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PROPOSED REFORMS IN NORTH CAROLINA DIVORCE LAW

PATRICIA H. MARSCHALL*

For many years the divorce laws in all jurisdictions were riddled with the fault concept. The need to show fault on the part of one's spouse obviously intensified the bitterness of the parties. It also increased the likelihood of perjury.¹ During the last ten years a revolution has occurred in divorce law, with some twenty states either making breakdown of the marriage the sole ground for divorce, or adding a breakdown ground to existing fault grounds.² There has also been a movement toward the elimination of the traditional divorce defenses such as recrimination,³ and a trend toward deemphasizing fault in awarding alimony and making property divisions.⁴

The earliest trend toward non-fault divorce was the adoption of separation statutes. Kentucky made separation a ground for divorce in 1850, and at least twenty-eight jurisdictions have followed suit.⁵

North Carolina adopted its first separation statute, N.C. GEN. STAT. § 50-5(4) in 1907, providing for divorce on the ground of a ten-year separation if there were no children.⁶ Despite its subsequent amendments, this statute has never been a true non-fault statute because of the restrictive judicial interpretation requiring that the plaintiff allege and prove that he is the injured party.⁷

In 1931 the General Assembly enacted the second separation statute, N. C. GEN. STAT. § 50-6,⁸ under which the plaintiff could obtain a divorce without showing that he was the injured party.⁹ This was a significant step toward eliminating fault from North Carolina divorce law. However, outmoded fault concepts are still sufficiently pervasive to cause problems.

North Carolina also has retained traditional notions in the areas of property and child custody. These notions, together with a continued emphasis on fault, have created four basic problem areas: (1) the perpetuation of non-viable marriages, (2) spousal support based on fault rather than on the needs

* Professor of Law, North Carolina Central University, School of Law.

1. Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 32-35 (1966).

2. Foster and Freed, *Divorce Reform: Brakes on Breakdown?* 13 J. FAM. L. 443, 444-45 (1973-74) [hereinafter cited as Foster and Freed].

3. *Id.* at 445. The recrimination doctrine requires the court to deny a divorce where both parties have grounds for divorce.

4. *Id.* at 477-482.

5. M. PLOSCOWE, H. FOSTER & D. FREED, *FAMILY LAW, CASES AND MATERIALS* 349 (1972) [hereinafter cited as PLOSCOWE, FOSTER, AND FREED].

6. 1 R. LEE, *NORTH CAROLINA FAMILY LAW* 293 (1963) [hereinafter cited as LEE].

7. *Id.* at 272.

8. *Id.* at 295.

9. *Id.* at 272; *Johnson v. Johnson*, 237 N. C. 383, 75 S.E. 2d 109 (1953); *Reeves v. Reeves*, 203 N.C. 792, 167 S.E. 129 (1932).

and capabilities of the parties, (3) the absence of power in the divorce court equitably to divide property, and (4) the absence of specific guidelines to the trial court in custody decisions. These problem areas and suggested reforms will be developed in this article.

I. THE PERPETUATION OF NON-VIABLE MARRIAGES

A. *Analysis of the Problem*

North Carolina courts have compelled couples whose marriages are no longer viable to remain subject to the matrimonial bonds.

Imagine a wife who feels that she and her husband are seriously incompatible. She leaves him; during the next three years, the spouses have almost no communication, and there is no hope of reconciliation. During the past year, the wife has been involved openly with another man. She sues for divorce on the ground of a one-year separation under N.C. GEN. STAT. § 50-6. The husband, in a vindictive mood, pleads and proves abandonment and adultery. Result in North Carolina: divorce denied and an empty marriage preserved.

Of the states with separation statutes which do not require a voluntary separation on the part of both parties, Professor Clark cites only North Carolina as one which denies a divorce to the plaintiff who is proved to be at fault in the separation.¹⁰ The propriety of using recrimination to defeat an action for divorce brought under the one-year separation statute was reaffirmed as recently as 1974 in *Harrington v. Harrington*.¹¹ In that case, the North Carolina Supreme Court held that the affirmative defenses of abandonment or adultery are available to the defendant to defeat an action under N.C. GEN. STAT. § 50-6. However, the court pointed out that a divorce a mensa et thoro, alimony without divorce under former N.C. GEN. STAT. § 50-16, or the existence of a valid separation agreement, will legalize the separation, with the result that after the passage of one year, either party will have a right to divorce.¹² Unfortunately, the first two remedies are not available to our hypothetical "guilty" wife, and a vindictive husband is not likely to sign a separation agreement.

Why has the North Carolina Supreme Court clung to an outmoded fault defense against the one-year separation statute, which is clearly a non-fault ground for divorce? The *Harrington* opinion gives us little insight. The court relies principally on the following quotation from *Byers v. Byers*:¹³

It is true, the statute under review provides that either party may sue for a divorce or for a dissolution of the bonds of matrimony, 'if and when the husband and wife have lived separate and apart for two years,' etc. (now one year). However, it is not to be supposed the

10. H. CLARK, JR., *LAW OF DOMESTIC RELATIONS* 353 (1968) [hereinafter cited as CLARK].

11. 286 N.C. 260, 210 S.E.2d 190 (1974).

12. *Id.* at 264, 210 S.E.2d at 192.

13. 223 N. C. 85, 25 S.E.2d 466 (1943).

