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FLORIDA'S NO-FAULT DIVORCE: IS IT REALLY NO-FAULT?

I. INTRODUCTION

In 1971 the Florida legislature passed the Dissolution of Marriage Act.¹ This act purported to eliminate fault from Florida's divorce system. The grounds for divorce under the old statute² were replaced by the "irretrievably broken" standard.³ Similarly, the previously recognized defenses of recrimination, condonation, collusion, and laches were abolished.⁴ Almost immediately the act was criticized for vagueness;⁵ most notably, it failed to define "irretrievably broken."⁶ One critic has suggested that it would result in "divorce by consent"⁷

1. FLA. STAT. §§ 61.001-20 (1975).

2. Fla. Laws 1969, ch. 69-142; Fla. Laws 1967, ch. 67-254 (§ 61.041).

3. FLA. STAT. § 61.052 (1975) provides:

(1) No judgment of dissolution of marriage shall be granted unless one of the following facts appears, which shall be pleaded generally:

(a) The marriage is irretrievably broken.

(b) Mental incompetence of one of the parties. . . .

(2) Based on the evidence at the hearing, which evidence need not be corroborated except to establish that the residence requirements of s. 61.021 are met, the court shall dispose of the petition for dissolution of marriage as follows, when the petition is based on the allegation that the marriage is irretrievably broken:

(a) If there are no minor children of the marriage and if the respondent does not, by answer to the petition for dissolution, deny that the marriage is irretrievably broken, the court shall enter a judgment of dissolution of the marriage if the court finds that the marriage is irretrievably broken.

(b) When there are minor children of the marriage, or when the respondent denies by answer to the petition for dissolution that the marriage is irretrievably broken, the court may:

1. Order either or both parties to consult with a marriage counselor, psychologist, psychiatrist, minister, priest, rabbi, or any other person deemed qualified by the court and acceptable to the party or parties ordered to seek consultation; or

2. Continue the proceedings for a reasonable length of time not to exceed 3 months, to enable the parties themselves to effect a reconciliation; or

3. Take such other action as may be in the best interest of the parties and the minor children of the marriage.

4. FLA. STAT. § 61.044 (1975).

5. Writing soon after the act's passage, Virginia Anne Church, a family law attorney, described the act as "stick figure" drawn with a "hurried drafting pen." Church, *Faults in Florida No-Fault Divorce*, 45 FLA. B. J. 568 (1971).

6. See *id.* at 569, 572. The author notes that the phrase "irretrievably broken" or similar words have been used in other state acts; consequently, there was an existing body of law interpreting such language at the time the Florida law was adopted. For example, the California Code defined "irreconcilable differences" as "substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved." CAL. CIV. CODE § 4507 (West 1970).

7. Murray, *Family Law*, 26 U. MIAMI L. REV. 566, 567, 572 (1972).

and endanger social stability. The new act gave no indication of what type or amount of evidence would be sufficient to show a broken marriage. Moreover, it specifically eliminated the need for corroboration of the spouses' testimony.⁸

In the 5 years since the act was passed, the judiciary has had time to deal with these ambiguities. The Supreme Court of Florida has held that the act is constitutional⁹ despite its lack of specificity. The circuit courts¹⁰ and, to a lesser degree, the appellate courts¹¹ have filled out the framework of the act.¹²

At this time, then, it seems appropriate to ask two questions. First, is no-fault divorce desirable? Second, if it is, has Florida's new law, as construed by the courts, actually eliminated fault as a consideration? There are three areas where fault has traditionally been a factor in the court's decision—granting a dissolution of marriage,¹³ awarding alimony,¹⁴ and granting child custody.¹⁵ Each area will be considered independently in assessing the success of the new act.

8. FLA. STAT. § 61.052(2) (1973). The act does require corroboration to establish that the petitioner has resided in the state for at least 6 months. *Id.*

9. *Ryan v. Ryan*, 277 So. 2d 266 (Fla. 1973). The constitutionality of the act was attacked on three grounds: (1) that it was too vague and indefinite to meet the requirements of due process of law; (2) that it impaired the obligation of the marriage contract, adversely affecting such property rights as the right to dower and potential alimony; and (3) that its retroactive application was unconstitutional. The court held that the statute was not vague and indefinite because it established guidelines which met the test of "reasonable certainty." *Id.* at 271. The *Ryan* court also found that marriage did not create the type of contract that was entitled to constitutional protection, *id.* at 269; that dower and potential alimony are inchoate rights and not property rights within the protection of the constitution, *id.* at 369-70; and that the regulation of marriage and divorce was a proper subject of the state's police power, *id.* at 273.

10. FLA. CONST. art. V, § 20. Under section 20(c)(3), the circuit courts are awarded jurisdiction of all cases in equity.

11. It has always been the rule in Florida that the trial court in a divorce action has a great deal of discretion. *E.g.*, *Shaw v. Shaw*, 334 So. 2d 13, 16 (Fla. 1976); *Dinkel v. Dinkel*, 322 So. 2d 22, 24 (Fla. 1975). *See also* *Oliver v. Oliver*, 285 So. 2d 638, 640 (Fla. 4th Dist. Ct. App. 1973); *Hobbs v. Hobbs*, 136 So. 2d 363, 365 (Fla. 2d Dist. Ct. App. 1962). In *Grant v. Corbitt*, 95 So. 2d 25 (Fla. 1957), the supreme court recognized the importance of intangible factors that do not appear in the record on appeal. Under the new law, the rule is still valid that "neither the [supreme court] nor the District Court can substitute its judgment for that of the trier of fact, absent a finding of an abuse of discretion, which requires a lack of competent substantial evidence to sustain the findings of the trial judge." 322 So. 2d at 24. Thus while the appellate courts have established guidelines for interpretation of the new law, the real power rests with the circuit courts.

12. *See* note 5 *supra*.

13. FLA. STAT. § 61.052 (1975).

14. FLA. STAT. § 61.08 (1975).

15. FLA. STAT. § 61.13 (1975).

II. PUBLIC POLICY—SHOULD FAULT BE A FACTOR?

Although the movement away from the fault system has been slow,¹⁶ the system's numerous shortcomings have been apparent for some time.¹⁷ The traditional adversary system, even in uncontested divorces, has not proved workable. In many cases both parties have the same interest—to end the marriage.¹⁸ In other cases, contesting the divorce may be one spouse's method of punishing the other spouse where the divorce is especially acrimonious. These contested divorces are more likely to be denied.¹⁹ The absurd result is that the most bitter and hopeless marriages will be perpetuated,²⁰ while those in which the spouses can maintain at least a front of civility will generally be ended.

