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IRRECONCILABLE DIFFERENCES: CALIFORNIA COURTS RESPOND TO NO-FAULT DISSOLUTIONS

The recent California Family Law Act¹ (hereinafter the Act or FLA) represents a concerted legislative effort to eliminate the fault, or "marital guilt," notion from proceedings for dissolution of marriage.² Radical changes in both the grounds to be proven and the procedures to be followed have been made.³ This Comment will describe the extent of change from prior law and will trace the consequences, and the problems, which have developed.

At first glance, the FLA appears to have eliminated virtually every barrier which a petitioning party previously had to overcome. In fact, various authorities believe that the FLA provides for virtually "carte blanche" dissolutions in that anyone seeking a dissolution of his or her marriage can obtain one merely by observing certain legal formalities.⁴ Yet, more than four years after its passage, the nature, quantum, and source of proof which must be adduced to obtain a dissolution under the Act have been, at best, only partially delineated.⁵ That the new ground for dissolution is itself defined with sufficient clarity to satisfy the requirements of constitutional due process has been tentatively affirmed,⁶ but whether or not actual trial court practice satisfies the procedural requirements of due process has not even been raised at the appellate level, let alone answered.⁷ The actual requirements of the FLA remain an enigma in California law.

I. THE PRIOR "FAULT" SYSTEM OF DIVORCE

In order to appreciate the extent of the changes worked by the Act, and especially to understand the "carte blanche" view taken by some, prior California divorce law must first be examined.

1. CAL. CIV. CODE §§ 4000-5138 (West 1970).

2. CAL. ASSEMBLY COMMITTEE ON JUDICIARY, REPORT OF 1969 DIVORCE REFORM LEGISLATION, 4 CAL. ASSEM. J. 8054, 8057 (Aug. 8, 1969) [hereinafter cited as ASSEMBLY REPORT]. See Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 U.C.L.A.L. REV. 1306 (1970) [hereinafter cited as *Innocence*]. See text accompanying notes 47-115 *infra*.

3. See text accompanying notes 47-115 *infra*.

4. See *Innocence*, *supra* note 2, at 1306 n.3.

5. See text accompanying notes 134-204 *infra*.

6. See text accompanying notes 208-66 *infra*.

7. See text accompanying notes 267-78 *infra*.

Former Civil Code section 92⁸ required the party seeking divorce to establish the other spouse's "fault." Only by proof of one or more of seven specified grounds was the court empowered to judicially terminate the marriage.⁹ The grounds consisted of adultery, extreme cruelty, conviction of felony, willful desertion, willful neglect, habitual intemperance, and incurable insanity.¹⁰ The first three of the causes required only a single act by the "guilty" spouse.¹¹ The others required continuance of a condition for a period of one year,¹² with the exception of incurable insanity for which three years was the requisite duration.¹³ Since it was necessary for the plaintiff to prove the defendant's fault, divorce proceedings were adversary in nature, and "questionable methods of gathering effective but lurid and ludicrous evidence were occasionally employed."¹⁴

More than ninety percent of all divorce complaints filed under the fault system were based upon extreme cruelty.¹⁵ Usually easy to prove, this ground could be established by the plaintiff's uncontested testimony that the defendant was "cold and indifferent," thus causing the plaintiff to become "nervous and upset."¹⁶ A single witness (required by statute¹⁷) corroborated this testimony, "and the legal charade was complete."¹⁸ Most proceedings were by default, and the requisite ground was often the product of an agreement between the spouses.¹⁹

8. Enacted 1872; amended, ch. 612, § 32, [1873-74] Cal. Stat. 191 (repealed, ch. 1608, § 3, [1969] Cal. Stat. 3313).

9. *Id.*

10. *Id.*

11. See, e.g., *Kirkpatrick v. Kirkpatrick*, 152 Cal. 316, 92 P. 853 (1907); *Woodworth v. Woodworth*, 242 Cal. App. 2d 301, 51 Cal. Rptr. 410 (1966); *Wirz v. Wirz*, 96 Cal. App. 2d 171, 214 P.2d 839 (1950); *Lucich v. Lucich*, 75 Cal. App. 2d 890, 172 P.2d 73 (1946).

12. CAL. CIV. CODE § 107 (enacted 1872; repealed, ch. 1608, § 3, [1969] Cal. Stat. 3313).

13. CAL. CIV. CODE § 108 (ch. 951, § 2, [1941] Cal. Stat. 2547; amended, ch. 1580, § 1, [1951] Cal. Stat. 3578; repealed, ch. 1608, § 3, [1969] Cal. Stat. 3313).

14. ASSEMBLY REPORT, *supra* note 2, at 8057.

15. Goddard, *A Report on California's New Divorce Law: Progress and Problems*, 6 FAMILY L.Q. 405, 406 (1972) [hereinafter cited as Goddard]; CAL. DEP'T OF PUB. HEALTH, BUREAU OF VITAL STATISTICS, DIVORCE IN CALIFORNIA 175 (1967).

16. Goddard, *supra* note 15, at 406; CALIFORNIA GOVERNOR'S COMMISSION ON THE FAMILY, REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY 119 (1966).

17. CAL. CIV. CODE § 130 (enacted 1872; amended, ch. 612, § 32, [1873-74] Cal. Stat. 191; repealed, ch. 1608, § 3, [1969] Cal. Stat. 3313).

18. See ASSEMBLY REPORT, *supra* note 2, at 8059, where this requirement is said to be "one of the most demeaning features of the old law."

19. *Id.* at 8057.

In a contested case, more conclusive evidence of misconduct was required by the court, and the proceedings tended to become protracted.²⁰ The necessity that the defendant be conclusively proven at "fault" for having caused the breakdown of the marriage aggravated the already bitter and antagonistic feelings between the parties, often leaving traumatic effects on all involved, especially children.²¹ "[T]he whole statutory scheme . . . promoted hate, scorn, bitterness, and acrimony."²² Yet, the defendant's opposition did not markedly reduce the plaintiff's chances of success. The only result of an attempt to prevent divorce was to make reconciliation less possible.²³

II. THE TREND TOWARD "NO-FAULT"

Critics of the marital guilt system felt that the fault concept was unrelated to the real cause(s) of marital failure. The commission of a single act (*e.g.*, cruelty or adultery) or the one-year continuance of a condition (*e.g.*, intemperance or desertion) would not necessarily cause the total breakdown of a marriage.²⁴ Yet, proof of any of the seven grounds, and only those seven, established marital breakdown *as a matter of law*. Under the prior law, no situation of domestic incompatibility, no matter how intolerable to either or both spouses, would justify divorce unless the facts of the situation could somehow support a statutory ground.²⁵ On the other hand, although the facts alleged and proven constituted a proper ground for divorce (*e.g.*, one act of adultery), they might not have caused the alleged (or any) breakdown of the marriage.²⁶ In fact, the actual effect of the commission of one of the specified acts on the spouse(s) and on the marriage itself was immaterial. Even the state's vital interest in the marriage relation did not invest the trial court with any special power to deny divorce when the marriage had not in fact broken down so long as a statutory ground was established by the evidence.²⁷

As early as 1952, Chief Justice Traynor's opinion in *De Burgh v. De Burgh*²⁸ recognized that, in the judicial decision to grant or to

20. Goddard, *supra* note 15, at 407.

21. ASSEMBLY REPORT, *supra* note 2, at 8057.

22. *Id.*

23. *Id.*

24. Goddard, *supra* note 15, at 407.

25. ASSEMBLY REPORT, *supra* note 2, at 8056.

26. Goddard, *supra* note 15, at 407.

27. ASSEMBLY REPORT, *supra* note 2, at 8058.

28. 39 Cal. 2d 858, 250 P.2d 598 (1952).

deny divorce, primary, if not sole, consideration should be given to the true condition of the marriage relationship and not to an established set of statutory causes of marital breakdown.²⁹ Writing for the California Supreme Court, Chief Justice Traynor stressed the point that "a marriage in name only is not a marriage in any real sense"³⁰ and should be dissolved:

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.³¹

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.³²

The court recognized the needlessness of making every divorce action a demeaning and sordid chronicle of human failings. Thus it urged "recognition of marriage failure as a social problem and correspondingly less preoccupation with technical marital fault."³³ It is clear that the court, through Chief Justice Traynor, was indicating that California should re-evaluate its divorce system and establish new grounds and procedures to deal realistically with the true causes of marital breakdown.

Chief Justice Traynor's call to re-evaluate the California divorce system was not answered until 1966. Concerned with the "high incidence of divorces in our society and its often tragic consequences,"³⁴ California Governor Edmund G. Brown established the Governor's

29. Mrs. De Burgh filed for divorce on the ground of extreme cruelty, and her husband cross-complained on the same ground. The trial court found both parties guilty of cruelty and denied each a divorce under the former Civil Code section 122 ground of recrimination. See note 89 *infra*. On appeal, Justice Traynor, writing for the California Supreme Court, reversed the trial court's decision by abrogating the prior judicial rule of mechanical operation of the recrimination defense. *De Burgh's* substitution of a broad discretion in the trial court to consider the important interests involved abolished the defense of recrimination for all practical purposes and allowed parties who were both "guilty" of cruelty to obtain a divorce. See Comment, *Retreat from Recrimination—De Burgh v. De Burgh*, 41 CALIF. L. REV. 320 (1953); Note, *Divorce: Recrimination—Is it Still a Defense in California?*, 4 HASTINGS L.J. 197 (1953); Comment, *California Recrimination Rule Reappraised*, 5 STAN. L. REV. 540 (1953).

30. 39 Cal. 2d at 868, 250 P.2d at 603.

31. *Id.* at 872, 250 P.2d at 606.

32. *Id.* at 864, 250 P.2d at 601.

33. *Id.* at 867, 250 P.2d at 603.

34. CALIFORNIA GOVERNOR'S COMMISSION ON THE FAMILY, REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY 1 (1966).

Commission on the Family³⁵ (hereinafter the Governor's Commission).

The Governor's Commission adopted the *De Burgh* rationale that dissolutions should be permitted "only upon a finding" that the marriage had failed beyond redemption³⁶ and recommended extensive revision of the state's divorce laws, including the complete elimination of the unrealistic fault grounds.³⁷ By its proposed discarding of fault, the Governor's Commission sought to eliminate the acrimony caused by procedures which required the petitioning party to specifically plead and prove a statutory ground,³⁸ but its primary motive was to deal with the real reasons of marital breakdown through

[new] procedures for the handling of marital breakdown which will permit the [proposed] Family Court to make a full and proper inquiry into the real problems of the family—procedures which will enable the Court to focus its resources upon the actual difficulties confronting the parties.³⁹

The proposed family court procedure was to begin with the filing of a neutral "petition of inquiry"⁴⁰ requesting the court to inquire into the continuation of the marriage.⁴¹ An initial evaluative interview with the court's professional staff was to be held in each case to determine the susceptibility of the spouses to conciliation or to assist the spouses in resolving disputed issues when conciliation was not workable and severance of the marriage was necessary.⁴² Raw data concerning the causes of marriage failure were also to be compiled.⁴³ Attendance of the parties at the interview was to be mandatory, a condition precedent to any further proceedings.⁴⁴ Following the interview(s), the staff would prepare a report on the condition of the marriage upon which the court would either order further counseling for a period not to exceed sixty days or proceed with dissolution.⁴⁵ If, at the end of the sixty day period, a reconciliation had not been effected, the court was *mandated* to enter a decree dissolving

35. *Id.*

36. *Id.* at 28.