General Assembly intends to authorize one spouse willfully or wrongfully to abandon the other for a period of two years and then reward the faithless spouse a divorce for the wrong committed, in the face of a plea in bar based on such wrong. . . . Out of unilateral wrongs arise rights in favor of the wronged, but not in favor of the wrongdoer. One who plants a domestic thornbush or thistle need not expect to gather grapes or figs from it.¹⁴

This language, which is more colorful than helpful, apparently grounds the recrimination doctrine in something akin to the clean hands doctrine. A careful study of the clean hands doctrine, however, reveals that it has never been applied automatically, but only in the discretion of the court. This principle is well stated in the Arizona Supreme Court case of *Matlow v. Matlow*:¹⁵

To hold that *any* recrimination would bar a divorce would be a degradation of marriage and a frustration of its purposes, for then the courts would be using recrimination as a device for punishment. If the marriage has failed and family life has ceased, the purposes of marriage are no longer served. . . . The doctrine of recrimination, like the doctrine of unclean hands of which it is a part, is not a mechanical doctrine but an equitable principle to be applied to the facts of each case and with a consideration for the interests of the public.¹⁶

Although not articulated in the North Carolina cases, the probable underlying reason for applying the recrimination doctrine to defeat suits under the one-year statute probably originated in the court's desire to afford financial protection to the wife abandoned by her husband. Prior to 1967, there could be no award of permanent alimony upon divorce in North Carolina;¹⁷ therefore the husband's duty to support his wife could be preserved only by denying divorce. A vast majority of the cases applying the recrimination doctrine have involved suits under N.C. GEN. STAT. § 50-6 by an abandoning husband.¹⁸ Before the possibility of permanent alimony existed, there was indeed a strong equitable argument for denying a divorce to the abandoning husband, who was usually the supporting spouse. But that argument is now outmoded. In fact, if the wife is the "guilty" spouse, she can suffer serious economic hardship under the current law. If the husband can prove abandonment without justification and/or adultery on the part of the wife, he owes her

14. *Harrington v. Harrington*, 286 N. C. 260, 263, 210 S.E.2d 190, 192 (1974).

15. 89 Ariz. 293, 361 P.2d 648 (1961).

16. *Id.* at 297-98, 361 P.2d at 650.

17. 2 LEE, *supra* note 6, at 162; 2 LEE 48-64 (Supp. 1976).

18. *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E.2d 562 (1968); *Taylor v. Taylor*, 257 N.C. 130, 125 S.E.2d 373 (1962); *Pruett v. Pruett*, 247 N.C. 13, 100 S.E.2d 296 (1957); *Johnson v. Johnson*, 237 N.C. 383, 75 S.E.2d 109 (1953); *Pearce v. Pearce*, 226 N.C. 307, 37 S.E.2d 904 (1946); *Taylor v. Taylor*, 225 N.C. 80, 33 S.E.2d 492 (1945); *Pharr v. Pharr*, 223 N.C. 115, 25 S.E.2d 471 (1943); *Byers v. Byers*, 223 N.C. 85, 25 S.E.2d 466 (1943); *Briggs v. Briggs*, 215 N.C. 78, 1 S.E.2d 118 (1939); *Brown v. Brown*, 213 N.C. 347, 196 S.E. 333 (1938).

no duty of support even through the marriage continues.¹⁹ But the wife is not free to remarry, since she cannot get a divorce. If she is unlucky enough to be without a good education or previous job experience, her chances of earning a decent livelihood are slim.

After a careful study of the history and evolution of the recrimination doctrine, Professor Moore concludes:

The liberalization of American divorce laws over the past few decades is evidently ascribable to a gradual realization that the denial of a divorce seldom restores life to families that are sociologically dead when they enter the court.²⁰

This theme is echoed by Professor Lee who states:

From a purely social viewpoint it is hard to defend the rule that recrimination is an absolute bar to the granting of a divorce for it requires that parties who are guilty of misconduct which makes their marriage impossible of success shall continue their impossible relationship as a sort of punishment for their mutual guilt. No court in the land can make a couple return to their home and live together happily unless they really want to do so.²¹

Another serious objection to the recrimination doctrine is that it indefinitely prevents divorce for only one class of people: the poor. A North Carolina plaintiff of substantial means who is denied a divorce because of recrimination need only migrate to a more liberal state. Assuming he or she remains in the new jurisdiction for a reasonable period of time and accumulates the necessary indicia of domicile, an ex parte divorce can be obtained that has a good chance of withstanding any attack that may be made by the disgruntled ex-spouse.

The only serious argument which can be raised against the recent trend toward liberalized divorce laws is that "easy divorce" has a detrimental effect on family stability. However, this does not appear to be true. The University of Chicago's Comparative Law Research Center designed a study to determine whether the ease with which divorces may be obtained affects the stability of marriages.²² Germany was selected as the appropriate location for the study because significant changes had occurred in German divorce laws during a period in which ample statistics had been kept. The researchers concluded that the strictness or laxity of the divorce laws had an insignificant effect on the divorce rate. The vast changes that did occur in family stability were instead regarded as being tied to such causes as the emergence of modern mass society and war.

Given the fact that legal preservation of a non-viable marriage serves no socially useful purpose, what can be done in North Carolina to prevent this

19. 2 LEE, *supra* note 6, at 136-37.

20. Moore, *Recrimination*, 20 S.C.L. Rev. 685, 717 (1968) [hereinafter cited as Moore].

21. 1 LEE, *supra* note 6, at 337.

22. M. RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE AND THE LAW* 292-301 (1972).

result? We will look first at remedies which could be effectuated either by the legislature or the courts and second at possible legislative reform.