One widely recognized problem is the encouragement of perjury by the parties²¹ caused by the limitation of the grounds for divorce to unilateral acts of fault. The spouses may fabricate an instance of adultery or physical abuse.²² While collusion between husband and wife is generally a defense to a divorce proceeding under a fault statute,²³ it is practically impossible to prove unless one of the parties

16. California adopted no-fault in 1970 and was one of the first states to do so. CAL. CIV. CODE § 4506 (West 1970). In California a divorce is granted on the basis of "irreconcilable differences, which have caused the irremediable breakdown of the marriage." *Id.* That state's lead has been followed in many other states, but provisions vary significantly. *See, e.g.,* ARIZ. REV. STAT. ANN. § 25-312 (Supp. 1973) (irretrievably broken); COLO. REV. STAT. ANN. § 46-1-6 (Supp. 1971) (irretrievably broken); IND. ANN. STAT. § 31-1-11.5-3 (Supp. 1975) (irretrievable breakdown); IOWA CODE ANN. § 598.2 (Supp. 1976); N.D. CENT. CODE § 14-05-03 (Repl. 1971) (irreconcilable differences). Some states have simply added a no-fault provision while retaining all the old fault grounds. *See, e.g.,* N.D. CENT. CODE § 14-05-03 (Repl. 1971); TEX. FAM. CODE ANN. § 3.01-.07 (1975) (Texas grants a divorce on the basis of "insupportability" of the marriage, cruelty, adultery, conviction of a felony, abandonment, living apart, and confinement in a mental hospital.) Other states have eliminated fault in the divorce proceedings but not in awarding alimony and child support. *See, e.g.,* MICH. COMP. LAWS ANN. § 552.16 (1967). Michigan did not change its child custody provisions when it adopted a no-fault standard for dissolution of marriage. Traditionally, the Michigan courts have held the mother's conduct to be relevant in awarding custody. *See, e.g.,* *Kelso v. Kelso*, 130 N.W.2d 418 (Mich. 1964); *Fish v. Fish*, 175 N.W.2d 343 (Mich. Ct. App. 1970).

17. Bradway, *The Myth of the Innocent Spouse*, 11 TUL. L. REV. 377 (1937).

18. M. WHEELER, NO-FAULT DIVORCE 6 (1974); 9 UNIFORM LAWS ANNOTATED, MATRIMONIAL, FAMILY, AND HEALTH LAWS 456 (1973).

19. WHEELER, *supra* note 18, at 8.

20. Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 38-39 (1966).

21. WHEELER, *supra* note 18, at 4-6, 8; 9 UNIFORM LAWS ANNOTATED, MATRIMONIAL, FAMILY, AND HEALTH LAWS 456 (1973).

22. WHEELER, *supra* note 18, at 5; Wadlington, *supra* note 20, at 33. Wadlington states that in New York, where divorce has traditionally been hard to get, parties have often staged instances of adultery to establish grounds for divorce. *Id.*

23. The defense was abolished in Florida by FLA. STAT. § 61.044 (1975).

vacillates about wanting the divorce.²⁴ As a practical matter, the judges and attorneys responsible for administering the system are parties to this deceit; they are generally aware of the prevalence of perjury, yet do little more than wink at its existence. This fact alone suggests that the fault system has failed. The willingness of officers of the court to countenance this hypocrisy cannot but breed disrespect for the law and the courts.²⁵

If the fault system served its stated purposes—preserving marriages, effecting amicable dissolution where reconciliation is impossible, and protecting the children of the marriage²⁶—its shortcomings might be overlooked. However, the necessity of placing blame on one spouse often leads to bitterness and rarely brings about a reconciliation.²⁷ It produces vindictive testimony and makes the truth harder to determine.²⁸ Perhaps worst of all, it obscures the best interests of the children and confuses those interests with the “morality” of the parents.²⁹

The existence of fault laws in some states and no-fault in others has encouraged the phenomenon of migratory divorces.³⁰ The result is discriminatory against low income families. While divorces are readily available to wealthy citizens who can afford to establish a domicile in a no-fault state, the poor must cope with the vicissitudes of the fault system or resort to the “poor man’s divorce”—desertion.³¹

The fault concept also fails to take account of our changing social mores and lifestyles. One of the most basic changes has been in the family unit itself.³² At one time its primary goal was the production of income and the necessities of life.³³ Today fewer people work at home; with more time available for recreation, a major role of the family has become the satisfaction of its members’ emotional needs.³⁴ This change has put stresses and pressures on the institution of marriage that did not exist a century ago, but divorce laws have

24. WHEELER, *supra* note 18, at 7.

25. *Id.* at 8.

26. See FLA. STAT. § 61.001 (1975), which sets out the purposes of the statute.

27. See WHEELER, *supra* note 18, at 8; Bradway, *supra* note 17, at 385.

28. 42 U. CIN. L. REV. 127, 134 (1973).

29. WHEELER, *supra* note 18, at 76.

30. *Id.* at 10; Wadlington, *supra* note 20, at 34.

31. WHEELER, *supra* note 18, at 10. Wheeler also notes that the complexities of fault laws make divorce more expensive, although possibly more lucrative for attorneys. Thus, even where migratory divorce is not a problem, the fault system tends to discriminate against the poor. See also Note, *The No Fault Concept: Is This the Final State in the Evolution of Divorce?*, 47 NOTRE DAME L. REV. 959, 964 (1972).

32. See Bradway, *supra* note 17, at 382.

33. Tenney, *Divorce Without Fault: The Next Step*, 46 NEB. L. REV. 24, 48-49 (1967).

34. *Id.*

only now begun to reflect this evolution. With the gradually changing status of women³⁵ and the new role of the family unit, the no-fault concept is more appropriate.³⁶

The most fundamental flaw in the fault system is that it is based on the myth that the breakup of a marriage can be attributed solely to the acts of one spouse.³⁷ With as many amorphous grounds for divorce as most fault statutes contain,³⁸ most spouses could be found "guilty" in some respects. Even though one of the partners has committed a specific act that is grounds for divorce, it may have been provoked by the less obvious behavior of the other spouse.³⁹ Thus the fault system deals with manifestations of a broken marriage but is inadequate to discern the causes.