37. *Id.* at 1, 28.

38. *Id.*

39. *Id.* at 2.

40. *Id.* at 17.

41. *Id.*

42. *Id.* at 18.

43. *Id.*

44. *Id.*

45. *Id.* at 22.

the marriage upon the application of either party.⁴⁶

When the FLA came before the California Legislature,⁴⁷ the Assembly Committee on the Judiciary (hereinafter the Assembly Committee) responded to the recommendations made by the Governor's Commission in the *Report of 1969 Divorce Reform Legislation*.⁴⁸ The Assembly Committee similarly accepted the *De Burgh* language that a dissolution should be based solely upon a judicial finding that "the legitimate objects of matrimony [had] been destroyed and [that] there [was] no reasonable likelihood that the marriage [could] be saved."⁴⁹ However, in a multi-faceted broadside attack, the Assembly Committee summarily rejected the Governor's Commission's proposals.⁵⁰

Counseling was believed to be effective only if both spouses were willing to participate.⁵¹ Additionally, to "inject the powers of the state into matters of private concern"⁵² was characterized as an unconscionable invasion of marital privacy.⁵³ The rejection of the proposal for mandatory counseling⁵⁴ was also influenced by pragmatic considerations. The estimated cost was in excess of \$10 million per year, "a heavy price to pay when no evidence [had] established that counseling would have any significant effect upon family stability."⁵⁵ Finally, the Assembly Committee determined that the proposed system, under which the court was required to accept the counselor's recommendations,⁵⁶

would have terminated the court's power to deny a decree of dissolution . . . [and that] the court would be performing a ministerial function which could be accomplished just as well by a referee.⁵⁷

To implement a dissolution procedure without mandatory counseling while still adhering to the *De Burgh* rationale the Assembly Committee retained the established conciliation court system⁵⁸ and the re-

46. *Id.* at 23.

47. Cal. A.B. 530, Reg. Sess. (1969); Cal. S.B. 252, Reg. Sess. (1969).

48. ASSEMBLY REPORT, *supra* note 2.

49. 39 Cal. 2d at 872, 250 P.2d at 606.

50. ASSEMBLY REPORT, *supra* note 2, at 8056.

51. *Id.*

52. *Id.*

53. *Id.*

54. See text accompanying notes 40-46 *supra*.

55. ASSEMBLY REPORT, *supra* note 2, at 8056.

56. *Id.* at 8058. See text accompanying notes 44-46 *supra*.

57. ASSEMBLY REPORT, *supra* note 2, at 8056.

58. *Id.* at 8056. See CAL. CODE CIV. PRO. §§ 1730-72 (West 1970); J. RYBURN & M. ELKIN, ATTORNEYS' READY REFERENCE TO THE CONCILIATION COURT (Los Angeles

quirement of a judicial determination of the existence of alleged grounds or reasons for divorce, but with major internal revisions to enable the courts to deal with the factual issues surrounding the marital breakdown.⁵⁹

Prior law had merely listed certain acts (*e.g.*, adultery, intemperance, etc.) which were conclusively presumed to cause a breakdown of the marriage without any inquiry into the specific relation of the act to the breakdown or any proof required that the marriage had in fact broken down irretrievably.⁶⁰ Furthermore, the prior procedure had required that the court put its finger on the guilty party whose act or condition had single-handedly caused the presumed breakdown.⁶¹ Yet, as the Assembly Committee acknowledged:

A marriage is a delicate interpersonal relationship which may break down for any number of reasons, usually a combination of circumstances involving responsibility—or perhaps the lack of it—on the part of *both* parties. An act which may be considered wrongful or immoral according to contemporary standards, and sufficient to constitute grounds for divorce, might very well have been directly caused by a course of conduct on the part of the other spouse which has not customarily been characterized as wrongful.⁶²

Because the possible causes of marital breakdown often are multiple, complex, overlapping, and non-discursive, the Assembly Committee chose to focus on the fact of a breakdown as the basis for dissolution, rather than attempting to formulate a mechanical list of potential causes.⁶³ The existence of a breakdown was to be determined by an examination of the individual, subjective reactions of the parties themselves.⁶⁴ Therefore,

absolute refusal on the part of one spouse to live with the other, despite a conciliatory attitude and effort on the part of the latter, was thought by the great majority of the legislators and witnesses considering the question to be a sufficient reason for dissolution. In that situation the court could hardly justify a refusal to grant an order of dissolution since the marriage certainly has broken down. Refusal would amount to a

County Bar Ass'n 1974); Elkin, *Conciliation Courts: The Reintegration of Disintegrating Families*, 22 THE FAMILY COORDINATOR 63 (1973).

59. See text accompanying note 57 *supra* and notes 67-107 *infra*.

60. ASSEMBLY REPORT, *supra* note 2, at 8058. See text accompanying notes 8-26 *supra*.

61. ASSEMBLY REPORT, *supra* note 2, at 8057. See text accompanying notes 8-27 *supra*.

62. ASSEMBLY REPORT, *supra* note 2, at 8057.

63. *Id.*

64. *Id.*

legal perpetuation of a relationship which has ceased to exist in fact.⁶⁵

But to allow the parties themselves, or even a third-party counselor, to determine the fact of marital breakdown was believed to be an impermissible encroachment on the judicial function.⁶⁶

Thus, the FLA maintained a conclusively presumptive causational approach to dissolution, establishing as the principal ground *irreconcilable differences* "which have caused the irremediable breakdown of the marriage."⁶⁷ "Irreconcilable differences" was defined as those grounds which are determined by the court to be "substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved."⁶⁸ The legislature also retained incurable insanity as a separate and distinct ground.⁶⁹ It was thought that one who is incurably insane falls within a wholly different category than one who provokes or otherwise causes an irreconcilable difference,⁷⁰ but the legislature lowered the requisite period of insanity to one year.⁷¹

Thus, the umbrella concept of "irreconcilable differences" encompasses virtually everything that causes a marriage breakdown.⁷² So long as the irreconcilable differences have caused the irremediable breakdown of the marriage, the ground is met since it is merely "descriptive of the *frame of mind of the spouses* in a marriage which is no longer viable."⁷³ Therefore, the irreconcilable differences standard is necessarily subjective. A situation which totally destroys one marriage may occur in another without causing serious problems.⁷⁴ Furthermore, the standard is satisfied if *either* spouse suffers an irretrievable marriage breakdown.⁷⁵

Consequently, the parties are required to plead and prove a ground which must, by definition, demonstrate the existence of the marital breakdown upon which dissolution is premised.⁷⁶ But the judicial function was not thereby relegated to mere ratification, for "the court must . . . require proof of the grounds alleged . . . which make[s]

65. *Id.* at 8058.

66. *Id.*

67. *Id.* (emphasis added).

68. *Id.* (emphasis added).

69. *Id.* at 8057.

70. *Id.*

71. *Id.* See also CAL. CIV. CODE § 4510 (West 1970).

72. CAL. CIV. CODE §§ 4506(1), 4507 (West 1970).

73. ASSEMBLY REPORT, *supra* note 2, at 8057 (emphasis added).

74. *Id.*

75. *Id.* at 8058. See text accompanying note 65 *supra*.

76. See notes 59-61, 63-68, 72-75 *supra* and accompanying text.

it appear that the marriage should be dissolved."⁷⁷

By the elimination of fault grounds, the California Legislature had hoped "to induce a conciliatory and uncharged atmosphere which [would] facilitate resolution of the other issues and perhaps effect a reconciliation."⁷⁸ Although realizing that "[i]t [was] unrealistic to expect to eliminate all the acrimony built up between the separating spouses,"⁷⁹ the Assembly Committee believed that "the procedures themselves [need] not add more divisiveness."⁸⁰

The California Legislature therefore proceeded to devise radically new procedures designed to reduce the acrimony which had characterized divorce proceedings under the prior law.⁸¹ The term "divorce" was itself eliminated and replaced by "dissolution of marriage."⁸² A neutral petition—*In re the Marriage of Mr. and Mrs. X*—took the place of the adversary complaint, *X v. X*.⁸³ The requirement of a corroborating witness was repealed,⁸⁴ as were the former equitable grounds for denial of divorce⁸⁵ (connivance,⁸⁶ collusion,⁸⁷ condonation,⁸⁸ recrimination,⁸⁹ or limitation and lapse of time⁹⁰). But

77. CAL. CIV. CODE §§ 4507, 4511 (West 1970).

78. ASSEMBLY REPORT, *supra* note 2, at 8058.

79. *Id.*

80. *Id.*

81. *Id.* at 8057.

82. CAL. CIV. CODE § 4350 (West Supp. 1974).

83. *Id.* § 4503 (West 1970).

84. CAL. CIV. CODE § 130 (enacted 1872; amended, ch. 612, § 32, [1873-74] Cal. Stat. 191; repealed, ch. 1608, § 3 [1969] Cal. Stat. 3313). See also ASSEMBLY REPORT, *supra* note 2, at 8059.

85. CAL. CIV. CODE § 111 (enacted 1872; repealed, ch. 1608, § 3, [1969] Cal. Stat. 3313).

86. CAL. CIV. CODE § 112 (enacted 1872; repealed, ch. 1608, § 3, [1969] Cal. Stat. 3313). The former section read as follows: "Connivance is the corrupt consent of one party to the commission of the acts of the other, constituting the cause of divorce."

87. CAL. CIV. CODE § 114 (enacted 1872; repealed, ch. 1608, § 3, [1969] Cal. Stat. 3313). The former section read as follows:

Collusion is an agreement between husband and wife that one of them shall commit, or appear to have committed, . . . acts constituting a cause of divorce, for the purpose of enabling the other to obtain a divorce.

88. CAL. CIV. CODE § 115 (enacted 1872; repealed, ch. 1608, § 3, [1969] Cal. Stat. 3313). The former section read as follows: "Condonation is the conditional forgiveness of a matrimonial offense constituting a cause of divorce."

89. CAL. CIV. CODE § 122 (enacted 1872; repealed, ch. 1608, § 3, [1969] Cal. Stat. 3313). The former section read as follows: "Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce."