B. *Suggested Reforms*

1. *By the courts or the legislature*

Since recrimination is not imposed by statute in North Carolina, the following reforms could be undertaken by either judicial decision or legislation.

a. *Making recrimination applicable in the court's discretion*

In the leading case of *DeBurgh v. DeBurgh*,²³ the California Supreme Court established judicial discretion in applying recrimination. Justice Traynor's opinion sets forth the major considerations which should govern a court's decision when faced with a situation involving recriminatory conduct by the plaintiff:

(1.) *The prospect of reconciliation.* The court should determine whether the legitimate objects of matrimony have been destroyed or whether there is a reasonable likelihood that the marriage can be saved. It should consider the ages and temperaments of the parties, the length of their marriage, the seriousness and frequency of their marital misconduct proved at the trial and the likelihood of its recurrence, the duration and apparent finality of the separation, and the sincerity of their efforts to overcome differences and live together harmoniously.

(2.) *The effect of the marital conflict upon the parties.* If a continuation of the marriage would constitute a serious hazard to the health of either party, as in the case of physical brutality, the court should be reluctant to deny divorce. Although financial considerations can play only a minor role in determining the propriety of divorce, even these may not be entirely ignored if the evidence indicates that marital conflicts are destroying the livelihood of the parties.

(3.) *The effect of the marital conflict upon third parties.* In every divorce case in which children are involved, their interests are of the utmost concern to the court. The disruptive effect of divorce upon children is to be deplored, but in a given case it may be preferable to violence, hatred, or immorality when these are present in the home. The community as a whole also has an interest. Adultery, desertion, or cruelty, for example, can only discredit marriage; their perpetuation is not lightly to be decreed.

(4.) *Comparative guilt.* In many ways the guilt of the parties may be unequal—in the gravity of the misconduct involved, in the frequency of its occurrence, or in its effect upon children and others. Moreover, one spouse may demonstrate substantially greater repentance and reform. Marital offenders, therefore, are not necessarily in *pari delicto* before the chancellor. Their comparative guilt may have an

23. 39 Cal.2d 858, 250 P.2d 598 (1952).

important bearing upon whether or not either one or both should be granted relief.²⁴

These appear to be reasonable guidelines for a trial court, particularly the emphasis on the prospect of reconciliation. Marriages in which there is hope of reconciliation will be continued, and marriages which are deemed irretrievably broken will be ended legally. The fact that *DeBurgh* was relied on heavily by several other jurisdictions which adopted the discretionary approach attests to the basic soundness of the decision.²⁵

One problem with making the application of the recrimination doctrine discretionary with the court is that any standard which involves an equitable balancing of various factors will result in somewhat uneven justice due to the varying personal predilections of judges. In North Carolina this might prove particularly true. Some trial judges steeped in the old tradition might find it difficult to grant divorces when faced with recriminatory conduct by the plaintiff. However, despite this drawback, judicial discretion clearly is preferable to an automatic application of the recrimination doctrine.

b. *Adopting the doctrine of comparative rectitude*

Where both parties have grounds for divorce, the doctrine of comparative rectitude gives a divorce to the party least at fault.²⁶ This doctrine has been adopted by only a few jurisdictions²⁷ and has two serious drawbacks. First, it unwisely continues to focus on fault, thus encouraging bitter courtroom battles. Second, in some jurisdictions, if the parties are equally at fault, the divorce will be denied,²⁸ thus leaving the door open for the legal perpetuation of marriages which are no longer viable.

c. *Making recrimination inapplicable when plaintiff seeks divorce under N.C. GEN. STAT. § 50-6*

Since the recrimination doctrine is no longer needed to protect the financial interest of the abandoned, dependent spouse, the courts of North Carolina could well refuse to apply recrimination against actions brought under the one-year separation statute. There seems no reason to continue applying a doctrine which has been criticized by various writers as: "‘fundamentally unsound,’ ‘logically absurd,’ ‘regressive and unfortunate,’ ‘outrageous,’ ‘incompatible with the interest of society in maintaining the basic family status,’ ‘the unholy outgrowth from the doctrine of fault,’ and ‘[a] good example of the uselessness and mischievous nature of the varied family legislation existing in some of our states.’"²⁹

24. *Id.* at 872-73, 250 P.2d at 606.

25. *Howay v. Howay*, 74 Idaho 492, 264 P.2d 691 (1953); *Burns v. Burns*, 145 Mont. 1, 400 P.2d 642 (1964); *O'Conner v. O'Conner*, 253 Ind. 295, 253 N.E.2d 250 (1969).

26. CLARK, *supra* note 10, at 377.

27. Professor Moore lists Arkansas, Louisiana, Texas and Utah as embracing the doctrine. Moore; *supra* note 29, at 735.

28. *See, e.g., Moore v. Moore*, 230 Ark. 213, 322 S.W.2d 77 (1959).

29. Statutory note, 20 MERCER L. REV. 484, 487 (1969).

If the courts refuse to abandon recrimination, the General Assembly could well follow the lead of the Virginia Legislature. As in North Carolina, the Virginia legislators added the non-fault ground of a one-year separation to the existing fault grounds.³⁰ However, they went one step further and provided that neither *res judicata* nor recrimination as to any other ground will bar a suit for divorce on the ground of the one-year separation statute.³¹ Since fault of the parties is logically irrelevant to a non-fault ground for divorce, this seems an eminently reasonable resolution of the matter.

d. *Abolishing the recrimination defense entirely*

In states which have followed the recent trend toward adopting the marital breakdown ground, the doctrine of recrimination has been abolished.³² However, at least two states which still have fault grounds for divorce also have abolished recrimination entirely. The Minnesota statute provides "A decree may be adjudged to either husband or wife notwithstanding that both have conducted themselves in such a manner as to constitute grounds for divorce."³³ New Jersey has also statutorily abolished the recrimination doctrine, providing that if both parties establish grounds for divorce, a decree may be granted to each.³⁴

Since the recrimination doctrine has been thoroughly discredited, its complete abolition seems preferable to the less pervasive reforms. However, since about ninety-seven percent of the divorces obtained in North Carolina are based on the one-year separation statute,³⁵ preventing the use of recriminatory defenses against that statute would solve the problem as a practical matter.