The advantages of the no-fault concept are obvious. By eliminating the need for placing blame, it may relieve the hostility between the parties and increase the possibility for reconciliation. Yet it does not necessarily lead to social instability by making divorce too easy to obtain.⁴⁰ Many no-fault statutes, including Florida's law⁴¹ and the Uniform Marriage and Divorce Act,⁴² call for counseling to effect a

35. This change has been recognized implicitly by the Florida legislature in providing for rehabilitative alimony. See FLA. STAT. § 61.08 (1975), which grants the court the right to order payment of alimony to either party; see note 85 *infra*.

36. Bradway, *supra* note 17, at 384-85. The author notes that the community sanctions against divorce are no longer as strong as they once were. Divorce is now accepted as a reasonable solution to a moribund marriage. *Id.*

37. WHEELER, *supra* note 18, at 12; see generally Bradway, *supra* note 17.

38. Bradway, *supra* 17, at 383-84. An example of such a vague ground would be the ground of extreme cruelty under the old Florida statute. FLA. STAT. § 61.041(4) (1969). As the supreme court recognized in *Ryan v. Ryan*, 277 So. 2d 266, 270 (Fla. 1973), "[e]xtreme cruelty" . . . was held . . . to envision a great variety of faults and wrongdoings . . ."

39. 42 U. CIN. L. REV. 127, 133 (1973).

40. *Ryan v. Ryan*, 277 So. 2d 266, 271 (Fla. 1973). Even if the divorce is uncontested, the court is required to make an independent finding that the marriage is broken based on evidence "beyond a petitioner's bare assertion." *Id.* at 272. See FLA. STAT. § 61.052(2)(a) (1975), which provides:

If there are no minor children of the marriage and if the respondent does not, by answer to the petition for dissolution, deny that the marriage is irretrievably broken, the court shall enter a judgment of dissolution of the marriage if the court finds that the marriage is irretrievably broken. (emphasis added).

41. FLA. STAT. § 61.052(2)(b) (1975) provides in part:

When there are minor children of the marriage, or when the respondent denies by answer to the petition for dissolution that the marriage is irretrievably broken, the court may:

1. Order either or both parties to consult with a marriage counselor, psychologist, psychiatrist, minister, priest, rabbi, or any other person deemed qualified by the court and acceptable to the party or parties ordered to seek consultation

42. UNIFORM MARRIAGE AND DIVORCE ACT § 305(b) provides:

If one of the parties has denied under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including

reconciliation where it appears there is any hope of salvaging the marriage. Moreover, a marriage that is beyond repair may have a more severe emotional impact on the spouses and the children than would a divorce.⁴³ Thus it seems that the objectives of public policy are best served by the no-fault system of divorce.

III. FAULT AND DISSOLUTION OF THE MARRIAGE

Under the old statute, the primary area in which fault could be considered was the dissolution itself. The new statute deletes all reference to the old grounds of divorce,⁴⁴ substituting therefor the single criterion that the marriage be "irretrievably broken."⁴⁵ Although this determination initially is made by the trial court, the Supreme Court of Florida established guidelines in *Ryan v. Ryan*.⁴⁶ "The new statutory test for determining if a marriage is irretrievably broken is simply whether for whatever reason or cause (no matter whose 'fault') the marriage relationship is for all intents and purposes ended, no longer viable, a hollow sham beyond hope of reconciliation or repair."⁴⁷ The court rejected the contention that the new law provided for an automatic decree of dissolution in uncontested proceedings.⁴⁸ Instead, the court stated that "[a]ll of the surrounding facts and circumstances"⁴⁹ must be considered by the trial judge in exercising his discretion.⁵⁰

While requiring some evidence of the breakdown, the *Ryan* court did not state whether evidence of specific acts by one or both of the parties would be necessary. In *Riley v. Riley*,⁵¹ the First District Court

the circumstances that gave rise to filing the petition and the prospect of reconciliation, and shall:

- (1) make a finding whether the marriage is irretrievably broken; or
- (2) continue the matter for further hearing . . . and may suggest to the parties that they seek counseling.

43. See *WHEELER*, *supra* note 18, at 17.

44. See FLA. STAT. § 61.052(1) (1975). Under the old statute, a divorce was granted for impotence, adultery, extreme cruelty, a violent and ungovernable temper, intemperance or drug addiction, desertion for one year, a previous divorce in another state or country, a prior valid marriage, and under § 61.042, incurable insanity. FLA. STAT. § 61.041 (1969).

45. FLA. STAT. § 61.052(1)(a) (1975). Section 61.052(1)(b) grants a divorce if one of the spouses is mentally incompetent.

46. 277 So. 2d 266 (Fla. 1973).

47. *Id.* at 271.

48. *Id.* However, under FLA. STAT. § 61.052(2) (1975), the evidence can be uncorroborated.

49. 277 So. 2d at 271.

50. See FLA. STAT. § 61.052(2)(a) (1975).

51. 271 So. 2d 181 (Fla. 1st Dist. Ct. App. 1972). In *Riley*, the district court held that the trial court was incorrect in "flatly dismissing" the husband's divorce petition because his testimony was questioned. *Id.* at 184. The proper result in this type of situa-

of Appeal addressed this issue, but refused to specify under what circumstances a divorce should be granted.⁵² It found that "observable acts and occurrences . . . are not as important or controlling as the question of whether the marriage is in fact ended"⁵³ In making this determination, the standard to be used by the court is subjective rather than objective.⁵⁴ The Second District Court of Appeal took a similar position in *Nooe v. Nooe*.⁵⁵ In that case, no specific evidence of fault was introduced. Instead, there was evidence that the parties had lived separately for a number of years and that the husband had previously filed a divorce action.⁵⁶ Although the wife denied that the marriage was broken, each party admitted that marital difficulties existed. The court admitted evidence that the parties had continued sexual relations during their separation but held this alone did not indicate reconciliation was possible.⁵⁷ In *Riley* and *Nooe* the courts did not consider such specific instances of fault as adultery, sexual misconduct, or drunkenness; and under the new act there should be no need for consideration of such behavior. In fact, for the court to do so greatly increases the likelihood that such factors will influence its decision.

