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SCHOOL OF LAW

DAVIS, CALIFORNIA 95616

June 2, 1969

Professor Robert J. Levy
University of Minnesota Law School
Minneapolis, Minn. 55455

Dear Bob:

I have now been able to read a large part of your Monograph. I think it is a masterpiece of analysis of the literature in the field. As for your conclusions, you know that I disagree with some of them. One of the things I like best is your idea of stopping modifications of custody decrees for a certain time. Perhaps you could go even further, as Dr. Watson I believe suggested, and prohibit them altogether, with the necessary exceptions for unusual or extraordinary circumstances. I enclose a copy of my comments on Tentative Drafts 2 and 3 of the Divorce Provisions and send another copy, as requested by Maurice, to Allison Dunham together with a copy of this letter.

Sincerely,

Brigitte H. Bodenheimer

BHB:rf

enc.

cc: Professor Allison Dunham

UMDA 03437

UNIFORM MARRIAGE AND DIVORCE PROJECT

Comments on Tentative Drafts 2 and 3 of the Divorce Provisions

I. The major impression one gains from the Drafts and the minutes of the December 1968 meeting is that one philosophy is predominantly represented almost to the exclusion of other viewpoints. This is the philosophy of extreme individualism which demands autonomy and non-intervention in the affairs not only of the functioning family (which is as it should be), but also in the affairs of a family which is in the process of disintegration and divorce. Under this philosophy the responsibilities the individual has towards others, including the public, are minimized or are left up to the individual to recognize or disregard. Other viewpoints are not considered except perhaps from the standpoint of the saleability of the statute. The result is a lack of balance without which a divorce law suitable for the whole country and responsive to the thinking of large segments of the public cannot be worked out.

Under the Drafts, divorce is largely a matter of private arrangement between the parties. Moreover, when there is friction which one spouse believes is best resolved by cutting off the marital ties, divorce seems to be favored over attempts to solve the problem in ways which could perhaps preserve the marriage. As Commissioner Ruud stated, if one of the partners has lost his sense of responsibility, perhaps temporarily, divorce is available to him in a short time. Nothing is done to "encourage a person to try harder." (Proceedings, December 1968, 8). A neutral position is taken as between marriage and divorce. No policy judgment is made. What one participant in the December meeting calls "the institution of divorce" is apparently considered to be as good as the institution of marriage. This equality between marriage

and divorce in effect cancels out our present public policy favoring the preservation of the family. If it is not the intent of the Committee to pursue this non-committal course, this must be made clear, not only in an eloquent preamble or "purposes" section, but also in the body of the divorce law itself. Justice Traynor whose famous sentence as to the "legitimate objects of matrimony" has been used in the Drafts makes it clear in de Burgh what the basic policy should be:

The deceptive analogy to contract law ignores the basic fact that marriage is a great deal more than a contract. It can be terminated only with the consent of the state. In a divorce proceeding the court must consider not merely the rights and wrongs of the parties as in contract litigation, but the public interest in the institution of marriage. The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve marriage. But when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted. "Public policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed."... (De Burgh v. De Burgh, 39 Cal. 2d 858, 863-4, 250 P.2d 598, 601 (1952)).

II. I cannot understand how a judge can "conclude" or "find" as a matter of legislative mandate that a "marriage has broken down irretrievably" if: (a) a joint petition for divorce is filed by the parties and 90 days have elapsed; or (b) one party files a divorce petition and proves separation for 6 months immediately before filing; or (c) one party requests divorce at the end of an adjournment period (for a week or a month or longer, but not exceeding 6 months) after a denial of divorce on the ground that the marriage had not broken down irretrievably.

I think that the judiciary should not be made a party to a scheme of fictions which surpasses the often complained of farce of finding "cruelty" under existing divorce procedures. As several of the participants in the December meeting have remarked, there is no need for the participation of the courts in the divorce process under these circumstances. The appropriate form of divorce under these conditions would be divorce by registration in an administrative office. This does not exclude subsequent court proceedings to settle property matters and child custody, somewhat like the dissolution of a business partnership where the court does not participate in the decision whether the partnership should be dissolved or not. If divorce by registration does not seem to be politically wise because it is not acceptable to the majority of the people of the United States, a different statute would have to be devised.