2. *By the legislature*

Another method of preventing the legal perpetuation of non-viable marriages would be the enactment of a true marital breakdown statute. First adopted in California,³⁶ the breakdown theory has now been adopted by some twenty states.³⁷

All breakdown statutes are grounded on the notion that it serves no socially useful purpose to perpetuate a marriage which is in fact dead. However, the language of the statutes varies as each jurisdiction attempts to formulate a workable definition of "breakdown."

The California statute provides for divorce if the court finds "irreconcilable differences, which have caused the irremediable breakdown of the marriage,"³⁸ defining such differences as "those grounds which are deter-

30. VA. CODE § 20-91 (1975).

31. VA. CODE § 20-91 (9) (a) (1975).

32. PLOSCOWE, FOSTER & FREED, *supra* note 5, at 511-12.

33. MINN. STAT. ANN. § 518.06 (9) (West 1969).

34. N.J. STAT. ANN. 2A: 34-7 (West 1975).

35. 1 LEE, *supra* note 6, at 272.

36. CAL. CIV. CODE § 4506 (West 1970).

37. Foster and Freed, *supra* note 2, at 451.

38. CAL. CIV. CODE § 4506 (West 1970).

mined by the court to be substantial reasons for not continuing the marriage and which make it clear that the marriage should be dissolved."³⁹ This definition is clearly circular and offers no real guidance to the court. The Iowa statute attempts to provide a clearer standard by focusing on the likelihood of reconciliation. The ground is stated to be the "breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved."⁴⁰

As Foster and Freed point out, under either the California or Iowa model, it is fair to say that divorce is obtainable on unilateral demand.⁴¹ Questioning the wisdom of a law which offers no protection against hasty divorce, they suggest that "perhaps the best proof of breakdown is separation due to marital difficulties, although it may be a matter of judgment as to how long a period of separation should be required."⁴² The shortest statutory separation period which serves as evidence of breakdown is Vermont's six months.⁴³

Foster and Freed note that an alternative method of proving breakdown is to require reconciliation efforts; if these fail, a divorce is then granted.⁴⁴ However, if this approach is used, the state must be committed to providing good conciliation services—an admittedly costly procedure.

Although the adoption of the breakdown theory of divorce would seem to preclude by implication the use of defenses such as recrimination, most states have made their intent clear by specifically excluding the use of the common law defenses. For example, § 303(e) of the Uniform Marriage and Divorce Act provides the "[p]reviously existing defenses to divorce and legal separation, including but not limited to condonation, connivance, collusion, recrimination, insanity, and lapse of time, are abolished."

In conclusion, it is suggested that the quickest and simplest way to prevent the legal perpetuation of marriages which are, in fact, dead would be for either the courts or the General Assembly to declare that the recrimination doctrine is no longer applicable to suits brought under the one-year separation statute. However, the ideal solution would be for the General Assembly to establish a single non-fault breakdown cause of action for divorce. This would emphasize a commitment to non-fault principles which would have important ramifications in other areas of divorce law, such as spousal support and property division. In establishing the breakdown criterion, the General Assembly should incorporate some objective test on which to base a conclusion that there is little or no hope for reconciliation. A lengthy separation period of from six months to one year could furnish the basis for a finding of irremediable breakdown.

39. *Id.* at § 4507.

40. IOWA CODE ANN. § 598.17 (West 1976).

41. Foster and Freed, *supra* note 2, at 447.

42. *Id.* at 452.

43. VT. STAT. ANN. tit. 15 § 551 (1974).

44. Foster and Freed, *supra* note 2, at 452-53.

II. SPOUSAL SUPPORT BASED ON FAULT RATHER THAN ON NEEDS OR CAPABILITIES OF THE PARTIES

A. *Analysis of the Problem*

Spousal support is based on the fault of the supporting spouse and the innocence of the dependent spouse rather than on the needs and capabilities of the parties. As previously mentioned, permanent spousal support upon absolute divorce was not available in North Carolina until 1967.⁴⁵ When permanent alimony was instituted, the General Assembly wisely provided that the "dependent spouse," whether husband or wife, is entitled to support.⁴⁶ The legislature, however, made two serious mistakes in its formulation of the new alimony statutes.

The first mistake was to tie the right to alimony to fault. Fault on the part of the supporting spouse is necessary to support an alimony award. The grounds for alimony include these acts by the supporting spouse: unnatural sex acts, abandonment, or indignities to the person of the dependent spouse.⁴⁷ Furthermore, fault on the part of the dependent spouse can be fatal to a claim for alimony. The statutes provide that "[a]limony or alimony pendente lite shall not be payable when adultery is pleaded in bar . . . and the issue of adultery is found against the spouse seeking alimony. . . ."⁴⁸

In order to determine reasonable criteria for the award of spousal support, agreement on its purposes is necessary. Clark suggests that alimony "prevents the wife from becoming a financial burden to the community, . . . eases the hardship of transition from marriage to single status, . . . compensates the wife for services rendered, and to some extent . . . gives tangible form to moral judgments about the relative fault of the spouses."⁴⁹ Unfortunately, in North Carolina, the last purpose has obscured the other more important purposes. Clark warns that "[b]asing alimony awards upon fault ignores the complexity of the causes underlying most marital disputes and risks being guided by nothing more substantial than prejudice or sentimentality."⁵⁰

Stress should be placed on easing the transition from married to single life. If one spouse has been taken out of the labor market for many years, the main purpose of spousal support should be to provide the education or training necessary to his or her reentry into the job market.

