

IRRETRIEVABLE BREAKDOWN ,
THE VIEW OF THE COURTS

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Legislators are often in a quest for more definite meanings in the language with which they deal. This is also a concern which afflicts lawyers, and, therefore, lawyer-legislators doubly. Sometimes, however, the concern for "definitions" (the means by which most of us believe meaning is clarified) overcomes the quest for real meaning. Language is not always capable of providing a "meaning" which can be made operational. Lawyers, who should know better because they deal with language inadequacies all the time, fall into the trap as consistently as anybody.

This is a problem in the field of no-fault divorce. People keep asking what does "irretrievable breakdown" mean? Indeed, this was a key point in the controversy between the NCCUSL and the ABA Family Law Section between 1971 and 1973, when the ABA finally approved the Uniform Marriage and Divorce Act. In the original version of the Uniform Act, the only effort at definition was contained in Section 305(c): "A finding of irretrievable breakdown is a determination that there is no reasonable prospect of reconciliation." This was not enough according to Family Law Section members. An effort to resolve the issue resulted in this language in Section 302(a)(2):

(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 a serious marital discord adversely affecting the attitude of one or both of the parties toward the marriage.

The first part of the definition satisfies the primal urge for meaning. Separation provides an objective standard, easily proved by conduct (or disputed for that matter). The second part, though, amounts to a tautology. It really says that "irretrievable breakdown" is "irretrievable breakdown." It does no harm, but does it really define things better? I don't really think so.

What is really more useful is an analysis of the operations under the language of "irretrievable breakdown." Is there a difference in the way things are done under the new law as opposed to the old? In legal terms, you ask, "How are people pleading and proving their cases differently?" You ask, "What are the qualitative and quantitative aspects of the evidence to be offered?" If there is no objective research, at least the lawyer can go to the cases to see what has happened in the courts. It develops that quite a few cases have been decided under no-fault statutes, and it is possible to see what is being required.

Under the fault system, the lawyer pleads and proves fault grounds. His evidence goes to proof of specific instances of conduct which establish the ground pleaded. This is traditional adversary procedure. If the ground is adultery, the lawyer brings proof of an act or acts of adultery. If the defendant party chooses to raise a defense, he or she can. The standard is objective and involves proof of specific conduct.

No-fault replaces grounds with language relating to something else entirely than specific conduct. The language varies from the

Uniform Act's "irretrievable breakdown" to California's "irreconcilable differences," to Iowa's "breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed." "Incompatibility," as interpreted, is no-fault language. Texas used for a time "insupportability" language which it interpreted as no-fault. In all the instances, the language has been identified as non-adversary, in nature. It is designed to avoid the conflict between the parties that is normally raised or aggravated by the adversary process.

The only problem that appears to be bothering the courts arises from their concern with how adversary the proceeding should be. In Baxla v. Baxla, 522 S.W. 2d 736, 738, the Texas Court has said:

It is also manifestly clear from the legislative history of many, if not all, of the statutes (no-fault statutes) that the purpose and intent of the legislatures of the various states, including Texas, is to abolish the necessity of presenting sordid and ugly details of conduct on the part of either spouse to the marriage in order to obtain a decree of divorce.

There is a concern, therefore, with introducing evidence towards proof of no-fault which might contravene the basic policy. However, the courts seem basically clear with respect to what the new language means in the operation of the proceeding.

In Woodruff v. Woodruff, N. H., 320A 2d 661, the court stated, "The court must consider the state of mind of the parties toward the

relationship in order to make the determination." Other courts have reflected this "state of mind," "subjective" approach to no-fault. In Michigan, in Kretzschner v. Kretzschner, 210 N.W. 2d 352, 355, the court cited this language from 51 Michigan State Bar J. 16, 18, approvingly:

"At the base of the marital relationship is the willingness of the parties to live together. If they are unwilling to do so for whatever reason or whoever is at fault, the marital relationship is in fact terminated..."

In In re Marriage of Morgan, Iowa, 218 N.W. 2d 552, the trial court was required to determine if the marriage was complete. The appellate court noted:

"It is obvious that in making this determination the court must depend to a considerable extent upon the subjective state of mind of the parties. Hence the central inquiry in each situation should be a subjective one."