III. It is astonishing to find that some of the participants in the December meeting consider "breakdown of the marriage" to mean nothing more than the unwillingness of one of the spouses to continue the marriage. As one of the advisors stated, "if one partner says that the marriage has broken down, it has broken down." (Proceedings December 1968, 21, 54). If this is to be the meaning of "breakdown" which is to be conveyed to the judges who administer the uniform law, the draft misleads and deceives many Commissioners, legislators and the public. It is obvious that this is neither the common meaning of the term nor is it what Justice Traynor had in mind in de Burgh, nor is this the breakdown concept which underlies the discussion in Professor Levy's monograph. If the purpose is to use the "breakdown" idea because it has recently become popular and is politically attractive, and to use it in a watered-down form which makes it

unrecognizable, again we are merely exchanging one fictitious divorce law for another of the same type.

IV. As was pointed out in the December meeting, the breakdown idea requires a "twofold finding": 1) a finding that the marriage is presently and was in the immediate past in a state of complete disharmony and 2) a finding that the prospects for reconciliation in the future are poor. (Proceedings December 1968, 32, 42, 46).

Both elements of the breakdown test must be established by proof.

(1) Element No. 1 calls for a factual inquiry into the marital situation. (See Levy Monograph 116-17). The Committee understandably seeks to avoid an "inquest" into the personal affairs of a couple. What is done in inquisitorial divorce proceedings in Poland, Hungary, and East Germany does not comport with our notions of privacy and of privileged, confidential communications. A way out is Commissioner Hellring's proposal to make living separate and apart for a certain period prima facie evidence of breakdown. I think that such a provision is necessary. However, Tentative Draft No. 3 contains a conclusive presumption of breakdown upon 6 months of pre-filing separation. In my opinion the presumption should be rebuttable, the period of separation should be at least one year (and 18 months when divorce is desired by only one partner) and the period should start to run from the time a declaration is made to the court (not the filing of a divorce petition) that a separation has taken place. If separations before court appearance are counted, as Draft No. 3 provides, an opportunity for instant unilateral divorce with fabricated evidence of separation is presented. In the case of poor persons the requirement of separating households may be a hardship, as was pointed out in the December meeting (Proceedings 85). For these cases judicial dispensations from the separation requirement may be needed.

(2) Element No. 2 of the "breakdown" formula calls for a testing of reconcilability. Unless the facts are obvious, such as absence of one partner for many years, or severe mental illness, the judge needs the assistance of trained professionals to help him arrive at a finding that there is little likelihood of reconciliation in a particular case. In other words, if the breakdown theory is employed, a professional court staff is a necessity for the marriage dissolution process itself.¹

Those who do not favor court conciliation, may say that this means testing, not counseling. Perhaps this distinction can be made in theory perhaps even in practice, but it would certainly be a waste of highly qualified professional talent to let opportunities thus presented for counseling and possible reconciliations go by unused.

V. If the public policy of preserving families, when possible, is seriously pursued, I believe it is highly desirable to provide for court conciliation services in addition to any counseling opportunities available in the community. What Professor Inglis of New Zealand recently said in a lecture could well apply to the United States:

There is, I think, a growing belief in the community that one of the primary points to be concentrated upon . . . is whether anything can be done to save the marriage, especially where there are children . . . But what enquiry is made at any stage about whether the parties were wise to separate; whether they could have been reconciled at the time of separation; whether they really considered the best interests of the children?..

¹ Dr. Andrew Watson offers the possible criterion of "whether or not the couple can live together with more advantage than disadvantage." This is similar to the element of reconcilability in the breakdown test. Dr. Watson assumes, of course, that the question be answered by a psychiatrist or other professional. Watson, "Psychoanalysis and Divorce" in The Marriage Relationship 332-33 (ed. by Rosenbaum and Alger 1968). See also pp. 325-26.

. . . many marriages could be saved if the right sort of action were taken, and the right sort of assistance given, at the right time. But what legal facilities are there for this? The answer is: none at all . . . Since our grounds for divorce are more liberal than any other Commonwealth country, . . .² ought we not now to take stock, and ask ourselves whether the law, having made marriages comparatively easy to dissolve, might not now concentrate on making marriages easier to save.