New Hampshire has adopted a realistic alimony statute which provides that where there are no minor children, the alimony order shall be effective for not more than three years.⁵¹ However, the alimony order may be renewed, if

45. 2 LEE, *supra* note 6, at 153; 2 LEE 36-64 (Supp. 1976).

46. N. C. GEN. STAT. § 50-16.1 (3) (Supp. 1975).

47. N. C. GEN. STAT. § 50-16.2 (Supp. 1975).

48. N. C. GEN. STAT. § 50-16.6 (a) (Supp. 1975).

49. CLARK, *supra* note 10, at 442 (1968).

50. *Id.*

51. N.H. REV. STAT. ANN. § 458: 19 (1968).

justice requires, for periods of not more than three years at a time.⁵² This approach seems a wise compromise between the view that prohibits alimony entirely, and the more widely prevailing view which allows alimony indefinitely, absent remarriage of the dependent spouse or death of one party.

If alimony is conceived of as transitional aid to the dependent spouse, the fault of either spouse logically is irrelevant.⁵³ Even if alimony is awarded on a permanent basis, there is a need to deemphasize fault in order to ensure that one spouse does not suffer unfair economic consequences. As one court has noted:

Alimony should not be a reward for virtue nor a punishment for guilt. The element of fault should be deemphasized. Fault should not be a bar to alimony except in cases of gross culpability, such as infidelity or abandonment. In most cases neither party is at fault or both are in some degree. Generally, family break-ups are not due to specific acts of either spouse, legal fictions notwithstanding. They result rather from general malaise to which both have contributed. Fault usually comes after the malaise has set in; it is the symptom not the cause of domestic discord.⁵⁴

Even infidelity and abandonment need not bar alimony to a needy spouse. The Uniform Marriage and Divorce Act, in § 308, provides that marital misconduct shall be disregarded in awarding maintenance. Of the ten states that have adopted marital breakdown as the sole ground for dissolution, eight have made fault irrelevant in awarding alimony.⁵⁵ However, of the ten states which have superimposed a breakdown ground onto existing fault grounds, only one state deems fault irrelevant to alimony determinations.⁵⁶

It should be noted that North Carolina is one of fourteen states which make fault a bar to alimony; in all the rest, fault is either irrelevant or is merely one factor to be considered by the court in making the alimony award.⁵⁷ It is time for North Carolina to follow the trend toward deemphasizing fault in the area of spousal support.

The second mistake made by the General Assembly in its formulation of the right to spousal support was to prevent an order of alimony when the divorce is obtained by the dependent spouse in an action initiated by that spouse on the ground of separation.⁵⁸ This means that a dependent spouse who has no other ground for divorce than the one-year separation statute is effectively precluded from receiving alimony unless he or she can persuade the other spouse to institute the action. The reason for this provision is not readily apparent.

52. *Id.*

53. However, the New Hampshire statute gives the court discretion to consider fault as a factor in awarding alimony. N.H. REV. STAT. ANN. § 458: 19 (6) (1968).

54. *Doyle v. Doyle*, 5 Misc.2d 4, 6, 158 N.Y.S.2d 909, 911-12 (1957).

55. *Foster and Freed*, *supra* note 2, at 476.

56. *Id.*

57. *Id.* at 477, n. 174.

58. N. C. GEN. STAT. § 50-11 (c) (Supp. 1975).

Perhaps the General Assembly was ambivalent about the wisdom of enacting the one-year separation statute and included N.C. GEN. STAT. § 50-11(c) to discourage its use. In any event, the section clearly works an unreasonable economic hardship on a dependent spouse who must use the one-year separation statute as grounds for divorce.

We have seen that fault concepts pervade the North Carolina statutes regulating spousal support and that fault has no relation to the needs of the dependent spouse as he or she makes the transition from married to single status. What legislative changes would provide a more realistic framework for spousal support?

B. *Suggested Reforms*

1. The North Carolina General Assembly should pass legislation providing either that fault is irrelevant in determining spousal support, or that it is merely one factor to be considered when the court awards support.

2. Consideration should be given to replacing permanent alimony with term alimony designed to ease the transition from married to single life.

3. N.C. GEN. STAT. § 50-11(c) should be repealed so that use of the one-year statute as grounds for divorce no longer precludes the petitioner from receiving spousal support.

III. THE ABSENCE OF POWER IN THE DIVORCE COURT EQUITABLY TO DIVIDE PROPERTY

A. *Analysis of the Problem*

Upon divorce, the spouse with legal title to property usually keeps it, which often results in economic injustice to one party.

The pure common law marital property system now exists in only fourteen states, including North Carolina and the Virgin Islands.⁵⁹ Under this system the court simply declares ownership to be in the person who has legal title unless a constructive trust or gift can be established. The spouse who has exercised predominant control over the earnings of the couple usually turns out to be the winner in this situation.

For example, suppose the husband invested \$50,000 saved from his earnings during marriage. He put all of the investments in his name. Despite the fact that the wife's services as a housekeeper, mother, chauffeur, and cook have made a substantial contribution to the family, she will get no share in her husband's savings should they divorce.