90. CAL. CIV. CODE § 124 (enacted 1872; amended, ch. 612, § 31, [1873-74] Cal. Stat. 191; repealed, ch. 1608, § 3, [1969] Cal. Stat. 3313). The former section read as follows:

such basically cosmetic procedural changes by themselves did not address the principal cause of bitterness and resentment: allegations of spousal misconduct. Thus, the legislature strove to enable

[t]he court, counsel and the parties [to] rationally consider the marriage relationship according to the irreconcilability standard without . . . accusatory pleadings or testimony of bad or immoral acts committed by one of the parties.⁹¹

For whatever reason introduced, the acrimonious effect of accusations of misconduct would remain unchanged. It was recognized that marital breakdown might occur without fault on either side, for the very existence of irreconcilable differences might hinge on one spouse's belief in the other's fault.⁹² For this reason, the legislature sought to assure that evidence of spousal fault would not *unnecessarily* embitter the proceedings by providing:

[E]vidence of specific acts of misconduct is inadmissible except where child custody is in issue or where the court deems such evidence necessary to prove irreconcilability.⁹³

The legislature also empowered the California Judicial Council to formulate rules establishing specific practices and procedures to implement the new Act,⁹⁴ but the FLA as written seemed to meet all the legislative aims. The parties were still required to plead and prove the cause(s) of the requisite breakdown, determination of which was still a judicial function.⁹⁵ Yet, under the FLA, the possibility of an erroneous judicial grant or denial of divorce was greatly reduced. Existence of the ground necessarily demonstrated the existence of the requisite breakdown,⁹⁶ and a proper balance had apparently been struck between the occasional need for proof of fault to

A divorce must be denied:

One—When the cause is adultery and the action is not commenced within two years after the commission of the act of adultery, or after its discovery by the injured party; or

Two—When the cause is conviction of felony, and the action is not commenced before the expiration of two years after a pardon, or the termination of the period of sentence.

Three—In all other cases when there is an unreasonable lapse of time before the commencement of the action.

91. ASSEMBLY REPORT, *supra* note 2, at 8058.

92. *Id.* at 8057.

93. *Id.* at 8059. See also CAL. CIV. CODE § 4509 (West 1970). Does this language mean that evidence other than *specific acts of misconduct*, similar to the prior type of fault evidence, is *admissible*? This question has not been judicially considered. See text accompanying notes 272-75 *infra*.

94. ASSEMBLY REPORT, *supra* note 2, at 8059.

95. *Id.* at 8058.

96. *Id.*

establish the ground and the dual goals of reducing interspousal hostility and encouraging reconciliation.⁹⁷

These goals are strongly reflected throughout the dissolution proceedings. A proceeding is commenced by the filing of a petition in the superior court.⁹⁸ In those counties which have established a conciliation court, the petitioner must also complete and file a confidential questionnaire.⁹⁹ A blank copy of the questionnaire must be served with the summons and petition upon the other spouse,¹⁰⁰ who in turn may complete and return the questionnaire.¹⁰¹ The forms are sent to the conciliation court and the superior court judge is generally precluded from reviewing them.¹⁰²

If either spouse had indicated that he or she desires counseling, the conciliation court will request both parties to fill out a petition for counseling.¹⁰³ Should the couple cooperate and reconcile, the case

97. *Id.*

98. CAL. CIV. CODE § 4503 (West 1970); CAL. R. CT. 1223. While the dissolution proceeding is pending, the superior court may order the husband or wife to pay a reasonable amount for the support and maintenance of the other spouse and of any children. CAL. CIV. CODE § 4357 (West Supp. 1974). *See also* CAL. CIV. CODE § 4359 (West Supp. 1974) which provides for *ex parte* protective orders while proceedings for dissolution are pending.

In order to receive pendente lite support, a party must file an order to show cause with the court which then determines the amount of support at a preliminary hearing. ATTORNEY'S GUIDE TO FAMILY LAW PRACTICE § 3.15 (C. Brosnahan & G. Colburn eds. 1972) [hereinafter cited as ATTORNEY'S GUIDE]. A party need not prove that he or she has a reasonable probability of success in order to be entitled to the pendente lite support, costs, and attorney's fees which enable the party to proceed with the dissolution. *Hudson v. Hudson*, 52 Cal. 2d 735, 344 P.2d 295 (1959); *Kalmus v. Kalmus*, 103 Cal. App. 2d 405, 230 P.2d 57 (1951); *Knox v. Knox*, 88 Cal. App. 2d 666, 199 P.2d 766 (1948).

Although the order made at the preliminary proceeding is not suppose to prejudice the rights of the parties with respect to any subsequent order which may be made at the dissolution proceeding (CAL. CIV. CODE § 4357 (West Supp. 1974)), this is not necessarily true, because usually a trial court will change the preliminary order only upon a strong showing by the party of change of circumstances.

99. CAL. CIV. CODE § 4356 (West Supp. 1974); CAL. R. CT. 1224, 1228. The confidential questionnaire was recently abolished by the state legislature. The California Judicial Council is now considering a new form which would merely ask if counseling is requested by the party.

100. CAL. CIV. CODE § 4503 (West 1970).

101. *Id.* § 4356 (West Supp. 1974).

102. Upon the filing of the questionnaire, the clerk shall protect it from access or inspection by unauthorized persons and shall promptly transfer it to the conciliation court.

CAL. R. CT. 1228. Interview with Hon. Jack T. Ryburn, Supervising Judge, Los Angeles County Superior Court, Family Law Department, in Los Angeles, July 12, 1973 [hereinafter cited as Ryburn Interview].

103. Interview with Meyer Elkin, M.S.W., Director, Family Counseling Services,

will never appear on the superior court calendar.¹⁰⁴ However, if either spouse (usually the petitioner) refuses to attempt reconciliation or to even submit to counseling, the conciliation court is powerless to force the issue further, and the case will come up on calendar for trial in superior court.¹⁰⁵

However, most, if not all, counties require confidential questionnaires whether or not a conciliation court has been established.¹⁰⁶ In counties without such courts, any questionnaires required are necessarily reviewed by the superior court judge, even though this examination is felt to affect his impartiality.¹⁰⁷

The *Attorney's Guide to Family Law Act Practice*¹⁰⁸ sets forth sample questions of the type commonly asked the petitioner to establish irreconcilable differences at a default trial:

Q.1 You have stated that there are irreconcilable differences between you and your spouse. Is it your belief that your marriage has completely broken down?

Q.2 Do you believe that conciliation counseling, the assistance of this court, or a waiting period can restore the marriage?¹⁰⁹

Civil Code section 4508 requires that, if "the court finds that there are irreconcilable differences which have caused the irremediable breakdown of the marriage, it shall order the dissolution of the marriage."¹¹⁰ Judges of the Los Angeles County Superior Court interpret section 4508 to mean that dissolution should be granted if the party answers "Yes" to Question 1, and "No" to Question 2, since those answers evidence irreconcilability.¹¹¹ However, "if it appears that there is a reasonable possibility of reconciliation, the court shall

Conciliation Court of the Superior Court, Los Angeles County, in Los Angeles, Mar. 27, 1974.

104. Ryburn Interview, *supra* note 102.

105. *Id.*

106. *Id.* See ATTORNEY'S GUIDE, *supra* note 98, § 3.11 *et seq.* for a complete list of counties in California which have conciliation courts.

107. Ryburn Interview, *supra* note 102. In this situation, the judge must act as both the marriage counselor who reads the confidential questionnaire and as the impartial judge who hears no evidence of misconduct. *Id.*

108. ATTORNEY'S GUIDE, *supra* note 98.

109. *Id.* § 3.24.

110. CAL. CIV. CODE § 4508(a) (West 1970).

111. Ryburn Interview, *supra* note 102; Interview with the Honorable Nancy Watson, Judge, Los Angeles County Superior Court, Family Law Department, in Los Angeles, June 26, 1973 [hereinafter cited as Watson Interview]; Interview with Commissioner James Reese, Judge Pro Tem, Los Angeles County Superior Court, Family Law Department, in Los Angeles, June 26, 1973 [hereinafter cited as Reese Interview].

continue the proceeding for a period not to exceed 30 days."¹¹² Thus, if the party were to answer "No" to Question 1 and/or "Yes" to Question 2, it would be evident that the party would like to attempt a reconciliation with his or her spouse. Therefore, the court, in keeping with the legislative policy favoring reconciliation, would send the parties to conciliation court to determine if a 30-day extension for counseling could save the marriage.¹¹³

Since default divorces are seldom appealed, the sufficiency of such unilateral conclusionary testimony has never been expressly ratified at the appellate level.¹¹⁴ It would appear that the usual sparsity of testimony is buttressed both by the absence of contradictory evidence and by the judge's opportunity to further question the petitioner in order to conclusively establish the existence of irreconcilable differences.¹¹⁵

However, were one spouse to testify that there were irreconcilable differences and the responding spouse to deny their existence, problems would apparently arise as to the parties' relative credibility and as to the sufficiency of such conclusionary evidence to sustain a judgment.¹¹⁶ The legislature specifically provided in Civil Code section 4509 that

evidence of specific acts of misconduct is improper and inadmissible, *except where it is determined by the court to be necessary to establish the existence of irreconcilable differences.*¹¹⁷

The legislative intent, as evidenced by the *Report of 1969 Divorce Reform Legislation* and the language of the Civil Code, would at first glance seem to require factual, not conclusionary, testimony as to the existence of irreconcilable differences in such situations.¹¹⁸ However, the apparent contradiction embodied in a requirement of the same sort of fault evidence, and resultant acrimony, which the FLA was purportedly enacted to eliminate has been neatly avoided by trial court judges.¹¹⁹

112. CAL. CIV. CODE § 4508(a) (West 1970).

113. Ryburn Interview, *supra* note 102.

114. No default dissolutions are appealed on the issue of sufficiency of the evidence used to prove the grounds, as evidenced by the total absence of any such reported cases, due to waiver of the issue by the defaulting party. Dissolution being an in rem proceeding, the issue is waived, and the result is res judicata, even without actual notice to the respondent. *Christiana v. Rose*, 100 Cal. App. 2d 46, 222 P.2d 891 (1950).