. . . Why do we not let the law, in proper cases, weigh in on the side of the party who wants a reconciliation, and insist that the reluctant party on the other side should at least make an attempt to cooperate? What many people want, in this age of wavering standards, is a sense of purpose and direction If it is socially desirable that marriages should be stable, then this is an aim that the law should be clear and plain in supporting. We take pride in the fact that our divorce law is the most liberal in the Commonwealth, and it may become even more liberal. We could, I suggest, take greater pride if New Zealand became the first Commonwealth country to do something really practical to rescue shaky marriages, and to insist that the responsibilities of marriage be taken seriously.

. . . The court should have a duty to satisfy itself, by proper means, that conciliation cannot possibly do any good: and in the majority of cases, the person best qualified to reach that decision is a properly trained counsellor. (Inglis, the Hearing of Matrimonial and Custody Cases, Family Law Centenary Essays, Victoria University of Wellington, the Law Faculty 36, 37, 46, 47, (1967)).

Professor Inglis then recommends that New Zealand try the Los Angeles Conciliation Court approach: "it might be seriously considered", he says, "whether a petition or application for reconciliation, on a basis similar to that provided in Los Angeles, is a remedy we can afford to be without." (Centenary Essays, supra, p. 47). The Australians are likewise interested to learn from the Los Angeles experience although they have state-subsidized marriage guidance organizations. Judges and scholars of other countries have studied the Los Angeles conciliation procedure which is now in use in 10 additional counties in California and in some of the courts of 6 other states.

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² New Zealand permits divorce upon living apart for 3 years under a separation agreement or under a court separation order, or 7 years without agreement or order, in addition to fault grounds.

Some of the advantages of the Los Angeles plan are (1) that it offers short-term counseling before as well as after court proceedings are begun; (2) that it concentrates on the more promising cases, that is, primarily those cases in which one of the partners requests the help of the conciliation court;³ and (3) that it assures the attendance of both spouses at a conference through the existence of the (seldom exercised) power of the court to order appearance. Another advantage of this procedure is the use of the so-called "Husband-Wife Agreement" which sets forth in simple English - now also in Spanish - the major problems and irritants arising in most marriages, together with suggestions for overcoming the difficulties through awareness of the sore points and individual effort of both partners to strengthen the relationship. Persons who need long-term counseling or psychiatric treatment after the court's brief procedure are referred to community agencies or professionals. The court conciliation process alone is especially effective with those couples who need primarily an understanding of the responsibilities of marriage and outside support to help them carry out their resolve to live up to these responsibilities. The husband-wife agreement which is read and re-read long after the court conference is over provides this kind of support to those who suffer from the current malady of confusion about basic values.

There is, of course, a minority of the population which rejects the values on which the husband-wife agreement is based and the values which underlie any counseling which seeks to preserve marriage, if possible. Especially among writers, artists and intellectuals generally, there are individuals who choose to live by their own private

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³ Under this system of selective counseling, figures showing marriages preserved are high. In 1966 the reconciliation rate was over 65%. See the brochure, The Conciliation Court of Los Angeles County (5th ed. by Judge MacFaden, 111 North Hill Street, Los Angeles (1967)).

code which may or may not coincide with traditional views on marriage and the family. Among other things, persons holding these views would not agree that state legislatures should adopt a public policy favoring the strengthening of family ties and the preservation of marriages. They may favor the stability of families, but as a matter of private belief rather than public standard. Members of this dissenting group are naturally not interested in court counseling sessions. Of course, members of this group would not be asked to participate in any court conciliation program once they make their thinking known. No attempt would be made to change their views. However, this group asks more than to be left alone. They are of the opinion that everyone should make his own decision on the values (or non-values, that is, nihilistic views) he wishes to embrace. Therefore they raise objections to any attempt to influence divorce seeking couples one way or the other. However, most people are unable to create their own personal value systems even if they wanted to. They waver back and forth and are torn here and there by the innumerable influences in all directions which are brought to bear upon them today. They have given up their religious or ethical family traditions and are thus left to shift for themselves in a turbulent world. Is it expecting too much of the dissenters to ask them to be tolerant of the views of the great many citizens who see in court conciliation some real hope for those unhappy and bewildered couples who grope for something definite and certain, some clear standard of conduct which can become the goal toward which they strive?

