of resolving family strife. But it is only a beginning. It is hoped that the State Bar's Family Law Section will at some future time recommend to the Texas legislature enactment of comprehensive measures that will provide our state with just and wholesome laws on family disorganization. Certainly the Section, as a respected adjunct of the State Bar of Texas, has an invaluable opportunity to impress upon the legislature the barren inadequacy of our present laws and the pressing urgency for reform.

B. . . . and Elsewhere

Most aspects of this nation's family laws are completely out of touch with the realities of modern divorce. Moreover, the path of divorce reform through the legislatures of the several states has been long and arduous. Only in isolated instances have substantial improvements in the laws been achieved. However, the occasional successful experiments of other states are well worth the examination and perhaps emulation of our own legislature.

The statutes of the state of California provide extensive conciliation procedures which may be invoked by either spouse.²⁷ An ambitious experiment along these lines resulted in the establishment of the famed Los Angeles Children's Court of Conciliation. A unique feature of the system is the provision for a formal conciliation agreement which, with the consent of the parties, may be reduced to writing and made an enforceable order of the court. The court has claimed an impressive record of success. A 1959 report showed that for the preceding five years the conciliation court had been able to reconcile forty-three per cent of the couples willing to listen to professional marriage counselors and three-quarters of the reconciliations proved permanent.²⁸

A new family code went into effect in Wisconsin on January 1,

²⁶ *Id.* at 11-12.

²⁷ Cal. Civ. Proc. Code § 1730-72.

²⁸ N. Y. Times, Nov. 24, 1959, p. 25. See Burke, *An Instrument of Peace: The Conciliation Court in Los Angeles*, 42 A.B.A.J. 621 (1956).

1960.²⁹ The code, drafted with the help of clergy and sociologists as well as lawyers, provides a family court system and imposes a duty upon the courts "to cause an effort to be made" to reconcile the parties.³⁰ The results of the code in operation are undetermined.

The state of Ohio has made great progress in family law matters through use of a family court system. The statutes provide the courts with power to conduct investigations into the background of the parties and circumstances of a contemplated divorce.³¹ Such authority has been utilized to provide competent professional staffs to assist the courts in the sociological aspects of family problems.³²

The reality of irreconcilable differences between spouses has been recognized by the states of New Mexico and Oklahoma through inclusion of "incompatibility" as a statutory ground for divorce.³³ This serves to remove all concepts of fault or guilt from the matrimonial litigation. Such non-fault grounds are, however, but a futile gesture toward reform unless accompanied by measures providing assistance and advice for distressed couples whose differences are not irreconcilable.

IV. THE PATH OF REASON

The antiquated doctrines of the divorce system in Texas prevent the courts from realistically resolving the incidents of marital strife. Our present divorce procedures not only fail to provide effective answers to family problems but actually encourage conflict, which aggravates rather than settles disputes.

The foremost problem is the traditional litigious positions of the embattled spouses required by adversary practice. The divorce "trial" is a formalistic ritual wherein one spouse grievously accuses the other of misbehavior. Such proceedings are sadly inadequate and harmful.³⁴ What is needed is not the traditional trial or anything resembling it. Matrimonial strife necessitates sympathetic and patient efforts at reconciling the parties. Clearly, if these efforts are to have any chance

²⁹ Wis. Stat. Ann. §§ 245.001 - 248.08 (Supp. 1963). See Drechsler, *Family Code*, 33 Wis. B. Bull. 9 (1959); Gullman, *Wisconsin's Family Law Code*, 33 Wis. B. Bull. 35 (1959).

³⁰ Wis. Stat. Ann. § 247.081 (Supp. 1963).

³¹ Ohio Rev. Code § 3105.08 (1960).

³² See Raskin & Katz, "Therapeutic Approach" to Divorce Proceedings, 7 Clev.-Mar. L. Rev. 155 (1958). Judge Paul Alexander of the Domestic Relations Court of Toledo, Ohio, has been a pioneer in family court procedures. For a convincing plea for the wholesale reform of the substantive and procedural law of divorce, see Alexander, *The Family Court: An Obstacle Race*, 19 U. Pitt. L. Rev. 602 (1958), which is but one of Judge Alexander's many articles on the subject.

³³ N.M. Stat. Ann. § 22-7-1 (1953); Okla. Stat. Ann. tit. 12, § 1271 (1961).

³⁴ See Alexander, *Let's Get the Embattled Spouses Out of the Trenches*, 18 Law & Contemp. Prob. 98 (1953).

of success, they must be disassociated completely from courtroom drama.