115. See text accompanying note 139 *infra*.

116. See notes 117-33 *infra* and accompanying text.

117. CAL. CIV. CODE § 4509 (West 1970) (emphasis added).

118. See text accompanying notes 66-77 *supra*.

119. See text accompanying notes 120-28 *infra*.

The Honorable Jack T. Ryburn,¹²⁰ the Honorable Nancy B. Watson,¹²¹ and Commissioner James Reese¹²² all maintain that the affirmation by one spouse and the denial by the other that such differences do exist is itself evidence of irreconcilable differences. The judges view this situation as one in which the marriage has obviously broken down and should be dissolved because one party, for whatever reason, does not want to remain married to the other.¹²³

Commissioner Reese commented:

It takes two people in a marriage to say "I do." If one party says "I don't," then there is no marriage performed. This applies to dissolutions, in that if one spouse says "I don't" (*i.e.*, I don't want to stay married), then there is no marriage either.¹²⁴

Thus, it is perhaps not surprising that the judges of the Los Angeles County Superior Court, Family Law Department, read Civil Code section 4509 to require that "evidence of specific acts of misconduct shall be improper and inadmissible" whenever the existence of irreconcilable differences has been controverted. In fact, the three judges feel that the contested dissolution has ceased to exist.¹²⁵ In actual practice, if one party claims that there are irreconcilable differences, other evidence will seldom be admitted and a dissolution will be granted, even should the other spouse attempt to deny the ground's existence.¹²⁶ There is thus really no material difference between a default, or uncontested, proceeding and a contested one. In either situation, the same testimony or proof is admitted.¹²⁷ However, the three judges have each indicated that, if there is no "absolute refusal" by either spouse to live with the other, dissolution will not be granted.¹²⁸

Thus, the trial courts have construed the FLA in such a manner as to turn all dissolutions into basically *ex parte* actions. To require

120. Ryburn Interview, *supra* note 102.

121. Watson Interview, *supra* note 111.

122. Reese Interview, *supra* note 111.

123. Reese Interview, *supra* note 111; Ryburn Interview, *supra* note 102; Watson Interview, *supra* note 111.

124. Reese Interview, *supra* note 111.

125. Reese Interview, *supra* note 111; Ryburn Interview, *supra* note 102; Watson Interview, *supra* note 111.

126. Reese Interview, *supra* note 111; Ryburn Interview, *supra* note 102; Watson Interview, *supra* note 111.

127. Reese Interview, *supra* note 111; Ryburn Interview, *supra* note 102; Watson Interview, *supra* note 111.

128. Reese Interview, *supra* note 111; Ryburn Interview, *supra* note 102; Watson Interview, *supra* note 111.

the court to make its determination on the basis of uncontradicted conclusionary testimony in all cases has, as a practical matter, made the grant of dissolution automatic.¹²⁹ This has engendered criticism that the courts are operating a system of "divorce for the asking" in clear contravention of the presumed legislative intent.¹³⁰

Appellate review of trial court practices under the FLA has been virtually non-existent. Grants of dissolution under the Act are seldom appealed, except upon collateral matters such as child custody, spousal or child support payments, and division of community property.¹³¹ In fact, only once has the California Supreme Court dealt with the evidentiary requirements for dissolution under the FLA. *In re Marriage of McKim*¹³² has been the court's sole opportunity to reaffirm the judicial supervisory power over dissolution proceedings under the FLA in order to prevent perfunctory dissolutions of marriage and to help achieve the legislative goal of reconciliation.¹³³

III. *In re Marriage of McKim*

The McKims were married in July, 1968, and separated two months later. In October of the same year, Mrs. McKim filed for divorce on the ground of extreme cruelty. Mr. McKim's default was entered and the case then went off calendar. On February 17, 1970, the pending action came up for hearing as a proceeding for dissolution of marriage on the ground of irreconcilable differences under the new Family Law Act. Mrs. McKim was absent from the hearing, and her attorney did not explain her absence nor did he produce her testimony by affidavit or other means. The husband did not appear as a party, but attended the hearing under subpoena as a witness for the wife.¹³⁴ His was the only testimony offered:

- 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 these differences?

129. See text accompanying notes 120-28 *supra*.

130. See text accompanying notes 66-77 *supra*.

131. See note 114 *supra*.

132. 6 Cal. 3d 673, 493 P.2d 868, 100 Cal. Rptr. 140 (1972).

133. *Id.* at 681, 493 P.2d at 871, 100 Cal. Rptr. at 144.

134. *Id.* at 678, 493 P.2d at 870, 100 Cal. Rptr. at 142.

A. Yes.

Q. In fact, you were 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.¹³⁵

The trial court denied the dissolution, holding that the wife was required to personally appear at the hearing and that the ground for dissolution could not be proven by the husband who had defaulted and whose testimony it held inadmissible as a matter of law.¹³⁶ The trial court, therefore, never reached the issue of whether or not the testimony was sufficient to establish the existence of irreconcilable differences.¹³⁷

The court of appeal reversed the trial court's decision.¹³⁸ In an opinion by Justice Kingsley, the court stated that

[i]t is clear from the record that [the] dissolution was not denied because the court was not satisfied with the quality or the quantum of proof; the action was taken solely because the proof came from the wrong source. Had the [trial] court doubted that the differences actually were "irreconcilable," it had the power to cross-examine the [husband] on his conclusionary testimony and, under [section] 4509, to require the [husband] to amplify his conclusions by testimony as to the *specific matters* which would support that conclusion.¹³⁹

Furthermore, the court of appeal determined that the trial court had also based its denial on the fact that the McKims had *agreed* to a divorce.¹⁴⁰ Under the prior law, such an agreement would have constituted collusion,¹⁴¹ a ground for denial. The appellate court, however, could

135. *Id.* at 678 n.3, 493 P.2d at 870 n.3, 100 Cal. Rptr. at 142 n.3.

136. *Id.* at 677-78, 493 P.2d at 870, 100 Cal. Rptr. at 142.

137. *Id.* at 681, 493 P.2d at 873, 100 Cal. Rptr. at 145.

138. 95 Cal. Rptr. 136-37 (1971).

139. *Id.* at 137-38 (footnote omitted and emphasis added).

140. *Id.* at 137.

141. *Id.*

see, in our present statute, nothing to suggest that there remains any policy objection to an agreement by the parties to a marriage to the fact that their differences are "irreconcilable" and that, therefore, it should be dissolved.¹⁴²

The California Supreme Court reversed the appellate court's decision and affirmed the trial court's denial of dissolution.¹⁴³ The basic issues which the supreme court sought to resolve in *McKim* were identical to those upon which the lower courts had passed. First, what quantum, type, and source of proof of irreconcilable differences are required?¹⁴⁴ Second, does the former policy against collusive dissolutions of marriage continue to apply to proceedings under the FLA?¹⁴⁵

A. Measure and Source of Proof

Reaffirming the judiciary's supervisory power over dissolution proceedings, Chief Justice Wright, writing for the majority, observed that the legislature had rejected the plan proposed by the Governor's Commission,

under which the court would have been required to dissolve a marriage on a showing that the parties had taken certain procedural steps and that a certain period of time had passed.¹⁴⁶

Instead, the legislature had clearly intended that the court should determine whether or not a marital breakdown had occurred.¹⁴⁷ Since "[t]he court cannot perform this contemplated function without evidence as to the condition of the marriage,"¹⁴⁸ evidence of irreconcilable differences is obviously required in all cases.¹⁴⁹ As the legislature had mandated in Civil Code section 4511:

No decree of dissolution can be granted upon the default of one of the parties . . . but the court must . . . require proof of the grounds alleged, and such proof, if not taken before the court, shall be by affidavit.¹⁵⁰

Furthermore, section 4511, when read with sections 4506¹⁵¹ and

142. *Id.* (footnote omitted).

143. 6 Cal. 3d 673, 684, 493 P.2d 868, 873, 100 Cal. Rptr. 140, 146.

144. See text accompanying notes 146-75 *infra*.

145. See text accompanying notes 176-94 *infra*.

146. 6 Cal. 3d at 679, 493 P.2d at 871, 100 Cal. Rptr. at 143; ASSEMBLY REPORT, *supra* note 2, at 8058.

147. 6 Cal. 3d at 679, 493 P.2d at 871, 100 Cal. Rptr. at 143.

148. *Id.* at 679, 493 P.2d at 871-72, 100 Cal. Rptr. at 143-44.

149. *Id.*

150. *Id.* at 679, 493 P.2d at 872, 100 Cal. Rptr. at 144.

151. A court may decree a dissolution of the marriage or legal separation on either of the following grounds, which shall be pleaded generally:

4507¹⁵² and with rule 1237¹⁵³ of the California Rules of Court, requires proof of (the ground defined as) "substantial reasons for not continuing the marriage."¹⁵⁴

This requirement or proof to the court's satisfaction is paramount, overshadowing the legislature's other aims in enacting the FLA. For [a]lthough the Legislature intended that as far as possible dissolution proceedings should be nonadversary, eliminating acrimony, it did not intend that findings of the existence of irreconcilable differences be made perfunctorily.¹⁵⁵

Such language clearly reveals that, in affirming the trial court's denial of divorce, the supreme court also felt that the husband's testimony had been, in some way, inadequate. Since the proffered testimony was virtually identical to the evidence on which dissolutions are regularly granted,¹⁵⁶ *McKim* might be interpreted as holding that more specific proof is required. Such an interpretation would lead to an unfortunate result; the only way in which greater specificity could be achieved would be by a general return to pre-FLA fault testimony under section 4509's allowance of evidence of misconduct.¹⁵⁷ Moreover, the language calling for such an interpretation is dicta, for the *McKim* court never reached the issue of the sufficiency of the proof offered.¹⁵⁸ Rejection of the husband's testimony was based

(1) Irreconcilable differences, which have caused the irremediable breakdown of the marriage.

(2) Incurable insanity.

CAL. CIV. CODE § 4506 (West 1970).

152. Irreconcilable differences are those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved.

CAL. CIV. CODE § 4507 (West 1970).

153. [T]he clerk shall enter the respondent's default upon proper application of the petitioner and thereafter the petitioner may apply to the court for the relief sought in the petition. The court shall require proof to be made of the facts stated in the petition and may enter its judgment accordingly.

CAL. R. CT. 1237.

154. CAL. CIV. CODE § 4507 (West 1970) (emphasis added).

155. 6 Cal. 3d at 679, 493 P.2d at 871, 100 Cal. Rptr. at 143. *In re Marriage of Higgason*, 29 Cal. App. 3d 806, 106 Cal. Rptr. 84 (1973), further re-enforced the court's supervisory role in protecting against perfunctory dissolutions by holding that a guardian *ad litem* cannot bring a proceeding for dissolution.

156. See text accompanying notes 108-28 *supra*.

157. See Note, *In re Marriage of McKim—Playacting and the New Family Law Act*, 4 SW. U.L. REV. 325 (1972), which stated:

Unfortunately, *McKim* will not be remembered as a case which judicially underscored the enlightened provisions of the current law Instead, *McKim* will be recalled as the case which imposed, and otherwise read into the current law, certain restrictive requirements reminiscent of the "Pre-Family Law Act era."

Id.