Another objection raised against court counseling is that it is authoritarian and that it interferes with the personal autonomy of divorcing spouses. (See Levy Monograph 123). It seems to me that if the policy of the law to preserve viable marriages is followed seriously

and without ambivalence, a program to encourage reconciliations is a logical consequence and in fact becomes a necessary component of a liberal divorce law. This does not mean that anyone is to be compelled to stay married, to reconcile, or to undergo psychotherapy. (See Professor Foster's article in Appendix F of the Levy Monograph.) It does mean requiring a divorce-bent spouse to come to court at least once for a conference. If he refuses cooperation at the conference, this ends the matter. I think, however, that a distinction must be made between marriages which are a going concern and marriages which are in the process of disintegration. I treasure the privacy and autonomy of my family affairs as much as anybody else and would vigorously oppose any legislative attempt to interfere in this private area as long as my family is a functioning unit of society. But if I indicate that I am going to apply for divorce and my husband thereupon petitions for conciliation, I would acknowledge that at this point of impending break-up the state has the right, in pursuance of its policy to preserve families, to ask me to come to court and give an explanation. If at the time of my court appearance some influence is brought to bear upon me to reconsider my plan, no "rights" of mine are violated nor is there interference with the autonomy of a family which had already stopped functioning as an autonomous unit.

Also, there seems to be some reluctance to acknowledge that individual effort can change behavior and attitudes, even feelings, and that such effort can be stimulated by skillful counseling. Psychiatrist Dr. George Saslow has this to say about the Los Angeles approach:

They are experimenting with what it is like to be a better wife or a better husband . . . They probably simultaneously ignore many irritations which are really trifles . . .

. . . and they learn that life can be much more pleasant this way. And they also learn that they can be different, that they are not the prisoners of their own past history and their own past misdeeds, mistakes and unjust acts.⁴

Dr. Watson in a somewhat different approach takes the position that the marital relationship is by no means static and that its psychodynamics permit the adjustment of differences through the early intervention of psychiatrists or well-trained counselors, and in some cases the aid of lawyers:

Recently developed theory regarding the interlocking psychology of marriage partners permits one to assume that there are many positive forces in a marriage regardless of the presence of powerful animosity. Adaptive necessity forces the parties to resolve progressively the negative factors in the relationship, and indeed a successful marriage is one in which the inevitable differences are resolved. Mere presence of differences is not evidence of a poor marriage. Failure to work out the differences is. For these reasons it is always appropriate for counsel to wonder if the parties really want a divorce. A lawyer may be approached by his client with the underlying and unconscious hope that somehow, through the magic of his role, the lawyer will bring about some restitutive change in the marital balance: perhaps counsel will use the imagined power of the law to bring a reluctant spouse to "understand" or "behave" better and then harmony can be restored or achieved. These and other covert goals may enter the office in company with the divorce-seeking client.⁵

. . . In order to have a good marriage, the partners must be willing and able to resolve differences, which usually means "fighting some things out." Happy marriages are not made in heaven; rather, they are a product of active struggle and adaptation by the individuals involved . . . Failures in marriages result in much pain and unhappiness for the partners and their children. While it is easy to say that, if one or the other of the partners had married a different spouse, they would have no difficulties, this does not appear to be the case. All too often, individuals who fail in one marriage will fail in another, due to their unerring ability to choose another mate exactly like the first. The problem that first caused failure in selection or failure to arrive at happy agreement must still be resolved no matter how many partners are tried. For this reason, an opportunity to

⁴ Quoted in Crenshaw, "A Blueprint for Marriage: Psychology and the Law Join Forces," 48 American Bar Association Journal 125, 126 (1962).

⁵ Watson, "Psychoanalysis and Divorce," supra note 1 at 324.

resolve the basic underlying problems is more often indicated than divorce. The lawyer's professional role gives him an opportunity to throw his weight toward the constructive or the disruptive approach to a marriage problem . . .