When Florida's new statute was passed, many observers believed the equitable defense of "clean hands" would still apply.⁵⁸ The essence of this defense is that a guilty party should not be allowed to take advantage of his own wrongdoing in a court of equity.⁵⁹ Under Florida law, the defense of recrimination was a part of the "clean hands"

tion would be the granting of a continuance to give the parties an opportunity to effect a reconciliation. See FLA. STAT. § 61.052(2)(b)(2) (1975).

52. 271 So. 2d at 183. See also *Oliver v. Oliver*, 285 So. 2d 638, 640 (Fla. 4th Dist. Ct. App. 1973).

53. 271 So. 2d at 183. In dissent, Judge Spector suggested that the legislature might have unwittingly established a standard more difficult to meet than that of the old statute. He argued that behavior which would clearly have been extreme cruelty under the fault system might not suffice to prove that a marriage was beyond repair. *Id.* at 185. In general, his fears have proven to be unfounded, but because of the broad discretionary powers granted to trial judges, his suggestion should not be totally disregarded. Even with the guidelines established by the *Ryan* court, there is disconcerting latitude for varying and possibly contradictory interpretations of "irretrievable breakdown."

54. 271 So. 2d at 183. See also FLORIDA FAMILY LAW § 21.10 (1972).

55. 277 So. 2d 835 (Fla. 2d Dist. Ct. App. 1973).

56. *Id.* at 837.

57. *Id.*

58. See, e.g., FLORIDA FAMILY LAW § 21.13 (1972).

59. See *Ryan v. Ryan*, 277 So. 2d 266, 276 (Fla. 1973) (Roberts, J., dissenting); *Stewart v. Stewart*, 29 So. 2d 247, 248 (Fla. 1947); *Spencer v. Spencer*, 193 So. 2d 40 (Fla. 4th Dist. Ct. App. 1966).

doctrine.⁶⁰ The Supreme Court of Florida held in *Ryan v. Ryan*⁶¹ that "the clean hands principle has been eliminated in marriage dissolution except for fraud and deceit which are always available . . ."⁶² It found that this result was required by the specific elimination of old defenses by the new act.⁶³ Notwithstanding a strong dissent in *Ryan* by Justice Roberts,⁶⁴ the "clean hands" doctrine no longer appears to be a viable defense to a divorce action.⁶⁵ To permit such a defense would clearly nullify the effectiveness of no-fault divorce—the doctrine would require a return to assessing relative fault and innocence, and proof of fault would necessitate introducing evidence of specific instances of wrongdoing.

Under the old statute, application of the related doctrines of recrimination and "clean hands" resulted in the denial of many divorces even though reconciliation was not a realistic expectation.⁶⁶ This is no longer true under the new statute. Where minor children are involved or where one spouse contests the dissolution, the trial court has several alternatives to decreeing dissolution or dismissing with prejudice. The court may order either or both of the parties to consult with a counselor;⁶⁷ it may continue the proceedings for a period not exceeding three months "to enable the parties themselves to effect a reconciliation";⁶⁸ or it may take any other action which it deems to be in the best interests of the parties and their children.⁶⁹

If the evidence shows the marriage is actually broken, however, the trial court must grant the divorce; failure to do so is an abuse of

60. *Stewart v. Stewart*, 29 So. 2d 247 (Fla. 1947).

61. 277 So. 2d 266 (Fla. 1973).

62. *Id.* at 272.

63. *Id.* See FLA. STAT. § 61.044 (1975).

64. 277 So. 2d at 276-78. Justice Roberts argued that the "clean hands" doctrine was so well established as a part of divorce law in Florida that the legislature could not have intended to abolish it simply by taking away the old defense of recrimination.

65. *See De La Portilla v. De La Portilla*, 287 So. 2d 345 (Fla. 3d Dist. Ct. App. 1973).

66. In *Carlson v. Carlson*, 144 So. 2d 340 (Fla. 2d Dist. Ct. App. 1962), the district court held that the trial court correctly applied the doctrine of recrimination to deny both the husband and wife a divorce where the evidence indicated that both parties were guilty of extreme cruelty. An application of the "clean hands" doctrine by the court in *Devlin v. Devlin*, 24 So. 2d 704 (Fla. 1946), led to the same result when an adulterous husband petitioned the court for a divorce. As the court noted in *Stewart v. Stewart*, 29 So. 2d 247, 248-49 (Fla. 1947), however, neither doctrine is absolute, and it is within the court's discretion to grant a divorce despite the wrongdoing of the petitioner. *See also* *Busch v. Busch*, 68 So. 2d 350 (Fla. 1953).

67. FLA. STAT. § 61.052(2)(b)(1) (1975).

68. FLA. STAT. § 61.052(2)(b)(2) (1975).

69. FLA. STAT. § 61.052(2)(b)(3) (1975).

discretion.⁷⁰ In *Nelms v. Nelms*,⁷¹ the district court reversed the lower court's order that the parties seek marriage counseling.⁷²

At final hearing the wife testified the marriage was irretrievably broken because she no longer loved her husband and could not live with him. Further inquiry developed that he had physically abused her during the marriage and that he paid little or no attention to their children; that they had spent untold hours discussing their problems, always without success; that she had suffered mental and physical abuse from him she would never forget; that he had sued her once before for divorce.⁷³

Based on this evidence, the district court held that a decree of divorce was the only solution.

In the area of dissolution of marriage, the new Florida law compares favorably with the Uniform Marriage and Divorce Act.⁷⁴ The Uniform Act, like the Florida statute, requires a finding that the marriage is "irretrievably broken"; unlike Florida, it provides specific guidelines to aid the trial court in making this determination.⁷⁵ The Florida law, however, has proved effective in eliminating the consideration of fault, at least in the area of dissolution. Appellate court decisions have now defined the irretrievably broken standard⁷⁶ and

70. *Carrigan v. Carrigan*, 283 So. 2d 574 (Fla. 4th Dist. Ct. App. 1973); *Riley v. Riley*, 271 So. 2d 181 (Fla. 1st Dist. Ct. App. 1972).

71. 285 So. 2d 50 (Fla. 4th Dist. Ct. App. 1973).

72. *Id.* See also *Carrigan v. Carrigan*, 283 So. 2d 574 (Fla. 4th Dist. Ct. App. 1973).

73. 285 So. 2d at 50.

74. UNIFORM MARRIAGE AND DIVORCE ACT § 302 (1973 amendment).

75. *Id.* Section 302 provides in part:

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

....