158. 6 Cal. 3d at 681, 493 P.2d at 873, 100 Cal. Rptr. at 145.

solely on its source:

[A] trial court must require the petitioner to appear personally and testify at the hearing unless, in exceptional circumstances where an explanation of petitioner's absence is shown to the satisfaction of the court, the court in its sound discretion permits the requisite proof to be made by affidavit as recognized by section 4511.¹⁵⁹

The court interpreted Civil Code section 4511 to require that the *petitioning party* appear personally and testify at the hearing.¹⁶⁰ However, as the majority admitted, while section 4511 and rule 1237 both require proof of the grounds alleged, neither by its terms specifically requires the petitioner to appear.¹⁶¹ The court relied on subdivision four of former Code of Civil Procedure section 585¹⁶² (replaced by rule 1237)¹⁶³ which specifically excepted "cases which involve the dissolution or annulment of marriage" from the statutory authorization of judicial "use of affidavits, in lieu of personal testimony, as to all or any part of the evidence or proof required or permitted to be offered, received, or heard in such [default] cases."¹⁶⁴ The court noted that

[t]his provision suggested a restraint upon the court's discretion to permit the use of affidavits in dissolution proceedings and we find nothing in rule 1237 suggesting an abrogation of this restrictive policy.¹⁶⁵

But, even if the silence of rule 1237 does not suggest an abrogation of the restrictive policy of the former specific exception, section 4511's unqualified authorization of affidavits clearly contradicts past practice.¹⁶⁶ Strangely, however, the court interpreted section 4511's contradiction of former practice as requiring adherence to former practice "insofar as is practicable."¹⁶⁷ Thus, the petitioner would not be required to appear "in exceptional circumstances where . . . the court in its sound discretion permits the requisite proof to be made by affidavit"¹⁶⁸

This infusion of qualifications into section 4511's unqualified lan-

159. *Id.* at 682, 493 P.2d at 874, 100 Cal. Rptr. at 146.

160. *Id.*

161. See text accompanying notes 150-59 *supra*.

162. CAL. CODE CIV. PRO. § 585(4) (West Supp. 1974); 6 Cal. 3d at 682, 493 P.2d at 873, 100 Cal. Rptr. at 145.

163. 6 Cal. 3d at 681-82, 493 P.2d at 873, 100 Cal. Rptr. at 145.

164. *Id.* at 682, 493 P.2d at 873, 100 Cal. Rptr. at 145.

165. *Id.* at 682, 493 P.2d at 873-74, 100 Cal. Rptr. at 145-46.

166. CAL. CIV. CODE § 4511 (West 1970). See note 150 *supra* and accompanying text.

167. 6 Cal. 3d at 682, 493 P.2d at 874, 100 Cal. Rptr. at 146.

168. *Id.*

guage was also said to be supported by the court's reliance on prior law. Although forced to admit that "[t]he former law did not forbid the granting of a divorce to an absent plaintiff,"¹⁶⁹ the court stressed that trial judges "as a *matter of policy* normally required that the plaintiff appear personally and testify in court"¹⁷⁰ Therefore, *McKim* apparently transforms a judicial "policy" under the former law into a rule of law under the FLA. Further, by basing its decision upon the contention that past law had been silently incorporated into the FLA, the court was forced to incorporate other aspects of prior policy.¹⁷¹ Thus, the court conditionalized even the petitioner's duty to appear by affidavit:

We further hold that in exceptional cases where the court deems it warranted, it may receive in lieu of petitioner's testimony *or affidavit* the testimony of other competent witnesses *including the respondent*.¹⁷²

While affirming the trial court's denial of dissolution, the supreme court not only recognized but also proclaimed that

[n]othing in the Family Law Act or the Family Law Rules suggests that the default of a party affects his competence as a witness or the admissibility of his testimony as to any issue of which he has knowledge.¹⁷³

Of course, when admitted by the court, "[s]uch testimony . . . must be sufficient to enable the court to make the required findings"¹⁷⁴ of irretrievable breakdown of the marriage. It is this language which may cause *McKim* to appear to hold that the testimony of the husband was inadequate, irrespective of its source. However, the supreme court then remanded the action to the trial court for further proceedings since

[u]nnecessary hardship would result from denying relief to the wife because she . . . was unaware that the trial court in its discretion could require that she testify in person or, if exceptional circumstances were shown, by affidavit.¹⁷⁵

Clearly, *McKim* was thus solely based on the source of the evidence, not on its quality or on its quantum.

169. *Id.* at 681, 493 P.2d at 873, 100 Cal. Rptr. at 145.

170. *Id.* (emphasis added).

171. *Id.*

172. *Id.* at 682, 493 P.2d at 874, 100 Cal. Rptr. at 146 (emphasis added).

173. *Id.* at 681, 493 P.2d at 873, 100 Cal. Rptr. at 145.

174. *Id.* at 682, 493 P.2d at 874, 100 Cal. Rptr. at 146.

175. *Id.* at 682-83, 493 P.2d at 874, 100 Cal. Rptr. at 146.

B. Collusive Dissolutions

The court of appeal had determined that dissolution had also been denied since the McKims had agreed to divorce, but that no "policy objection to an agreement . . . that their differences are 'irreconcilable'" remained under the FLA.¹⁷⁶ Whether or not the former policy against collusive dissolutions was to continue was also appealed to the supreme court.¹⁷⁷

Collusion had been defined by former Civil Code section 114¹⁷⁸ as

an agreement between husband and wife that one of them shall commit, or appear to have committed, or to be represented in court as having committed acts constituting a cause of divorce, for the purpose of enabling the other to obtain a divorce.¹⁷⁹

Thus, under the former law, if the parties agreed to commit or testify to an act constituting a ground for divorce and if the agreement became known to the court, a denial of divorce on the ground of collusion was mandated by former Civil Code section 111.¹⁸⁰

Although the supreme court acknowledged that "[t]he Family Law Act contains no express reference to collusion,"¹⁸¹ it also recognized the judicial duty to deny and prevent perfunctory, or "carte blanche," dissolutions because "[t]he public is interested in the marriage relation and the maintenance of its integrity, as it is the foundation of the social system"¹⁸² Hence, if the parties sought to obtain a decree of dissolution by an agreement whereby "one of them would present false evidence that their differences were irreconcilable and their marriage had broken down irremediably,"¹⁸³ the court reasoned that that agreement would constitute a "fraud on the court."¹⁸⁴

Under the Family Law Act, the court, not the parties, must decide whether the evidence adduced supports findings that irreconcilable differences do exist and that the marriage has broken down irremediably and should be dissolved.¹⁸⁵

The requirement that the petitioning party appear and testify at the

176. 95 Cal. Rptr. at 137.

177. 6 Cal. 3d at 680, 493 P.2d at 872, 100 Cal. Rptr. at 144.

178. See note 87 *supra*.

179. 6 Cal. 3d at 680, 493 P.2d at 872, 100 Cal. Rptr. at 144.

180. See text accompanying notes 85-90 *supra*.

181. 6 Cal. 3d at 680, 493 P.2d at 872, 100 Cal. Rptr. at 144.

182. *Id.*, quoting *Baker v. Baker*, 13 Cal. 87, 94 (1859).

183. 6 Cal. 3d at 680, 493 P.2d at 872, 100 Cal. Rptr. at 144.

184. *Id.*

185. *Id.*

hearing was also the court's method of insuring that a fraud on the court would not be perpetrated, since proof of the actual irreconcilability of differences would be better guaranteed before a decree of dissolution was granted.¹⁸⁶ However, Justice Mosk argued in dissent that this requirement completely disregarded the "innovative spirit and intent of the Family Law Act."¹⁸⁷ By continuing to apply the former policy against collusive dissolutions as "fraud on the court" under the FLA, Justice Mosk felt that the court was disregarding the legislative intent that the courts do their utmost to effect a healing of marital wounds by eliminating acrimony in the proceeding.¹⁸⁸ Admittedly, the purpose behind the FLA was to deal rationally and realistically with marital breakdown and to avoid accusatory pleadings and testimony.¹⁸⁹

The majority also recognized this, as it quoted from the *Report of 1969 Divorce Reform Legislation*:

By requiring the consideration of the marriage as a whole and making the possibility of reconciliation the important issue, the intent is to induce a conciliatory and uncharged atmosphere which will facilitate resolution of the other issues and perhaps effect a reconciliation.¹⁹⁰

It is thus clear that the court *will* allow parties to reach a rational agreement that their differences are irreconcilable and that their marriage should be dissolved. It merely requires more than an agreement between the spouses to prove irreconcilable differences.¹⁹¹ The legislature clearly indicated that the requisite findings were to be made by the trial court.¹⁹² Acceptance of the spouses' determination as sufficient evidence would be an impermissible delegation of the judicial function.¹⁹³ Acceptance of an agreement knowingly made without irreconcilable differences would be to allow a "fraud on the court."¹⁹⁴ To require other proof does not prohibit interspousal agreements; it merely limits them to their proper function.

Another possible rationale for the *McKim* holding is to regard the matter as a procedural deficiency. "Irreconcilable differences," the

186. *Id.* at 681, 493 P.2d at 873, 100 Cal. Rptr. at 145.

187. *Id.* at 685, 493 P.2d at 875, 100 Cal. Rptr. at 147.

188. *Id.*

189. See notes 78-80, 91-93 *supra* and accompanying text.

190. 6 Cal. 3d at 679, 493 P.2d at 871, 100 Cal. Rptr. at 143, quoting ASSEMBLY REPORT, *supra* note 2, at 8058.

191. 6 Cal. 3d at 680, 493 P.2d at 872, 100 Cal. Rptr. at 144.

192. ASSEMBLY REPORT, *supra* note 2, at 8058.

193. *Id.*

194. 6 Cal. 3d at 680, 493 P.2d at 872, 100 Cal. Rptr. at 144.

ground to be proven, is "descriptive of the frame of mind" of a spouse in a marriage which is no longer viable.¹⁹⁵ Either or both spouses may feel that such differences are present; the belief need not be shared by both parties.¹⁹⁶

In *McKim*, the husband had defaulted, alleging neither the existence nor the non-existence of irreconcilable differences.¹⁹⁷ Thus, the sole issue was whether or not the wife believed that the ground was present.¹⁹⁸ The husband's testimony, however, related solely to his own feelings, matters not in issue.¹⁹⁹ As noted previously, such testimony by a petitioner (or cross-petitioner) would normally result in dissolution.²⁰⁰ Coming from a defaulting party and relating to his own *unalleged* feelings and beliefs, the testimony is immaterial and irrelevant.²⁰¹

Thus, the supreme court's requirement that the petitioner testify is a recognition that subjective attitudes and feelings can best be proven by their possessor. The preference for *personal* testimony over affidavits serves to guarantee the trial court a view of the petitioner's demeanor and an opportunity to more extensively examine the witness through questioning.²⁰² Yet, as the court recognized, such attitudes *can* be proven by testimony of a defaulting spouse "to any *issue* of which he has knowledge."²⁰³ Thus, assuming an adequate showing of exceptional circumstances, the husband's testimony would have been in all ways perfectly adequate had the word "wife's" merely been added after "your" in the four questions relating to opinion or belief.²⁰⁴

195. ASSEMBLY REPORT, *supra* note 2, at 8057.

196. *Id.* at 8058. See text accompanying note 65 *supra*.

197. 6 Cal. 3d at 676-77, 493 P.2d at 869-70, 100 Cal. Rptr. at 141-42.