A corollary to the adversary proceeding is the concept of fault whereby the "innocent" party attempts to prove his spouse "guilty" of wrongful deeds for which divorce is the proper punishment. Historically, divorce has been looked upon as a redress for an injury inflicted by one spouse upon the other. But the notion of matrimonial fault is a fallacy.³⁵ The commission of a particular kind of offense as the test for marriage dissolution is artificial and unsatisfactory. The fact that one of the parties has committed one of the designated faults does not necessarily mean that the marriage should be dissolved. Furthermore, the various complaints that husbands and wives have about each other are merely symptoms of disintegration of the union and indicia whether there is any hope for the marriage to continue.

Divorce should be available as a remedy only if it is evident that all life has gone out of the marriage. The test for divorce, writes Judge Morris Ploscowe, should be "whether the marriage is broken beyond repair, so that it is impossible to establish a tolerable relationship between the parties."³⁶ Our traditional divorce laws and procedures, based upon the premise of guilt and punishment, provide no such test.

In a humane, civilized divorce system there can be no underlying concept of matrimonial fault. The traditional grounds for divorce should be eliminated from our statutes. There should be no necessity for legal demonstration that the husband slapped his wife or that the wife's neglect and nagging justified her husband's actions. The court's inquiry should be whether an acceptable relationship can be maintained despite such misbehavior.

In summary, a rational divorce system should embody three fundamentals: (1) divorce without traditional courtroom procedure, (2) divorce without defendant's guilt, and (3) divorce despite plaintiff's guilt. Implementation of such a system in Texas law necessitates abolition of articles 4629³⁷ and 4630³⁸ and replacement thereof with legislation providing state machinery capable of coping adequately with problems of family disorganization.

One perceptive observer has written:

It is the duty of the state to provide machinery for exploring the causes [of divorce] and offering but not compelling remedies. It is in the interests of the state to maintain the home if possible, but also to dissolve the marriage with the least possible damage if the principals refuse

³⁵ See Bradway, *The Myth of the Innocent Spouse*, 11 Tul. L. Rev. 377 (1937).

³⁶ Ploscowe, *op. cit. supra* note 1, at 256.

³⁷ Tex. Rev. Civ. Stat. Ann. art. 4629 (1960).

³⁸ Tex. Rev. Civ. Stat. Ann. art. 4630 (1960).

to go on with it. It is within the power of the state to offer such services of persuasion and enlightenment that its duty will be carried out and its interest preserved.³⁹

Enormous benefits to the family life of this state could be achieved by enactment of statutes providing a positive approach in resolving marital conflict. The following suggestions are offered as guides for such a civilized system of divorce in Texas:

(1) Each community should have a unified family court which is staffed with skilled counselors—psychiatrists, marriage advisers, social workers—trained to cope with family problems.

(2) There should be no concept of guilt and innocence or matrimonial "fault" in the family court. There should be no grounds or defenses applicable to the divorce. The problems of the divorce, which are really social rather than legal, should be resolved through informal, nonadversary proceedings such as those utilized in our present juvenile courts.

(3) Either spouse should be permitted to file with the family court a declaration of intention to divorce. None of the so-called grounds for divorce or "faults" of the other spouse should be enumerated in the petition. It should be merely a neutral declaration that a marital dispute exists.

(4) A lengthy waiting period, perhaps as long as six months, should be required before a hearing is held. This will serve to insure that decisions of the parties are not made in the heat of passion or as merely emotional responses of anger or revenge.

(5) During the waiting period the specialized resources of the family court should be made available to the couple in an effort to save the marriage. The real basis for the marital conflict—and not some artificial reason or evidence fabricated to fit the law—should be explored. With the assistance of the court advisers, the husband and wife would be able to appraise their marriage and the probable results of divorce in a calm atmosphere.

(6) Upon expiration of the waiting period, and further discretionary periods as the court may deem necessary, if it is evident that the marriage is irretrievably destroyed so that conciliation attempts are futile, the court should enter a decree of dissolution.

(7) If the discordant couple has children, the welfare of the children should be the primary concern of the court. In such instances divorce should be decreed only if it is impossible to restore a har-

³⁹ Ernst & Loth, *For Better or Worse* 244-45 (1951).

monious home. A condition of the dissolution should be that the arrangements as to custody and support are in the best interests of the children. Moreover, custody should not be based upon the fault or guilt of either spouse.

In order to achieve objectives of healthy, stable families and rational means of resolving marital disputes, radical changes in our divorce laws and in the operation of our divorce courts are necessary. Unified family courts with adequate, trained staffs, elimination of the concept of fault, and adoption of nonadversary court procedures, waiting periods, efforts at reconciliation, marriage counseling—all of these will help prevent unnecessary divorces and reduce the human damage from those that must be granted. Traditionally, our divorce laws have been Olympian and censorious; we have a precious opportunity to provide new laws that are human and understanding. Such is the path of reason.