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

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

Id. Section 305 provides in relevant part:

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

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

(2) continue the matter for further hearing . . . and may suggest to the parties that they seek counseling.

76. *Ryan v. Ryan*, 277 So. 2d 266, 271 (Fla. 1973) (The new statutory test for determining whether a marriage is irretrievably broken is whether "the marriage relationship is for all intents and purposes ended, no longer viable, a hollow sham

have eliminated the need to show specific instances of fault before the marriage will be dissolved.⁷⁷

This has been accomplished without creating a system of "divorce by consent." The Supreme Court of Florida has held there must be some evidence to support a finding by the trial court that the marriage is beyond repair,⁷⁸ albeit uncorroborated.⁷⁹ If there are minor children or if the divorce is contested, the trial judge has been granted a great deal of discretion to attempt a reconciliation between the parties.⁸⁰

IV. FAULT IN AWARDING ALIMONY

While fault has been effectively eliminated as a factor in granting or denying a divorce in Florida, the same cannot be said about awarding alimony. There still appears to be some uncertainty about the relevance of fault to alimony awards. In states that consider fault, an alimony award resembles a damage award to the injured spouse.⁸¹ Punishment of the "guilty" spouse⁸² in this manner fails to recognize that both spouses generally share the blame,⁸³ and that a specific act of one spouse may have been precipitated by the equally reprehensible but less overt behavior of the other.⁸⁴

Alimony should be based on the spouses' respective needs and abilities to pay.⁸⁵ The state's interest in this regard should be in assuring that its citizens are supported and do not become wards of the state, not in punishing one of the parties. Apparently it was the legislature's intent to further this purpose in providing that the trial court could "consider any factor necessary to do equity and justice between the

beyond hope of reconciliation or repair."). See *Riley v. Riley*, 271 So. 2d 181, 183 (Fla. 1st Dist. Ct. App. 1972).

77. See, e.g., *Oliver v. Oliver*, 285 So. 2d 638 (Fla. 4th Dist. Ct. App. 1973); *Carrigan v. Carrigan*, 283 So. 2d 574 (Fla. 4th Dist. Ct. App. 1973); *Nooe v. Nooe*, 277 So. 2d 835 (Fla. 2d Dist. Ct. App. 1973); *Riley v. Riley*, 271 So. 2d 181, 183 (Fla. 1st Dist. Ct. App. 1972).

78. *Ryan v. Ryan*, 277 So. 2d 266, 271-72 (Fla. 1973).

79. See FLA. STAT. § 61.052(2) (1975).

80. FLA. STAT. § 61.052(2)(b) (1975).

81. See 42 U. CIN. L. REV. 127, 133 (1973).

82. WHEELER, *supra* note 18, at 56.

83. See *Bradway*, *supra* note 17; WHEELER, *supra* note 18, at 12.

84. 42 U. CIN. L. REV. 127, 133 (1973). See note 39 and accompanying text *supra*.

85. Florida's new law implicitly recognizes these factors as the basis for awarding alimony. Under FLA. STAT. § 61.08(1) (1975), alimony may be granted to either spouse, rather than just the wife, as was the case under the old law. Fla. Laws 1967, ch. 67-254 (§ 61.08). Just as significant is the change providing for rehabilitative alimony. This means that the spouse will receive alimony payments only to the extent that, and as long as, they are necessary. Under this concept, the trial judge must consider such factors as the health, educational background, and employment potential of the

parties.”⁸⁶ But while the legislature seems to have been referring to the financial equities,⁸⁷ the courts in awarding alimony have broadly interpreted this language to allow them to consider any misconduct of the spouses.⁸⁸ In *Oliver v. Oliver*,⁸⁹ the Fourth District Court of Appeal voiced this interpretation when it said: “The equities, circumstances and the whole marital picture furnish and form the fabric from which the award is to be cut, and if the court limits itself solely to the economics of the matter, it deprives itself of valuable factors that may aid in doing justice to the problem.”⁹⁰ The *Oliver* court, noting certain similarities between the old and new statutes, found that earlier case law was still applicable under the new law.⁹¹ This illustrates one of the dangers of failure to make the no-fault concept explicit in the area of alimony.⁹² Judges steeped in case law which developed under the fault system may find it difficult to change old attitudes and biases, especially without an express mandate from the legislature.

In contrast to the statute’s vague reference to “any factor necessary to do equity and justice,”⁹³ the act deals specifically with the treatment of adultery. Unlike the old statute, which stated that “no alimony shall be granted to an adulterous wife,”⁹⁴ the new statute provides only that it is within the court’s discretion to consider adultery by a spouse in awarding alimony to that spouse.⁹⁵

By allowing a court to consider adultery as a factor in alimony determinations, the statute undermines the theory of no-fault divorce.

spouse requesting alimony. See generally *Barrett v. Barrett*, 305 So. 2d 260, 261 (Fla. 3d Dist. Ct. App. 1974); *Brown v. Brown*, 300 So. 2d 719, 724-26 (Fla. 1st Dist. Ct. App. 1974), cert. denied, 307 So. 2d 186 (Fla. 1975); *Baker v. Baker*, 299 So. 2d 138, 141 (Fla. 3d Dist. Ct. App. 1974), cert. denied, 307 So. 2d 186 (Fla. 1975).

86. FLA. STAT. § 61.08(2) (1975).

87. O’Flarity, *Financial and Property Aspects of Dissolution of Marriage*, FLORIDA CONFERENCE ON MARRIAGE AND THE FAMILY UNIT 64 (1975) (limited publication).

88. See *Pro v. Pro*, 300 So. 2d 288 (Fla. 4th Dist. Ct. App. 1974); *Oliver v. Oliver*, 285 So. 2d 638 (Fla. 4th Dist. Ct. App. 1973).

89. 285 So. 2d 638 (Fla. 4th Dist. Ct. App. 1973).

90. *Id.* at 640. See also *Pro v. Pro*, 300 So. 2d 288 (Fla. 4th Dist. Ct. App. 1974).

91. 285 So. 2d at 640. FLA. STAT. § 61.08 (1969) provides in part: “[T]he court shall make such orders about . . . alimony . . . as from the circumstances of the parties and nature of the case is equitable”

92. See Church, *supra* note 5, at 572. In discussing a similar problem in the area of child custody, the author notes that “[s]hort of neurosurgery, it is doubtful that habitual thinking of circuit or appellate courts will change greatly.” But see *Brown v. Brown*, 300 So. 2d 719, 723-24 (Fla. 1st Dist. Ct. App. 1974), quoting *Kahn v. Kahn*, 78 So. 2d 367, 368 (Fla. 1955).