198. *Id.*

199. *Id.* at 677 n.3, 493 P.2d at 870 n.3, 100 Cal. Rptr. at 142 n.3. See text accompanying note 135 *supra*.

200. See notes 108-13, 123-28 *supra* and accompanying text.

201. See notes 197-200 *supra* and accompanying text.

202. 13 CAL. JUR. 2d *Courts* § 113 (1954).

203. 6 Cal. 3d at 681, 493 P.2d at 873, 100 Cal. Rptr. at 145 (emphasis added).

204. See notes 197-203 *supra* and accompanying text. Although clearly hearsay, such testimony by a defaulting respondent would nevertheless be admissible since evidence of a statement of the declarant's then existing state of mind . . . is not made inadmissible by the hearsay rule when . . .

(1) . . . [O]ffered to prove the declarant's state of mind . . . when it is itself an issue in the action; or

(2) The evidence is offered to prove or explain acts or conduct of the declarant.

CAL. EVID. CODE § 1250(a) (West 1968). "Statement," of course, includes both "oral or written verbal expression" and "nonverbal conduct . . . intended . . . as a substitute for oral or written verbal expression." *Id.* § 225.

IV. DUE PROCESS—VAGUE AND AMBIGUOUS STANDARD

Apart from issues as to the quantum and source of evidence adduced to prove irreconcilable differences, ostensibly answered by *McKim*,²⁰⁵ questions have also been raised as to whether or not trial court practice under the FLA complies with the requirements of constitutional due process. As will be seen, although the Act has been held not to be unconstitutionally vague,²⁰⁶ the adequacy of its compliance with the requirements of procedural due process is at best questionable.²⁰⁷

Due process of law as provided by the fourteenth amendment²⁰⁸ is violated if a statute affecting a person's rights is unreasonably uncertain or ambiguous.²⁰⁹ As a matter of fundamental fairness, a person is entitled to know reasonably what he or she can or cannot do.²¹⁰ "Civil as well as criminal statutes must be sufficiently clear as to . . . provide a standard or guide against which conduct can be uniformly judged by courts" ²¹¹ Therefore, a statute which is vague to the extent that it does not provide a proper definition of its terms works a denial of due process since fair notice is not given of the terms by which the statute will be followed.²¹²

Professor Max Rheinstein, in his book *Marriage, Stability, Divorce and the Law*,²¹³ has attacked the California Family Law Act on the ground that sections 4506, 4507, and 4508 are unconstitutionally vague.²¹⁴ Professor Rheinstein maintains that a literal application of these statutes "is impossible"²¹⁵ and that "[a]ny court may give . . . ["marriage breakdown" and "irreconcilable differences"] almost any meaning."²¹⁶

If the statute was meant to provide for the termination of the marriage bond in the case of the factual breakdown of the marital community

205. See notes 134-204 *supra* and accompanying text.

206. See notes 208-66 *infra* and accompanying text.

207. See notes 267-78 *infra* and accompanying text.

208. The fourteenth amendment reads, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1.

209. *In re Marriage of Walton*, 28 Cal. App. 3d 108, 115-16, 104 Cal. Rptr. 472, 478-79 (1972).

210. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

211. *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 231, 461 P.2d 375, 387, 82 Cal. Rptr. 175, 187 (1969).

212. *Id.*

213. M. RHEINSTEIN, *MARRIAGE, STABILITY, DIVORCE AND THE LAW* 367 (1972).

214. *Id.* at 368.

215. *Id.*

216. *Id.*

of life, it fails to indicate any standard by which one is to determine the meaning of the vague term of marriage breakdown. But the text makes things worse by requiring that the breakdown be "irremediable"

. . . .

If one were to take literally the word "irremediable" . . . no marriage could ever be judicially dissolved. . . . Even in the case of a profoundly deep split in the marital community, the possibility of reconciliation is never completely excluded, even though the probability may be as low as one-hundredth of 1 percent. So what is meant in the statute is obviously a marriage breakdown with a low probability of being remedied. But how low must the probability be: 20 percent, or 10, or 1, or 49?²¹⁷

Professor Rheinstein followed with a similar criticism of "irreconcilable differences," the ground for dissolution, as being too vague.²¹⁸ He also questioned the standard the courts are to apply in deciding whether or not to grant a dissolution—whether or not there are in fact "substantial reasons for not continuing the marriage."²¹⁹ Narrowing the possible interpretations of this language to a determination of either "the substantiality of the reasons *for the parties* discontinuing their marital life" or "the sufficiency of the reasons *for the judicial termination* of the bond,"²²⁰ Rheinstein maintained that a court would find no real guidance as to the meaning of substantiality from either interpretation of the statute.²²¹

Rheinstein characterized Civil Code section 4508 as being so vague as to be a "riddle."²²² He interpreted this section to mean:

If the court finds that there are *truly* irreconcilable differences which have caused the *truly* irremediable breakdown of the parties' marital life, the court shall order the dissolution of the marriage. But if it appears to the court that the differences are not irreconcilable, it shall continue the proceeding for a period not to exceed thirty days. Then, when that period has expired, either party may move for the dissolution of the marriage and the court may enter its judgment decreeing such dissolution.²²³

Rheinstein also questioned whether or not the court could dissolve the marriage if it found that the marriage had not *truly* broken down irremediably, and whether or not the fact that the parties had thus far

217. *Id.*

218. *Id.*

219. *Id.* at 370.

220. *Id.* at 371.

221. *Id.*

222. *Id.*

223. *Id.*

failed to reconcile was sufficiently *irrefutable* evidence of irremediability.²²⁴ Thus, he hinted that courts will circumvent the correct and intended meanings, as he interpreted them, of these statutes, and would therefore "dissolve a marriage upon the unilateral motion of one party when it has found that the marriage has *not* irremediably broken down."²²⁵

It would thus seem that statutory vagueness is not really the issue raised by Professor Rheinstein. As he has interpreted the relevant provisions of the FLA, the requisite conditions for dissolution are crystal clear. The problem is that it is virtually impossible that they could occur, much less that they could be conclusively proven. Thus he fears that trial courts will formulate their own more-attainable standards, and that they will do so unevenly, uncertainly, vaguely. Any vagueness in the application of standards so completely outside the scope of legislative authorization would seem to be, at best, a secondary issue.²²⁶

Nevertheless, the point is well taken that, if "irretrievable marriage breakdown" and "irreconcilable differences" were intended to denote circumstances capable of attainment or occurrence, the standards may be too uncertain to assure uniform application. The issue of vagueness has been raised in two appellate court cases, *In re Marriage of Cosgrove*²²⁷ and *In re Marriage of Walton*,²²⁸ in each of which the respondent wife appealed from an interlocutory judgment granting the husband's petition for dissolution of the marriage.²²⁹ Mrs. Walton argued that the ground of irreconcilable differences as set forth in Civil Code sections 4506(1) and 4507 is too vague and ambiguous to assure uniform application.²³⁰ Mrs. Cosgrove also claimed that the FLA

224. *Id.*

225. *Id.* at 371-72.

226. *See* note 202 *supra*.

227. 27 Cal. App. 3d 424, 103 Cal. Rptr. 733 (1972).

228. 28 Cal. App. 3d 108, 104 Cal. Rptr. 472 (1972).

229. *Id.* at 110, 104 Cal. Rptr. at 475; 27 Cal. App. 3d at 426, 103 Cal. Rptr. at 734.

230. 28 Cal. App. 3d at 111, 104 Cal. Rptr. at 475. Mrs. Walton had also asserted that the substitution of irreconcilable differences for the prior fault grounds worked an unconstitutional impairment of the obligations of the marital contract in marriages celebrated before the enactment of the FLA. 28 Cal. App. 3d at 111, 104 Cal. Rptr. at 475. Both the United States Constitution and the California Constitution guarantee that no law impairing the obligation of contracts is ever to be passed. U.S. CONST. art. I, § 10; CAL. CONST. art. I, § 16. Civil Code section 4100 defines marriage as "a personal relation arising out of a civil contract," CAL. CIV. CODE § 4100 (West 1970), and section 5100 states that the parties "contract toward each other obligations of mutual respect, fidelity, and support." CAL. CIV. CODE § 5100 (West 1970).

was unconstitutionally vague because "absolutely no ground rules or

The California Supreme Court stated, in *Mott v. Mott*, 82 Cal. 413, 22 P. 1140 (1890), that

[t]he contract of marriage creates a *status* . . . by reason of which the law imposes upon each party to the contract certain duties and obligations, the violation of which constitutes a breach of the contract and gives a cause of action.

Id. at 418, 22 P. at 1141. However, as the *Walton* court of appeal stated, "marital rights and obligations are not contractual rights and obligations within the meaning of article I, section 10, of the United States Constitution or article I, section 16, of the California Constitution," because "[m]arriage is much more than a civil contract; it is a relationship that may be created and terminated only with the consent of the state and in which the state has a vital interest." 28 Cal. App. 3d at 112, 104 Cal. Rptr. at 475-76.

This holding represents long-settled law in the area. As early as 1888, the United States Supreme Court held in *Maynard v. Hill*, 125 U.S. 190 (1888), that "marriage is not a contract within the meaning of the [constitutional] prohibition." *Id.* at 210. Justice Field noted that:

The provision of the Constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces.

Id., paraphrasing *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 629 (1819).

"The contracts designed to be protected by the tenth section of the first article of . . . [the Constitution] are contracts by which *perfect rights, certain, definite, fixed private rights* of property are vested."

125 U.S. at 210, quoting *Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 416 (1850).

Thus, the *Maynard* Court concluded that, rather than a contract within the meaning of the contract clause of the Constitution, marriage was "a social relation, . . . the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself . . ." 125 U.S. at 211. In fact, marriage was viewed as "more than a *mere* contract," but rather "an institution, . . . the maintenance of which in its purity the public is deeply interested." *Id.* at 210-11 (emphasis added).

Additionally, the *Walton* court reasoned that,

even if marital obligations were treated as contractual obligations protected by the constitutional prohibitions, a statutory change in the grounds for divorce would not constitute an unconstitutional impairment thereof.

28 Cal. App. 3d at 112, 104 Cal. Rptr. at 476. A contrary position has long been held by the California Supreme Court regarding the impairment of contracts in general:

As the law enters into the contract, and forms a part of it, the obligation of such contract must depend upon the law existing at the time the contract was made. The contract, being then, complete and operative the Legislature cannot, by a subsequent act, impair its obligation, by requiring the performance of *other* conditions, not required by the law of the contract itself.

Robinson v. Magee, 9 Cal. 81, 84 (1858). However, as the *Walton* court recognized:

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

28 Cal. App. 3d at 112, 104 Cal. Rptr. at 476, quoting *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

Walton is obviously based upon the simple proposition that the legislature of a state cannot "bargain away the public health or the public morals." Home Bldg. & Loan

guidelines are laid down in the statute as to what constitutes irrecon-

Ass'n v. Blaisdell, 290 U.S. 398, 436 (1934). As the Court indicated in *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U.S. 548 (1914):

[I]t is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and all contract and property rights are held subject to its fair exercise.