. . . Practicing psychiatrists frequently see marriage problems which might possibly have worked out successfully had it not been for the ill-timed and inappropriate invoking of some legal procedure . . . Legal intervention should be the last, rather than the first kind of professional service offered to unhappy married couples.⁶

. . . Evolving an appropriate self-image necessitates both masculine and feminine models; mother and father are both needed. For this reason, efforts should be made to resolve intrafamily problems at the first sign of stress. All necessary and available community and medical resources should be bent to the task of removing the cause of the disruptive stress.⁷

I urge the Reporters and the Special Committee to include provisions for court conciliation in a revised divorce draft. I believe that the parties should be permitted to avail themselves of the court counseling service before any legal action to terminate the marriage is taken. To avoid turning the court into a general counseling agency, I think that as a rule only those pre-divorce cases should be accepted in which divorce or separation is imminent (or separation has already occurred), particularly those in which a lawyer has been contacted for purposes of divorce. The availability of court conciliation proceedings at this early stage would be a great relief for those lawyers who are conscious of their responsibility in their strategic position to question their client's real desire for divorce, but feel that they have neither the time nor the aptitude to undertake counseling themselves. In Los Angeles 50% of the conciliation petitions are due to

⁶ Watson, Psychiatry for Lawyers 274-75 (1968).

⁷ Id. at 197.

attorney referrals and many of these are made before divorce proceedings are instituted. The lawyer who assists his client in conciliation proceedings earns his fee and usually has a better chance to collect it than after divorce proceedings.⁸

Court counseling after the filing of a divorce petition - or a declaration of separation - would also have to be selective in order to avoid mass-counseling which almost inevitably degenerates into a useless formality, and to conserve highly qualified manpower and public funds. Hopeful cases would be screened in and less promising ones screened out. Much of the screening could probably be done by requiring the filing of an affidavit with basic information about the marriage. It would be the responsibility of the lawyer, spelled out by law, to assist his client with a conscientious preparation of the affidavit. The other party, if in the state, would also file an affidavit. Some cases would require a screening interview by a member of the professional staff. One major criterion for accepting a case for counseling would be the desire of one of the spouses to preserve the marriage. The use of a document like the "Husband-Wife Agreement" would in my opinion greatly contribute to the effectiveness of short-term court counseling. The court would have the power to order the appearance of the other party in these and pre-divorce cases. Cooperation of the court with community counseling agencies and individual psychiatrists and marriage counselors would be required. The court would refer cases to such agencies or individuals, and there would be referrals the other way, especially where an agency's or professional

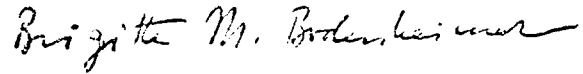
⁸ See MacFaden, "The Conciliation Court of Los Angeles County" 9, 13 (1967).

person's work is frustrated because of their inability to require the second spouse to come in for a conference. All interviews with the professional staff would be confidential. If there is no reconciliation, counseling would take on the character of "divorce counseling", with known benefits for custody and property arrangements and the post-divorce relationship between the parties.

As stated before, the use of the breakdown formula virtually presupposes the existence of a professional court staff which can certify to the judge that reconciliation attempts were unsuccessful or would have been futile under the circumstances. The counselor's brief report would be based on the screening-out process (in futile cases), or on actual conciliation conference held in court, or on reports received by the court counselor from qualified out-of-court counseling agencies or individuals. Only with the aid of this report can it be proved that one of the elements of the breakdown test, the element of unlikelihood of reconciliation, is present. As for the second element, the disruption of the marriage, I do not believe that we can uncover the true and complete facts about the condition of a marriage under our Western ideas of privacy and confidentiality. The use of separation as evidence of breakdown seems to be the best solution. But the period of separation must be sufficiently long that it gives a real indication of the destruction of the marriage. I have talked to many people, divorced and undivorced, educated and uneducated, and have found that they all felt that divorce should take time, one year as a minimum, and in some cases 18 months to two years. If a declaration of separation (or of intent to apply for divorce without separation) is made

at the beginning of the one-year or 18 month period, counseling opportunities in or out of court would be utilized during the waiting period.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Brigitte M. Bodenheimer".

Brigitte M. Bodenheimer
University of California Law School, Davis.