93. FLA. STAT. § 61.08(2) (1975).

94. FLA. STAT. § 61.08 (1969). See also FLORIDA FAMILY LAW § 22.38 (1972).

95. FLA. STAT. § 61.08(1) (1975).

Adulterous conduct is not relevant to either the ability of one spouse to pay or the needs of the other spouse for support. Florida courts have reached different results as to the admission of evidence of adultery, seemingly dependent on whether the evidence is offered to reduce the award to the "guilty" spouse⁹⁶ or increase the award to the "innocent" spouse.⁹⁷

The Third District Court of Appeal in *Stafford v. Stafford*⁹⁸ held that it was an abuse of discretion by the trial court to refuse to allow a party to introduce evidence of adultery in mitigation of alimony.⁹⁹ When the evidence has been presented, the court may refuse to consider it in making the award,¹⁰⁰ but it cannot entirely exclude such evidence.¹⁰¹ Thus, while the *Stafford* court did not require that the wife's claim for alimony be defeated, or even limited by her adultery, it did require that the evidence be heard despite the fact that her conduct had no bearing on either her needs or her husband's ability to pay. In effect, then, the trial judge has the authority to punish a wife if he is offended by her conduct.

Apparently the third district would not apply this rule where the petitioner was seeking to increase his or her award of alimony by presenting evidence of the other partner's adultery. Thus, in *Escobar v. Escobar*,¹⁰² the district court affirmed the lower court's holding that evidence of the husband's adultery was not relevant in awarding alimony to the wife. Instead, the court stated that alimony should be based on the needs and financial situations of the parties.¹⁰³

While the language of the statute¹⁰⁴ supports both the *Stafford* and *Escobar* decisions, the results of the two cases remain inconsistent. Under a true no-fault system, the result in *Escobar* would be desirable. All evidence that is irrelevant to need and ability to pay should be

96. See *Stafford v. Stafford*, 294 So. 2d 25 (Fla. 3d Dist. Ct. App.), cert. denied, 303 So. 2d 24 (Fla. 1974).

97. See *Escobar v. Escobar*, 300 So. 2d 702, 703 (Fla. 3d Dist. Ct. App. 1974).

98. 294 So. 2d 25 (Fla. 3d Dist. Ct. App.), cert. denied, 303 So. 2d 24 (Fla. 1974).

99. *Id.* at 27.

100. *Id.* See also *Vandervoort v. Vandervoort*, 265 So. 2d 77 (Fla. 3d Dist. Ct. App. 1972), cert. denied, 273 So. 2d 761 (Fla. 1973).

101. This rule has also been adopted by the fourth district. See note 88 *supra*.

102. 300 So. 2d 702, 703 (Fla. 3d Dist. Ct. App. 1974).

103. *Id.*

104. FLA. STAT. § 61.08(1) (1975) provides:

In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. . . . The court may consider the adultery of a spouse and the circumstances thereof in determining whether alimony shall be awarded to such spouse and the amount of alimony, if any, to be awarded to such spouse.

excluded. A contrary result increases the danger that fault will be a determining factor in awarding alimony.

The new no-fault law does not eliminate fault as a consideration in awarding alimony and apparently was not intended by the legislature to do so. It specifically allows the consideration of a spouse's adultery in determining whether alimony should be awarded to that spouse¹⁰⁵ and has been construed by the courts to allow consideration of other types of misconduct.¹⁰⁶ As the court in *Oliver* recognized, "it would be desirable to make the whole marriage dissolution procedure pleasurable and non-abrasive."¹⁰⁷ Retention of the element of fault under the present law does not foster this goal. One consequence of admitting evidence of misconduct on the part of one of the spouses in an alimony determination is the nullification of most of the salutary results achieved in the area of dissolution. The proceedings become acrimonious; any chance of reconciliation, or at least reasonable agreement between the parties, is diminished; the incentive for perjury is increased; and the divorce proceeding again becomes a forum for assessing fault and meting out punishment.

V. FAULT IN GRANTING CHILD CUSTODY

Child custody is the third area in which fault may be a consideration. Ideally, the "best interests of the child" should be the primary—perhaps the only—factor taken into account by the court.¹⁰⁸ The moral behavior of the parent may or may not affect these interests. If there is an effect, however, it should be evident from the behavior of the child at school and at home, his emotional adjustment, and other such manifestations. Only rarely should the presentation of evidence of specific instances of parental "immorality" be necessary.

This may be especially applicable when dealing with the sexual behavior of the parents. A determination of the best interests of the child is an area where unpredictability is the general rule. Trial judges have broad discretionary powers¹⁰⁹ and cannot help but be in-

105. *Id.*

106. *See, e.g.,* *Stafford v. Stafford*, 294 So. 2d 25 (Fla. 3d Dist. Ct. App. 1974); *Ruhnau v. Ruhnau*, 299 So. 2d 61 (Fla. 1st Dist. Ct. App. 1974); *Pro v. Pro*, 300 So. 2d 288 (Fla. 4th Dist. Ct. App. 1974).

107. 285 So. 2d at 640.

108. *E.g.,* *Dinkel v. Dinkel*, 322 So. 2d 22 (Fla. 1975); *Blue v. Blue*, 66 So. 2d 228 (Fla. 1953); *Ebaugh v. Ebaugh*, 282 So. 2d 14 (Fla. 4th Dist. Ct. App. 1973); *Brust v. Brust*, 266 So. 2d 400 (Fla. 1st Dist. Ct. App. 1972); *Green v. Green*, 254 So. 2d 860 (Fla. 1st Dist. Ct. App. 1971).

109. *E.g.,* *Dinkel v. Dinkel*, 322 So. 2d 22 (Fla. 1975); *Grant v. Corbitt*, 95 So. 2d 25 (Fla. 1957); *Ebaugh v. Ebaugh*, 282 So. 2d 14 (Fla. 4th Dist. Ct. App. 1973); *Tagliarini v. Tagliarini*, 213 So. 2d 10 (Fla. 2d Dist. Ct. App. 1968).

fluenced by their personal beliefs. Changing concepts of morality have had varying effects on trial judges; but, as the dissenting judge in *Ebaugh v. Ebaugh*¹¹⁰ recognized, what constitutes immoral sexual conduct is largely a matter of "private conviction."¹¹¹

As passed in 1971, section 61.13, Florida Statutes, contained no explicit provisions authorizing or restricting the consideration of parental misconduct. It stated that the court should make such order "as from the circumstances of the parties and the nature of the case is equitable."¹¹² During the 1975 legislative session, section 61.13 was amended;¹¹³ it now specifies a number of factors the trial court must consider in evaluating the best interests of the child, including the moral fitness of the parents.¹¹⁴ It is not immediately clear what effect this revision will have on developing case law.