Id. at 558. The power of the legislature concerning marriage is plenary; this power cannot be diminished by its exercise. Thus, at marriage, the spouses enter into a contract deemed to incorporate and contemplate both existing law and "the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy . . ." 28 Cal. App. 3d at 112, 104 Cal. Rptr. at 476. Such legislative enactments or amendments would not constitute an unconstitutional impairment of contractual obligations. The *Walton* court thus upheld the "impairment" based on *Maynard* and the state's police power.

Although the United States Supreme Court's *Maynard* holding seems definitive as to the inapplicability of the contract clause to marital status, the permissibility of retroactive application of the FLA to previously-acquired marital community property is still an open question. This is especially so since "[u]nder the concept of divisible divorce, financial responsibility and marital status may be separately litigated at different times and in different forums" and since "divisible divorce is a part of the public policy of this state." *Lopez v. Lopez*, 63 Cal. 2d 735, 737, 408 P.2d 744, 746, 48 Cal. Rptr. 136, 138 (1965). See also *Faught v. Faught*, 30 Cal. App. 3d 875, 106 Cal. Rptr. 751 (1973); *In re Marriage of Stuart*, 27 Cal. App. 3d 834, 104 Cal. Rptr. 395 (1972).

Civil Code section 5105 decrees that: "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests . . ." CAL. CIV. CODE § 5105 (West 1970). This has been held to create in each spouse a *vested* one-half interest in *each* item of community property. *Sidebotham v. Robison*, 216 F.2d 816, 830 (9th Cir. 1955); *Brooks v. United States*, 84 F. Supp. 622, 625 (S.D. Cal. 1949). Since the FLA mandates an equal division of community property on dissolution, CAL. CIV. CODE § 4800 (West Supp. 1974), each spouse is divested of his one-half interest in one half of the items of community property. (Of course, such a spouse receives the other's one-half interest in the remainder.) Retroactive modification of the terms and conditions under which a spouse can be so deprived does not violate either the federal fourteenth amendment or article I, section 1, of the California Constitution as a deprivation of property without due process. See, e.g., *Addison v. Addison*, 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965).

But California courts have held that, as a rule of property, community property laws cannot be applied retroactively. See, e.g., *Boyd v. Oser*, 23 Cal. 2d 613, 623, 145 P.2d 312, 318 (1944) (Traynor, J., concurring); *Spreckels v. Spreckels*, 116 Cal. 339, 48 P. 228 (1897); *Armstrong, "Prospective" Application of Changes in Community Property Control—Rule of Property or Constitutional Necessity?*, 33 CALIF. L. REV. 476 (1945). In *McKay v. Lauriston*, 204 Cal. 557, 269 P. 519 (1928), the supreme court stated

that amendments whereby it [is] sought to lessen, enlarge or change in any manner the rights of the respective spouses in community property will not be given retroactive effect so as to affect the respective rights of the parties in community property acquired prior to the enactment of such amendments.

Id. at 566, 269 P. at 523 (citations omitted). Hence, "the law in force at the date of the acquisition of the property is determinative of the rights of the parties therein." *Id.* at 567, 269 P. at 523. That a change in the requirements for divestment of these

cilable differences.’”²³¹ She argued that this has resulted in marriage being dissolved “‘on the whim and caprice of the particular judge,’”²³² and, therefore, that the function of dissolving marriages had been delegated “‘to any litigant who wants to have his or her marriage dissolved and to the absolute discretion of the courts’”²³³

Replying to the contentions of unconstitutional vagueness, Justice Kaufman, in *Walton*, found no unreasonable uncertainty or ambiguity in the section’s language.²³⁴ “[R]easonable certainty is all that is required,”²³⁵ and “[a] statute will be upheld if its terms may be made reasonably certain by reference to its legislative history or purpose.”²³⁶ The *Walton* court referred to the legislative intent as found in the *Assembly Report*: “[irreconcilable differences] is . . . descriptive of the *frame of mind* of the spouses in a marriage which is no longer viable.”²³⁷ Irreconcilable differences was thus to be a subjective standard, not to be necessarily found “in the form of observable acts and occurrences such as marital quarrels”²³⁸ The *Walton* court found that this standard was not unconstitutionally vague, even though “the court must depend to a considerable extent upon the subjective state of mind of the parties.”²³⁹ Reliance on *McKim* further re-enforced the fact that it was the court, and not the parties, which must decide whether or not the evidence adduced supported a finding of irreconcilable differences, even though a subjective standard was used.²⁴⁰ Thus the parties were prevented from injecting their own definition of irreconcilable differences into the determination. How-

vested rights fits within the *McKay* prohibition would seem virtually axiomatic.

It has been held, however, that the FLA does not deprive a spouse of a vested right in its substitution of mandatory equal property division for the unequal division which prior law required to favor the “innocent” spouse. *In re Marriage of Silvers*, 23 Cal. App. 3d 910, 100 Cal. Rptr. 731 (1972). *Silvers* is clearly based on the well-established principle that “any partial or incomplete right becomes vested only when reduced to a judgment and no person has a vested right in an unenforced penalty.” *Id.* at 911, 100 Cal. Rptr. at 731 (citations omitted). A retroactive modification of vested community property rights is clearly distinguishable and impermissible under well-established California law.

231. 27 Cal. App. 3d at 429, 103 Cal. Rptr. at 736.

232. *Id.*

233. *Id.*

234. 28 Cal. App. 3d at 116, 104 Cal. Rptr. at 478-79.

235. *Id.*

236. *Id.*

237. *Id.*, quoting ASSEMBLY REPORT, *supra* note 2, at 8057 (emphasis added).

238. *Innocence*, *supra* note 2, at 1319.

239. 28 Cal. App. 3d at 117, 104 Cal. Rptr. at 479.

240. *Id.*

ever, *Walton* did perceive some difficulty in the language of Civil Code section 4507,²⁴¹ which

[could] be read . . . as meaning that irreconcilable differences are whatever substantial reasons the court finds for not continuing the marriage and which make it appear that the marriage should be dissolved.²⁴²

Such an apparently limitless grant of discretion to the trial courts would result in unconstitutional vagueness by circumventing section 4506(1)'s requirement that an irretrievable breakdown has occurred. However, "[w]here possible, statutes are construed to avoid unconstitutionality."²⁴³ Thus, "to achieve harmony and to give effect to the legislative intent and to all of the parts so far as possible,"²⁴⁴ sections 4506(1) and 4507 were construed together. Rather than circumventing the standard of section 4506(1), 4507 served "to make clear that the irreconcilable differences [specified by section 4506(1)] . . . must be substantial as opposed to trivial or minor."²⁴⁵ By thus further conditionalizing the 4506(1) standard, 4507 was held to add specificity to "irreconcilable differences" and adequate constitutional clarity was perceived.

Since, however, "irreconcilable differences" are defined in terms of the "irremediable breakdown of the marriage" which they must cause,²⁴⁶ vagueness of the latter term would also be fatal to the standard. Although no allegation of vagueness was made in *Cosgrove*, the court of appeal pointed to the specificity of the phrase "marital breakdown."²⁴⁷ The *Assembly Report* had adopted the *De Burgh* rationale that divorce should be granted when

241. CAL. CIV. CODE § 4507 (West 1970), reprinted in full in note 152 *supra*.

242. 28 Cal. App. 3d at 117, 104 Cal. Rptr. at 479.

243. *Id.*, 104 Cal. Rptr. at 480.

244. *Id.*

245. *Id.* at 118, 104 Cal. Rptr. at 480. As the court noted, the primary purpose of section 4507 is to indicate that the determination of irreconcilable differences is to be a judicial, not a ministerial, function. *Id.* at 117-18, 104 Cal. Rptr. at 479-80.

246. See text accompanying notes 67-75 *supra*.

247. 27 Cal. App. 3d at 429, 103 Cal. Rptr. at 736. The court said that

[t]he guidelines for the proof and determination of the existence of "irreconcilable differences" are no more lacking in the present law than were the guidelines for the determination of fault under the former law.

Id. A similar rationale is found in *People v. Enskat*, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973), in which Penal Code section 311.2, California's present obscenity statute, was upheld as constitutional:

[I]f a claim is made that retention of section 311's requirement that a work be "utterly without redeeming social importance" renders the statute fatally vague, we think the answer is that it is no more vague than the phrases upheld against [prior] challenge, . . . or for that matter, than the predecessor language of section 311 upheld against an attack of vagueness

Id. at 912, 109 Cal. Rptr. at 441 (citations and footnote omitted).

the purposes of family life are no longer served . . . [and] “. . . [w]here the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed.”²⁴⁸

By defining “irremediable [marital] breakdown” in such terms, both that effect and the causational “irreconcilable differences” have sufficient clarity to withstand an allegation of unconstitutional vagueness. One may not, of course, foresee or statutorily define all the possible causes of a breakdown. That is not necessary. When the requisite effect has occurred, the precise nature of the cause is immaterial to the satisfaction of due process.²⁴⁹

Assertions may, of course, be made, and properly so, that the actual trial court practice does not maintain the precision of the statutory standard. A *petitioner's* allegation of “irreconcilable differences” does not necessarily signify marital breakdown. Even if it did, the determination is for the court.²⁵⁰ Acceptance of such a conclusionary allegation, without more, would impermissibly delegate the judicial decisional process to the petitioner; but, as noted previously, courts adamantly oppose the introduction of evidence of specific acts of misconduct.²⁵¹

In a contested proceeding, the contradictory assertions of the parties *may*, as the courts believe, furnish adequate proof of irreconcilable differences.²⁵² ; Yet, most proceedings are by default. To grant dissolution on an uncontested and unaccompanied assertion of “irreconcilable differences” *would* impermissibly grant the right of decision to the petitioner. More is required.²⁵³

In a contested proceeding, the contradictory assertions of the parqured, a comparison might be drawn between the California no-fault system and the present English system of divorce. Under the Divorce Reform Act of 1969,²⁵⁴ there is only one ground upon which a person may petition for divorce in England: that the marriage has broken down irretrievably.²⁵⁵ Since the FLA's ground of irreconcil-

248. ASSEMBLY REPORT, *supra* note 2, at 8055, quoting *De Burgh v. De Burgh*, 39 Cal. 2d 858, 864, 250 P.2d 598, 601 (1952).

249. See notes 67-77 *supra* and accompanying text.

250. CAL. CIV. CODE § 4511 (West 1970). See text accompanying notes 148-55 *supra*; see also *In re Marriage of McKim*, 6 Cal. 3d 673, 679, 493 P.2d 868, 871, 100 Cal. Rptr. 140, 143-44 (1972).