In urging some type of marital property division, Professor Rheinstein asks:

Why should a wife working as keeper of the home and nurse of the children be in a less favorable position than the married woman who works outside the home, earns her own living and accumulates her own savings? Does not the housewife through her work enable the

59. Foster and Freed, *supra* note 2, at 479, n. 180.

husband to earn money and accumulate his savings? Is she not his partner in a joint venture and therefore entitled to participate in his acquests?⁶⁰

The working wife who spends her income on her family and lets her husband save may be no better off than the housekeeper. In one such case the New York courts refused to give the wife who supported the family an equitable interest in the husband's investments made in his name.⁶¹ Such a result is obviously unfair and does not uphold the reasonable expectations of the parties.

A marriage is a partnership, and this fact should be reflected in the way the law treats the finances of the parties on dissolution. Recognition of the partnership factor has been achieved in community property states by giving each spouse title to his or her property owned before marriage or acquired by gift or inheritance after marriage. All income earned by either spouse during marriage is deemed community property, and on divorce it is either divided equally,⁶² or the court is given discretion to divide the community property in an equitable manner.⁶³ In some community property states, the court also has discretion to make an equitable division of the parties' separate property.⁶⁴

With regard to property division, it is better to be an unmarried "meretricious spouse" in the community property state of California than to be a legally wed North Carolina housewife. In *In re Cary*,⁶⁵ a meretricious union lasted eight years. Four children were born and a substantial amount of property was acquired before the "spouses" separated. Deciding that a "family" existed within the meaning of the Family Law Act, the court held that the property acquired by the couple during their union could be divided pursuant to the dissolution statute.⁶⁶

In twenty-five states and the District of Columbia, the common law system has been retained, but the courts have been given the power to divide the parties' property equitably.⁶⁷ Clark points out that in making an equitable division of property, some courts limit themselves to consideration of factors having a direct bearing on equitable ownership, such as: "Whose funds were used to purchase the property; how the property was used after it was acquired; and whether the marriage partners had made agreements with

60. Rheinstein, *Division of Marital Property*, 12 WILLAMETTE L.J. 413 (1976) [hereinafter cited as Rheinstein].

61. *Fischer v. Wirth*, 38 A.D.2d 611, 326 N.Y.S.2d 308 (1971).

62. CAL. CIV. CODE § 4800 (West 1970).

63. ARIZ. REV. STAT. § 25-318A.

64. TEX. FAM. CODE ANN. tit. 1, § 3.63 (Vernon 1975).

65. 34 Cal. App.3d 345, 109 Cal. Rptr. 862 (1973).

66. *Id.* at 353, 109 Cal. Rptr. at 865. A decision handed down during the publishing cycle of this article overruled *Cary* by refusing to ground recovery by the "meretricious spouse" on the Family Law Act, but says a property division can be obtained on general equitable principles as well as on implied-in-fact or express contract theories. *Marvin v. Marvin*, No. LA 30520 (Cal. Sup. Ct. Dec. 27, 1976) (dictum); see 3 FAM. L. REP. 2157 (1977).

67. Foster and Freed, *supra* note 2, at 479.

respect to the property'⁶⁸ Other courts look to the same factors deemed relevant in alimony determinations, including "the extent of the husband's property, the wife's needs, the duration of the marriage, relative responsibility for the marital breakup and other factors having nothing to do with the equitable ownership of the property."⁶⁹

Clark expresses concern over the blurring of distinctions between property division and alimony because methods of enforcement and rights to modification depend on the characterization.⁷⁰ It is true that parties in settlement agreements and courts in making alimony awards and property divisions do need to pay careful attention to labels. However, since the purpose of both alimony and the equitable division of property is to achieve economic justice between the parties, it seems reasonable to consider both simultaneously. At least two states provide for alimony and an equitable division of property in the same statutory section,⁷¹ thus indicating that the two should be considered together.

The Uniform Marriage and Divorce Act, in § 307, offers two alternatives covering the disposition of property. Alternative A, to be used in common law states, provides that "the court, without regard to marital misconduct, shall, . . . finally equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both." The court is instructed to consider such things as the duration of the marriage, the age, health, skills, employability, assets and liabilities of the parties and the contribution or dissipation of each party in the acquisition and preservation of the property. Alternative A of § 307 further instructs the court to consider "the contribution of a spouse as a homemaker or to the family unit." The Commissioners attempt to relate the equitable division of property to maintenance by directing the court to consider whether an apportionment of property is in lieu of, or in addition to, maintenance.

The provisions of the Uniform Marriage and Divorce Act are sufficient to deal with most problems of marital property division on divorce. However, at least one problem would not be solved: how to handle pension problems. In community property states, courts have been awarding wives contingent interests in their husband's pensions based on the number of years the parties were married out of the total years during which the pension accrued.⁷² In fact, a California attorney incurred a \$100,000 malpractice verdict for failing to consider the husband's retirement benefits in settling the client wife's community property rights.⁷³

68. CLARK, *supra* note 10, at 450.

69. *Id.* at 451.

70. *Id.* at 451-52.

71. N.H. REV. STAT. ANN. § 458: 19 (1968), UTAH CODE ANN. § 30-3-5 (1976).

72. *Miser v. Miser*, 475 S.W.2d 597 (Tex. Civ. App. 1972).

73. *Smith v. Lewis*, 31 Cal. App.3d 135, 107 Cal. Rptr. 95 (1973).