Under the 1971 law, case law developed the rule that evidence of the adultery of one parent, while relevant in a child custody proceeding, was not alone sufficient to deprive the parent of custody.¹¹⁵

110. 282 So. 2d 14 (Fla. 4th Dist. Ct. App. 1973).

111. *Id.* at 16 (Walden, J., dissenting).

112. FLA. STAT. § 61.13 (1975).

113. Fla. Laws 1975, ch. 75-99.

114. FLA. STAT. § 61.13(3) (1975) provides:

For purposes of custody, the best interests of the child shall be determined by the court's consideration and evaluation of all factors affecting the best welfare and interests of the child, including, but not limited to:

(a) The love, affection, and other emotional ties existing between the parents and child.

(b) The capacity and disposition of the parents to give the child love, affection, and guidance and to continue the educating of the child.

(c) The capacity and disposition of the parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home.

(f) The moral fitness of the parents.

(g) The mental and physical health of the parents.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.

(j) Any other factor considered by the court to be relevant to a particular child custody dispute.

115. *Smothers v. Smothers*, 281 So. 2d 359 (Fla. 1973). In *Smothers*, while the court noted that adultery alone was not a sufficient reason to modify a child custody order, it found that the man practically lived with the mother, that a sexual relationship was carried on under the same roof where the children lived, that the man physically disciplined the children, and that he got into arguments when the father visited. On

This rule, however, still leaves the trial judge tremendous latitude to interject his own biases. One of the most blatant examples of abuse of this discretion can be found in *Ebaugh v. Ebaugh*.¹¹⁶ There the husband petitioned the trial court for modification of a decree awarding custody of their child to his wife. The circuit court held in favor of the father, and the district court affirmed in a brief opinion that made no mention of the facts.¹¹⁷ From the dissenting opinion, however, it appears that the basis for the trial judge's decision to award the father custody was the wife's sexual conduct. The wife had had sexual relations with two men after her divorce. There was no showing that her behavior had adversely affected the child; in fact, the evidence indicated the child's behavior and outlook had improved. On these facts alone, it would appear that the father failed to meet his burden of proof in showing changed circumstances that would justify modification.¹¹⁸ Moreover, the trial court failed to consider evidence that the husband had engaged in the same type of sexual behavior as the wife. Apparently the judge felt such conduct was more reprehensible in the wife than in the husband. As recognized by the dissent in *Ebaugh*, depriving a parent of custody can be a judge's way of punishing nonconforming behavior.¹¹⁹

Far too often, the court's inquiry stops at the parents' activities and does not reach the effects, if any, on the child. In *Goodman v. Goodman*,¹²⁰ for example, the appellate court noted evidence that the mother's home was untidy, that she used profanity with the children and the babysitters, that she was carrying on a sexual relationship in her home, and that a small quantity of marijuana was found in her home; but it never questioned the effect of this on the children.

Dinkel v. Dinkel,¹²¹ handed down by the Supreme Court of Florida after section 61.13 was amended, specifically deals with the issue of a parent's moral fitness and its relevance to child custody. The trial

the basis of all these factors, the court modified the custody order. See also *Farrow v. Farrow*, 263 So. 2d 588 (Fla. 2d Dist. Ct. App. 1972). This was also true under the old statute. *Anderson v. Anderson*, 205 So. 2d 341 (Fla. 2d Dist. Ct. App. 1967); *McAnespie v. McAnespie*, 200 So. 2d 606 (Fla. 2d Dist. Ct. App. 1967).

116. 282 So. 2d 14 (Fla. 4th Dist. Ct. App. 1973).

117. The traditional reluctance on the part of Florida's appellate courts to reverse the trial courts, see note 11 *supra*, which is evident in the majority's holding in *Ebaugh*, serves to compound the possible abuse of discretion by the trial court.

118. See *Teta v. Teta*, 297 So. 2d 642 (Fla. 1st Dist. Ct. App. 1974). That court found that a trial court does not have "the same degree of discretion as it does in entering the original decree . . ." The burden of proof is on the party seeking to modify the decree.

119. 282 So. 2d at 16 (Walden, J., dissenting).

120. 291 So. 2d 106 (Fla. 3d Dist. Ct. App. 1974).

121. 322 So. 2d 22 (Fla. 1975).

court had awarded custody of the 3-year-old child to his mother, but the decision was reversed by the First District Court of Appeal¹²² on the grounds that the mother was morally unfit. The evidence showed that the wife had been having an affair with a co-worker while her husband was overseas in the armed forces.¹²³ The supreme court quashed the decision of the district court, holding that the trial judge had not abused his discretion.¹²⁴ The supreme court stated:

Adultery may or may not have a direct bearing on the welfare of a child of tender years. . . . Where the trier of fact determines that the spouse's adultery does not have any bearing on the welfare of the child, the act of adultery should not be taken into consideration in reaching the question of custody of the child.¹²⁵

While the *Dinkel* decision expresses some approval of limiting the consideration of adultery in child custody determinations, it does not go far enough. In essence, it does nothing more than restate the rule that existed in Florida prior to the 1975 amendment. The opinion in no way lessens the discretionary powers of the trial court; it may actually have the opposite effect. Although recognizing that adultery may well have no bearing on a child's welfare, the court did nothing to shift the emphasis from the parents' behavior to the child's best interests. Today Florida courts do little more than pay lip service to the "best interests of the child." In its treatment of child custody, the Florida law falls short of the Uniform Act's provision which specifically requires that the court "shall not consider conduct of a proposed custodian that does not affect his relationship to the child."¹²⁶ In addition, the Uniform Act lists a number of factors that should be influential in determining the "best interest of the child," including the wishes of both child and parents, the child's social adjustment, and the health of all those involved.¹²⁷ Even under the Uniform Act

122. *Dinkel v. Dinkel*, 305 So. 2d 90 (Fla. 1st Dist. Ct. App. 1974).