251. See text accompanying notes 116-27 *supra*.

252. See text accompanying notes 120-27 *supra*.

253. See text accompanying notes 146-86 *supra*.

254. Divorce Reform Act 1969, c. 55. See Rosenbaum, *Divorce Reform in England: The Decline of the Matrimonial Offense*, 12 J. FAMILY L. 365 (1972-73).

255. Divorce Reform Act 1969, c. 55, section 1 of which reads as follows:

After the commencement of this Act the sole ground on which a petition for di-

able differences is defined solely in terms of resultant irretrievable breakdown, the two grounds are virtually identical. The English ground, however, is proven only if the petitioner satisfies the court of the existence of at least one of five specified guideline-facts²⁵⁶ which closely resemble the former grounds of divorce in California. The petitioner must introduce evidence to prove (1) adultery causing continued cohabitation which is alleged to be intolerable,²⁵⁷ (2) that the petitioner cannot reasonably be expected to live with the respondent,²⁵⁸ (3) desertion,²⁵⁹ (4) a two-year separation with the respondent's consent to divorce,²⁶⁰ or (5) a five-year separation.²⁶¹ Thus, the English Divorce Reform Act provides the court with factual guidelines to determine the causation of the parliamentarily-approved ground for divorce.

It is, of course, not suggested that the California system adopt and apply the English guideline-facts. Facts (1) and (3) clearly call for the proof of fault, the elimination of which was the prime goal of the FLA.²⁶² Facts (4) and (5) provide for divorce by mutual spousal consent or by purely ministerial judicial procedures after the lapse of a certain period of time. Either method as a basis for dissolution was rejected by the California Legislature even more strongly than was proof of fault.²⁶³ Fact (2), a catch-all provision, is virtually identical to the California requirement of proof of irreconcilable differences and would in no way augment or improve present practice.²⁶⁴

Nevertheless, the basic principle of guideline-facts would be useful if adapted to the California statute. However, rather than causal factors, proof of "effect-facts" should be required. An allegation by a petitioner of irreconcilable differences is all very well, but may not signify the requisite marital breakdown. Testimony that the petitioner re-

orce may be presented to the court by either party to a marriage shall be that the marriage has broken down irretrievably.

256. *Id.* § 2.

257. *Id.* § 2(a).

258. *Id.* § 2(b).

259. *Id.* § 2(c). Desertion for a continuous period of two years is required. *Id.*

260. *Id.* § 2(d).

261. *Id.* § 2(e).

262. See text accompanying notes 48-127 *supra*.

263. See ASSEMBLY REPORT, *supra* note 2, at 8058.

264. In practical fact, it is uncertain whether the English standard of "reasonableness" was intended to establish an objective or a subjective standard, which could make the divorce determination either relatively easy or difficult for the petitioner to obtain. The question was resolved in California by the specific determination that "irreconcilable differences" was to be a subjective standard. ASSEMBLY REPORT, *supra* note 2, at 8057.

fuses to continue to live with the respondent and believes that reconciliation will not occur²⁶⁵ would, however, clearly demonstrate the occurrence of a breakdown but would not require proof of fault or other misconduct. In fact, these two facts were themselves suggested by the legislature as being demonstrative of the occurrence of breakdown.²⁶⁶ Thus, trial courts should require proof of sufficient resultant facts to assure that the differences alleged are irreconcilable as the legislature defined that term of art. Only thus will the adequate clarity of the statute be sustained in its application.

V. DENIAL OF PROCEDURAL DUE PROCESS

A question which has yet to be considered by California appellate courts involves the situation in which the respondent in an action for dissolution of marriage would assert the non-existence of substantial irreconcilable differences and, in fact, would attempt to introduce evidence to prove the allegation.²⁶⁷ Procedural due process under the fourteenth amendment specifies that "[p]arties whose rights are to be affected are entitled to be heard"²⁶⁸ Allowance of a respondent's conclusionary allegation denying the existence of the ground is clearly not enough. "[T]here is no hearing when the party . . . is not given an opportunity to test, explain, or refute."²⁶⁹

The Family Law Act expressly prohibits evidence of specific acts of misconduct except "where it is determined by the court to be necessary to establish the existence of irreconcilable differences."²⁷⁰ Yet, as previously discussed, the belief of trial courts, at least in Los Angeles County, is that a contradiction in allegations as to irreconcilable differences is itself evidence of irreconcilable differences which often has prevented *any* contradictory evidence from being admitted.²⁷¹ This ex-

265. See text accompanying notes 108-28 *supra*.

266. See ASSEMBLY REPORT, *supra* note 2, at 8058. See text accompanying note 65 *supra*.

267. While both *In re Marriage of Cosgrove* (see note 227 *supra*) and *In re Marriage of Walton* (see note 228 *supra*) dealt with "contested" dissolutions, neither contestant denied the existence of irreconcilable differences. Further, in neither case was there an attempt to cross-examine the petitioner, nor was objection made to the petitioners' conclusionary testimony, which would have preserved the appellants' records for appeal.

268. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 222, 233 (1863).

269. *ICC v. Louisville & N.R.R.*, 227 U.S. 88, 93 (1913).

270. CAL. CIV. CODE § 4509 (West 1970).

271. See text accompanying notes 120-27 *supra*. The Honorable Jack T. Ryburn has stated that "testimony should be taken to determine the validity" of a parties contention regarding irreconcilable differences, if necessary. Letter from Judge Jack T. Ryburn to Elayne Berg, Aug. 8, 1974.

clusion of all but conclusionary testimony from contested proceedings is not only statutorily unwarranted, but denies procedural due process to the respondent as well.

Trial judges believe that evidence of irreconcilable differences is provided by contradictory allegations as to their existence. Thus, in any contested case, section 4509 would allow them to exclude evidence of specific misconduct.²⁷² Although contestation may be the best evidence of a spousal disagreement, it provides no further proof of the occurrence of a marital breakdown than would a petitioner's uncontested allegation.

Even accepting the hypothesis that mere contestation adequately proves the ground to the court, the ban of section 4509 extends only to "evidence of specific acts of misconduct." Although an attempt to disprove the existence of irreconcilable differences might conceivably include allegations of the petitioner's misconduct, it would seem more likely that such a defense would comprise proof of specific spousal good conduct or general allegations of interspousal amity. Such evidence is not made inadmissible by section 4509 under any circumstances.²⁷³

Of course, beyond compliance with section 4509, the evidence must have relevance.²⁷⁴ In such a contested proceeding, the irreconcilable differences alleged comprise solely the subjective state of mind of the petitioner.²⁷⁵ The evidence proffered must therefore relate thereto and not to the beliefs and opinions of the respondent which technically are not in issue. It is not enough, or even required, that the respondent think that everything is satisfactory. He must show that that is what the petitioner really believes or that contrary beliefs of the petitioner are transitory.

For the respondent to successfully so defend would, admittedly, be virtually impossible. Any attempt to show the court that the petitioner's sentiments are too inconstant, too alternating for irreconcilable differences to be conclusively found, would be wrecked on the shoals of practicality. An average minimum period of three months elapses between the filing of a petition for dissolution and the actual hearing,²⁷⁶ far too long a time to sustain an assertion of mercurialness.

272. CAL. CIV. CODE § 4509 (West 1970) (reprinted in relevant part in text accompanying note 117 *supra*). See notes 120-27 *supra* and accompanying text.

273. See notes 267-72 *supra* and accompanying text.

274. "No evidence is admissible except relevant evidence." CAL. EVID. CODE § 350 (West 1968).

275. See notes 197-204 *supra* and accompanying text.

276. Ryburn Interview, *supra* note 102.

Likewise, an attempt to prove a constant lack of irreconcilable differences would also be virtually doomed. Such would amount to proof of an attempted "fraud on the court."²⁷⁷ Yet the legislature has provided that an absolute refusal to live with the other spouse adequately demonstrates an irreconcilable difference. What is the filing of a petition for dissolution if not such a refusal? The respondent is placed in the difficult position of having to prove that the petitioner really does not want what he or she is so strongly demanding.

Yet, however uncommonly rare the potential for success, procedural due process requires that the court allow the attempt to be made. Provided that section 4509's stricture on the proof of specific misconduct is observed, respondents must be allowed to contest the existence of irreconcilable differences.²⁷⁸

VI. CONCLUSION

The Family Law Act has been in force over four years, and although at first met with severe criticism, it now appears that the angry comments have subsided. In practical fact, the Act has accomplished much of what the legislature hoped it would. Much of the acrimony that was present at the "guilt" phase of the trial under the prior law has disappeared. Yet, under the new Act, bitterness and quarrels have been carried into the custody and property division phases of the proceedings. Still, for all practical purposes, the judicial process of obtaining a dissolution is running uncontroversibly.

The *McKim* decision emphasizing the courts' supervisory power has served as the basis for two subsequent lower court opinions upholding the constitutionality of the Act. However, in both *Cosgrove* and *Walton*, there were reciprocal allegations of irreconcilable differences by husband and wife. Were the supreme court to confront a true contested dissolution, one in which the very existence of the ground was disputed, a clear choice would be forced among several alternatives: (1) To automatically grant a dissolution and exclude all other evidence whenever one spouse refuses to reconcile, since such a refusal

277. See notes 181-86 *supra* and accompanying text.

278. "Except as otherwise provided by statute, all relevant evidence is admissible." CAL. EVID. CODE § 351 (West 1968). The Family Law Act was held not to work a deprivation of due process of law in *In re Marriage of Walton*. See note 228 *supra*. The Florida Supreme Court has ruled similarly in *Ryan v. Ryan*, 277 So. 2d 266 (Fla. 1973), upholding that state's new divorce law. As does California's FLA, the Florida divorce statute establishes irretrievable marital breakdown and insanity or mental incompetence as the sole grounds for divorce and applies retroactively to marriages entered into before its effective date. See FLA. STAT. ANN. § 61.001 *et seq.* (Supp. 1973).

is proof of irreconcilability; (2) to require more proof of the actual irreconcilable differences and more proof that the marriage has broken down irremediably; or (3) to allow a party to introduce evidence other than specific acts of misconduct to prove that the differences are *not* irreconcilable. If the court followed (1), it would apply the same procedure that trial judges in Los Angeles County presently follow, reducing acrimony but effectively denying procedural due process to the respondent in any contested dissolution. If the court chose to follow (2), due process would be satisfied but the evidence admitted would resemble that admissible under the prior "fault" system, a highly undesirable result in view of the calming intent of the FLA. Only (3) would allow the unimpassioned proof of irreconcilable differences by conclusionary testimony and permit adequate testing of the ground's actual existence without undue bitterness or a denial of due process. Admittedly, under this alternative the mere allegation of irreconcilable differences raises a rebuttable presumption of their existence, which was probably not intended by the legislature. Yet, in this, and only this, way, can the FLA constitutionally achieve its goal of virtually painless no-fault dissolution. Perhaps one *can* have it both ways.

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