In common law states there is no method, at the present time, for handling the pension problem. To require employers to keep track of ex-wives' rights to share in pension plans if and when they accrue obviously presents difficulties. Nor is it easy to give the wife a larger share of property or higher alimony to compensate her for loss of pension rights, because at the time of the award, the right is not vested, and it is uncertain what the ultimate value of the pension will be. The best resolution of this problem may be the enactment of legislation giving a petitioning spouse an equal share in the other spouse's pension rights during any period of time that the petitioning spouse is not employed. Noting that a thorough analysis of possible solutions to the pension problem was undertaken by the English Law Commission, and that the West German Law of 1976 attempts to deal with the problem in detail, Professor Rheinstein suggests that American legislators learn from the experiences of other countries.⁷⁴

We have seen that the pure common law marital property system now in effect in North Carolina unreasonably favors the husband at the expense of his homemaker wife. An appropriate reform is readily apparent.

B. *Suggested Reform*

North Carolina should adopt legislation patterned on the Uniform Marriage and Divorce Act, giving the court discretion to divide the parties' property on divorce in an equitable manner. By doing this, recognition will be given to the fact that marriage is an economic partnership. Neither spouse should be allowed to circumvent the fact of partnership by making investments in his or her name alone.

IV. THE ABSENCE OF SPECIFIC GUIDELINES TO THE TRIAL COURT IN CUSTODY DECISIONS

A. *Analysis of the Problem*

The courts are not given sufficient guidelines upon which to base child custody determinations, resulting in decisions which are based on the individual predilections of the judges.

North Carolina, like a vast majority of states, simply instructs the trial court to award custody "to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child."⁷⁵ This vague standard leaves the trial court free to do as it pleases.

In North Carolina the mother still has the edge when children are of tender years. As recently as 1973, the North Carolina Supreme Court reaffirmed the maternal preference rule, citing Nelson for the proposition that:

74. Rheinstein, *supra* note 60, at 438-39.

75. N. C. GEN. STAT. § 50-13.2 (a) (Supp. 1975).

If she is a fit and proper person to have custody of the children, other things being equal, the mother should be given their custody, in order that the children may not only receive her attention, care, supervision and kindly advice, but also may have the advantage and benefit of a mother's love and devotion for which there is no substitute. A mother's care and influence is regarded as particularly important for children of tender age and girls of even more mature years.⁷⁶

At the time the maternal preference doctrine arose, the mother usually stayed home and cared for small children. Thus, it was reasonable to assume that she was closer to the children, and they therefore should be placed in her custody. Today both parents often work, and the care of small children is likely to be distributed more equally between them. To prefer the mother as custodian prevents the court from looking closely at the parent-child relationships to determine who has the deepest relationship of trust and affection with the child, *i.e.*, who is the "psychological parent." If only one parent is classifiable as a psychological parent, failure to give custody to that parent can have a detrimental effect on the child.⁷⁷

The easiest way to eradicate the maternal preference doctrine would be for the General Assembly to pass a statute providing that neither parent has a *prima facie* right to custody; rather both have equal claims.⁷⁸ The courts should hold that the application of the tender years doctrine deprives a father of his right to equal protection of the law under the fourteenth amendment.⁷⁹

Other than the maternal preference doctrine, what criteria for custody determinations have been emphasized by the North Carolina courts? In many cases, it is difficult to tell what the trial court considered crucial. The appellate court often states that the custody question is one addressed to the discretion of the trial court and declines to review the evidence in detail.⁸⁰ However, it is clear that North Carolina judges are often swayed by the child's wishes if he is of sufficient age to give meaningful testimony.⁸¹ This emphasis on the child's desires probably reflects an attempt to place the child with the parent to whom he feels closest. The danger in letting the child be the decision maker is that children may select custodians for wrong reasons, such as attempting to reach

76. *Spence v. Durham*, 283 N. C. 671, 687, 198 S.E.2d 537, 547 (1973), *rev'g* 16 N. C. App. 372, 191 S.E.2d 908 (1972).

77. Marschall and Gatz, *The Custody Decision Process, Toward New Roles for Parents and the State*, 7 N. C. CEN. L.J. 50, 55 (1975) [hereinafter cited as Marschall and Gatz].

78. Examples of such statutes which are becoming numerous are: N.Y. DOM. REL. LAW § 70 (1964); WIS. STAT. § 247.24 (3) (Supp. 1976-77).

79. *State ex rel. Watts v. Watts*, 350 N.Y.S. 2d 285 (Family Court, City of New York, New York County, 1973).

80. *Hinkle v. Hinkle*, 266 N. C. 189, 146 S.E.2d 73 (1966).

81. *Lennon v. Lennon*, 252 N. C. 659, 114 S.E.2d 571 (1960); *Gafford v. Phelps*, 235 N. C. 218, 69 S.E.2d 313 (1952). It should be noted that any attempt by the trial judge to talk to a child in chambers without giving the parties the right to be present and rebut the evidence will be considered error. *In re Gibbons*, 245 N. C. 24, 95 S.E.2d 85 (1956).

the more withdrawn parent by selecting him or her, selecting the more lenient parent, etc.⁸²

North Carolina courts have not overreacted to parental faults such as adultery. Although such conduct will be considered by the court in determining the best interest of the child, the court will not punish a parent by withholding custody.⁸³ This approach seems reasonable. The adultery of a parent is not relevant to the welfare of the child, unless it in some way adversely affects the child. The Uniform Marriage and Divorce Act speaks to this problem by stating, in § 402, that "[t]he court shall not consider conduct of a proposed custodian that does not affect his relationship to the child."