In Florida, the refrain repeats in Riley v. Riley, 271 So. 2d 181, 183:

"In other words, observable acts and occurrences in the marriage relationship and the causes of the state in which the parties find themselves are not as important or controlling as the question of whether the marriage is in fact ended because of the basic unsuitability of the spouses for each other and their state of mind toward the relationship."

The Riley case points to a central focus of inquiry, by stating that the important determination is the possibility of reconciliation. Riley at 183-4. That also is essential to the proceeding described in the Woodruff case. Woodruff at 663. The same concern is expressed in Georgia, "The only question is whether there are prospects

for a reconciliation." Harwell v. Harwell, 209 S.E. 2d 625, 627.

The courts are pretty much in agreement as to the nature of the inquiry. It is subjective and concerned with the state of mind of the parties. A number of courts emphasize possibility of reconciliation as the important determination.

Since the question of proof relates to a "state of mind" and a "possibility of reconciliation," what evidence do courts accept? Almost all jurisdictions appear to require some substantive evidence to show what the state of mind is. No jurisdiction, except perhaps Washington, adheres to the theory that no-fault divorce is administrative divorce. The final decision rests with the trial court. Woodruff at 663. It must have sufficient facts upon which to base its determination of dissolution or divorce. The quantity of proof may be, in fact, very little, but it must be there.

The Texas court has taken a stand somewhat different from the general rule. In Baxla at 738, it adopted a kind of scintilla rule:

"The prima facie case for dissolution should be satisfied by the declaration of petitioner that he or she sincerely believes that the marriage has irreparably broken down."

The Texas court, as noted before, has wrestled with the problem "of sordid and ugly" details as evidence. The Baxla case represents its solution to the problem. Interestingly, prior to the adoption of this language, Texas had the language:

"A divorce may be decreed without regard to fault if the marriage has become unsupportable because of discord or conflict of personalities that destroys the legitimate ends of the marriage relationship and prevents any reasonable expectation of reconciliation."
V.T.C.A. 30.01

This is clearly a no-fault ground, and was so interpreted by the Texas court. This ground had to be proved by full and satisfactory evidence. McCardy v. McCardy, 489 S.W. 2d 712. The scintilla rule adopted in Baxla, therefore, represents a break for the Texas court from prior decisions.

I have information in discussions with Kentucky lawyers that some courts in Kentucky at the trial level follow a similar rule to Baxla. There is no appellate decision in Kentucky, however, on the issue. As in Texas, the Kentucky courts applying the rule appear to fear any evidence of specific conduct which might bring out the sordid details. There is also fear that the details might improperly taint the property, maintenance, and custody settlements. The majority rule, however, requires some substantive evidence.

What can that evidence be? The inquiry must be into "state of mind" and "possibility of reconciliation." In Phillips v. Phillips, 274 So. 2d 71, 78, the Alabama court cites these factors as subject for inquiry in an incompatibility hearing: personality conflicts, lack of mutual concern for the emotional needs for each other, financial difficulties, physical separation, difference of interests, resentment, coolness, distrust, constant bickering, and irreversible antagonistic feelings. In Harrison v. Harrison, 314 So. 2d 812, 813, a Florida case, the husband received a divorce because of his wife's independent activities out of the home "as a prominent political figure." The evidence demonstrated that they had grown apart and lived separate lives, even though there was no evidence that the woman was a bad wife or mother.

In Texas, in Cusack v. Cusack, 491 S.W. 2d 714, 719, the husband obtained a divorce because his wife was "loud, opinionated, very aggressive, and self-righteous." He testified communications between them were nil, she was a lousy housekeeper, and that she spent no time with him. This was sufficient, even though there was evidence of his desire to live with another woman, and that the wife had no inkling of a problem until he walked out. Perhaps most persuasive were his vehement statements - "I do not intend to go back...There's no chance for reconciliation...There's not going to be a reconciliation, regardless of anything." Cusack at 719. A similar proof sequence was accepted in Florida in the Riley case, and in Alabama in the Phillips case. A separation of a long-standing nature was "irretrievable breakdown," even though there were some contacts between the parties during that time. Nooe v. Nooe, Florida, 277 So. 2d 835. In short, just about any factor which can demonstrate to the court that the marriage is ended, and that no reasonable prospect for reconciliation exists, is material and relevant to the dissolution of that marriage. Once the trial court is satisfied, that is sufficient.