123. 322 So. 2d 22, 23 (Fla. 1975).

124. *Id.* at 24.

125. *Id.* at 23-24.

126. UNIFORM MARRIAGE AND DIVORCE ACT § 402. Compare FLA. STAT. § 61.13(3) (1975). See note 114 *supra* for text.

127. UNIFORM MARRIAGE AND DIVORCE ACT § 402 provides:

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

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;

there is room for the judge to exercise discretion. The judge's first concern, however, should be the relationship between parent and child; if that is found to be satisfactory, there is no justification for an inquiry into the parent's conduct.

VI. SUMMARY AND RECOMMENDATIONS

The new Florida no-fault divorce law does not live up to its name. While it has been effective in the limited area of dissolution, this success must be set off against its failure in the areas of alimony and child custody. The problems that arise under a fault system cannot be cured by partially abolishing the fault element. The abolition must be total.

A number of statutory amendments are necessary to achieve this goal. First, and most important, the fault concept must be explicitly and absolutely removed from every part of the existing statute. It is not sufficient to leave this determination to courts which have not been weaned from the old system. Specifically, all mention of adultery should be deleted from section 61.08, concerning alimony. Similarly, section 61.13(3), dealing with child custody, should be further amended to remove any reference to the moral fitness of the parents.

The trial judge's discretionary powers should be limited by establishing clear guidelines for the types of evidence admissible at trial¹²⁸ and rules excluding evidence of marital misconduct.¹²⁹ This

(4) the child's adjustment to his home, school, and community; and

(5) the mental and physical health of all individuals involved.

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

The Florida statute also states certain factors that the trial judge should consider. FLA. STAT. § 61.13(3) (1975). See note 114 *supra* for text.

128. See O'Flarity, *supra* note 87, at 75. O'Flarity lists the following factors recommended by the Family Law Section of the Florida Bar for consideration by the trial court:

(1) Duration of the marriage;

(2) Contribution of each party to the acquisition of property;

(3) Contribution of each party to the marriage including but not limited to services rendered in homemaking, child rearing, education, career and job building of the other spouse;

(4) The loss of dower, curtesy, statutory share, or inheritance rights, in the property of the other party, and the loss of protection from insurance coverage and the loss of pension rights, social security benefits and similar advantages;

(5) Whether the parties have filed joint income tax returns or other tax advantages have accrued from the marriage;

(6) Whether the property was acquired after a decree of legal separation or while the parties were living separate and apart due to marital difficulties;

(7) Financial contributions made to the property acquired during the marriage;

(8) Financial contributions made to the marriage by the parties.

129. *Id.* at 76. See Note, *supra* note 31, at 971.

requires a delicate balancing of competing interests; while a judge must be restricted in imposing his personal judgments and prejudices on the system, many of the decisions made in a divorce proceeding require a subjective assessment of intangible factors that may not be obvious in the record on appeal. With this in mind, it would be in the best interest of all parties to make evidence of specific acts of misconduct inadmissible. Any relevance which such evidence might have to awarding alimony or granting child custody is outweighed by the prejudicial effect it could have on the judge's determination.

Closely related to this issue is the need to clearly establish the factors that should be considered by the court.¹³⁰ The legislature has already taken this step with regard to child custody,¹³¹ and the guidelines set out in the relevant legislation are similar to the criteria of the Uniform Act.¹³² In the area of alimony, a revision of section 61.08(2), Florida Statutes, is necessary. The ambiguity of this section has provided the means for the judiciary to invoke the old standards of the fault system. A desirable amendment might state that the criteria for awarding alimony are the needs and resources of the parties, which would eliminate the element of punishment. Specifically, the court should be directed to consider the relative financial status of each party; their respective potential earning powers based on numerous factors such as educational background, age, health, and past experience; and their financial needs.

In child custody proceedings, an independent attorney should be appointed to protect the best interests of the child.¹³³ To some extent, this would avoid the problems raised when hostile and vindictive parents use a custody fight to accuse each other of misconduct. In this same vein, an impartial determination of the child's interests might be aided by requiring the judge to make use of investigative reports from the Department of Health and Rehabilitative Services.¹³⁴

130. See O'Flarity, *supra* note 87.

131. FLA. STAT. § 61.13(3) (1975). See note 114 *supra* for text.

132. Compare FLA. STAT. § 61.13 (1975) with UNIFORM MARRIAGE AND DIVORCE ACT § 402. See notes 114 and 126, respectively, for text.

133. Note, *supra* note 31, at 975; Church, *supra* note 5, at 573.

134. See FLA. STAT. § 61.20 (1975). Under this section, the judge has the option to request such a report but is not required to do so. See Church, *supra* note 5, at 573. The constitutionality of FLA. STAT. § 61.20 (1975) was upheld by the Supreme Court of Florida in *Kern v. Kern*, 33 So. 2d 17 (Fla. 1976). In *Kern*, a mother who had been denied custody of her children challenged the constitutionality of the statute on the grounds that it violated due process and infringed on her right to confront witnesses. Recognizing the importance of professional assistance to judges and the value of an independent source of information, the court held that the use of outside reports is not unconstitutional where a copy is furnished to the attorneys for each party. See *id.* at 20-21.

This would necessitate the establishment of some guidelines for the division's investigators to assure that the fault element does not reappear in their reports to the judge. The obvious difficulty with the latter suggestions—appointment of an attorney for the child and expanded reliance on outside reports—is the financial burden their implementation would place on either the state or the parents.

The statutory remedies are necessary as a first step, but in the long run a large scale reorganization of the entire family law field is desirable. It is not within the scope of this note to deal with this possibility in any depth, but a few suggestions are offered. The establishment of a "family court" system which would handle all aspects of family law should be contemplated.¹³⁵ Ideally, it should be coordinated with a counseling service which would be available to parties seeking counseling under section 61.052(2)(b)(1) and other statutes. Special training in the areas of psychology and sociology should be required for judges sitting on this court. Hopefully, such a system would reduce the vagaries and inconsistencies in present divorce decisions. The legislature can and should take a concrete first step by undertaking a thorough revision of the existing divorce law with the goal of achieving a true no-fault system in Florida.

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135. See generally Fall, *Implementation of a Family Court in Dade County*, FLORIDA CONFERENCE ON MARRIAGE AND THE FAMILY UNIT 105 (1975) (limited publication).