The three criteria just discussed: (1) the maternal preference, (2) the child's wishes, and (3) the parties' moral conduct have received the most attention by North Carolina courts. However, a court occasionally will place emphasis on discipline of the child,⁸⁴ the apparent depth of affection between the parent and child,⁸⁵ or the desirability of the child's physical environment.⁸⁶

With regard to modification of child custody decrees, North Carolina appellate courts correctly have stressed continuity of care and frequently have overruled changes ordered by the trial courts. Where the trial court failed to make a finding of fact regarding changed conditions before modifying the custody decree, the Supreme Court of North Carolina reversed.⁸⁷

N.C. GEN. STAT. § 50-11.2, enacted in 1973, states that custody may be modified only on a showing of a *substantial* change in conditions. Even where conditions changed due to the custodian-mother's overnight visits from the man she later married, the state supreme court emphasized the good aspects of the mother-child relationship. It concluded that the evidence was insufficient to show a substantial change of circumstances affecting the welfare of the children sufficient to justify the trial court's modification order.⁸⁸

The cases indicate that the North Carolina appellate courts are carrying out the legislative intent to avoid modification of custody in the absence of a substantial change in conditions which makes modification in the best interest of the child. However, to further decrease the frequency of modification orders by trial courts, it might be wise for the General Assembly to adopt the language of § 409 of the Uniform Marriage and Divorce Act. Subsection (a) provides that motions to change custody orders may not be made within two years from the date entered unless the petitioner supplies affidavits that the child's present environment may endanger seriously his physical, mental, moral or emotional health. Subsection (b) provides that custody will not be changed unless:

82. Marshall and Gatz, *supra* note 77, at 55-56.

83. *In re McCraw Children*, 3 N. C. App. 390, 165 S.E.2d 1 (1969).

84. *In re Gibbons*, 245 N. C. 24, 95 S.E.2d 85 (1956).

85. *Blackley v. Blackley*, 285 N. C. 358, 204 S.E.2d 678 (1974).

86. *Lennon v. Lennon*, 252 N. C. 659, 114 S.E.2d 571 (1960).

87. *Shepherd v. Shepherd*, 273 N. C. 71, 159 S.E.2d 357 (1968).

88. *Blackley v. Blackley*, 285 N. C. 358, 204 S.E.2d 678 (1974).

- (1) the custodian agrees to the modification;
- (2) the child has been integrated into the family of the petitioner with consent of the custodian; or
- (3) the child's present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused is outweighed by its advantages to him.

With regard to the initial custody decision, the open-ended best interest test seems insufficient. What guidance can the General Assembly give to the trial courts in this area?

B. *Suggested Reforms*

North Carolina should adopt a custody statute which details the criteria to be considered by trial judges in making custody decisions. Michigan has done this in its Child Custody Act of 1970.⁸⁹ The court is told to consider the following factors in determining the best interests of the child:

- (a) The love, affection and other emotional ties existing between the competing parties and the child.
- (b) The capacity and disposition of competing parties to give the child love, affection and guidance, and continuation of the educating and raising of the child in its religion or creed, if any.
- (c) The capacity and disposition of competing parties 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 competing parties.
- (g) The mental and physical health of the competing parties.
- (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 age to express preference.
- (j) Any other factor considered by the court to be relevant to a particular child custody dispute.⁹⁰

This comprehensive list of factors insures that all relevant matters are considered by the trial court. The statute says nothing, however, about the weight to be accorded each factor. The capacity to feed and clothe the child could be weighed equally with the depth of affection in the parent-child relationship, even though the latter is more crucial. It might be wise for the legislature to single out those factors which should be stressed. For example, the statute might provide that the greatest weight shall be given to the depth of the parent-child emotional ties, the continuity in the care of the child, and

89. MICH. COMP. LAWS ANN. § 722.21 *et seq.*, (Supp. 1976-77).

90. *Id.* at § 772.23.

the reasonable preference of an older child. These factors, which point toward protecting the psychological welfare of the child, deserve more emphasis than do those concerned with his material well being.⁹¹

CONCLUSION

The current divorce law in North Carolina does not allow all dead marriages to be dissolved. Nor does it enable the parties dissolving marriages to avoid undue fighting and bitterness. Emphasis on fault aggravates existing problems and encourages hypocrisy and even perjury. It is time for the courts and the legislature to act.

The most pressing need is for a true non-fault ground for divorce. One option is to join the trend toward adopting marriage breakdown as the sole ground for divorce. Another alternative is to eliminate recrimination as a defense to the one-year statute, thereby turning it into a true non-fault statute.

Alimony should not be considered a permanent bonus to the "innocent" spouse, but rather a means for easing the dependent spouse's transition from married to single status. The General Assembly should replace permanent alimony with term alimony and should provide that fault is irrelevant in determining spousal support. Use of the one-year statute should not preclude the plaintiff from claiming alimony as the dependent spouse.

North Carolina should join the majority of states which provide for distribution of property upon divorce. Approaching the problem as one of equitably dissolving a partnership, fault of the parties should be deemed irrelevant.

Recognizing that child custody problems are extremely difficult to resolve, the General Assembly should provide trial courts with more guidance than is now furnished by the open-ended "best interest of the child" test. It is suggested that the Michigan Child Custody Act of 1970⁹² offers a good model by setting forth in detail all of the major criteria relevant to the custody determination.

A thorough reform of North Carolina divorce law would encompass many changes not discussed in this article. However, it is believed that the reforms suggested here would provide a basic framework for a civilized and equitable procedure for dissolving marriages.

91. Marschall and Gatz, *supra* note 77, at 55 and 60.

92. MICH. COMP. LAWS ANN. § 722.21 *et. seq.*, (Supp. 1976-1977).