That proof may turn out to be minimal, indeed. Witness the proof offered in McKim v. McKim, 493 P 2d 868, a California case. In McKim, the court states plainly that evidence of the condition of the marriage must be produced and that the legislature did not intend to make the proceedings perfunctory. McKim at 871, 872. Here was the proof, verbatim, which sufficed:

"Q. Mr. McKim, you are the respondent in this case, is that correct?

A. Right.

Q. At the time the petition in this matter was filed, was it your belief that there were irreconcilable differences between you and your wife?

A. Right.

Q. Since that time, have you and your wife attempted to resolve those differences?

A. Yes.

Q. In fact, you reconciled for a period of time. Is that correct?

A. Yes.

Q. That reconciliation did not work out?

A. No.

Q. Is it your opinion that at the present time there are irreconcilable differences?

A. Right.

Q. Is it your opinion that any further waiting period or conciliation would assist in saving this marriage?

A. No.

Q. As far as you are concerned, there is no longer a marriage?

A. No.

I suspect that McKim's proof of irreconcilable differences reflects much of the activity in uncontested divorces in all jurisdictions, whether they have stated a requirement for substantive evidence or not. The difference may be very little, in reality, in most instances between the jurisdictions which require positive, substantive evidence and those espousing a scintilla rule.

The fact remains that much evidence is provided in contested cases. The inquiries run fairly deep and elicit, often, evidence which would have been proof of fault grounds under older law. Those same inquiries raise evidence that might have been the basis of a defense, also. For example, in Husband W. v. Wife W., Delaware, 297A 2d 39, 40, there was considerable evidence of extreme physical cruelty on both sides, evidence enough to support a fault ground and a defense. The divorce was granted on the theory that there was no likelihood for reconciliation. Husband W. at 40. Delaware uses incompatibility as a "no-fault" ground.

Adultery appears in a number of cases. Cusack, supra; Kritzscher supra (also physical cruelty and long-term separation); In re Marriage of Morgan, supra; Riley, supra. Alcoholism and drunkenness appear in a couple of instances. Bakken v. Bakken, Texas, 503 S.W. 2d 315; Harwell, supra. Such conduct is no longer relevant to a question of fault, however, but it goes to the state of mind of the parties and to the prospects for reconciliation.

In In re Marriage of Morgan, supra, there was a counterclaim for a dissolution by the husband who was openly committing adultery, in an action by the wife for separate maintenance. The trial court denied the counterclaim on the grounds the conduct of the husband was improper. The Iowa court reversed the trial court and granted the dissolution. Fault is dead as an issue, noted the appellate court. Morgan at 557. The trial court's function is upon the

evidence, to see if the marriage is complete. Morgan at 560. If not, a dissolution should be granted. Ibid. The Morgan case reflects the relevance of evidence which was "of fault" in prior law. Note also Riley, supra, in which the adulterer husband obtained a dissolution.

The courts which have commented on the meaning of no-fault have recognized the substantive effect of the change-over in the law. Specific conduct, as evidence of fault, is not relevant. Facts which relate to the state of mind of the parties and to the possibility of reconciliation are relevant and generally admissible. The only controversy seemingly exists over the quantity of evidence required to establish a prima facie case. The courts vary, depending upon their perception of the policy issue served. Should all evidence which might enhance the aggravation of the parties be discouraged? How far should the non-adversarial concept be pushed? These are the questions concerning courts in no-fault jurisdictions. With respect to actual introduction of evidence, it is a matter of degree.

The Uniform Act provides language of "irretrievable breakdown" to which this growing body of law readily fits. Because Section 302(a)(2) does refer to a "finding supported by evidence," it probably fits most consistently with the majority rule. I would submit that, in effect, the cases are creating a uniformity of decision which makes the language of the Uniform Act more persuasive than it was when originally coined in 1971.