Land & Water Law Review

Volume 20 | Issue 1 Article 7

1985

Fault Factor in No-Fault Divorce and Equitable Distribution: Some Suggestions for Change in Wyoming, The

Mary Frances Blackstone

University of Wyoming
College of Law

LAND AND WATER
LAW REVIEW

VOLUME XX 1985 NUMBER 1

The Fault Factor in No-Fault Divorce and Equitable Distribution: Some Suggestions for Change in Wyoming

*Mary Frances Blackstone**

In this article, the author assesses the significance of no-fault divorce in Wyoming in the wake of the supreme court's decision in Grosskopf v. Grosskopf. The author begins by presenting a brief overview of the development of no-fault divorce and of property distribution in divorce actions. With this survey of divorce law, the author's analysis of the Wyoming Supreme Court's decision in Grosskopf illustrates that the significance of no-fault divorce in Wyoming is now severely limited. The author concludes the article by suggesting statutory reform needed to effectuate the purposes of a no-fault divorce law.

When California led the parade toward no-fault divorce in 1969 by adopting a statute that eliminated all vestiges of the fault system of divorce,[1] reformers rejoiced. Other states quickly followed, including Wyoming in 1977.[2] Many observers in Wyoming assumed that the fault system now had only historical interest. Few states, however, changed their statutes as drastically as California had. Most, like Wyoming, superimposed only some elements of a no-fault system on their existing statutory scheme. This approach has led to much litigation: first, to determine whether the new laws are constitutional as applied to persons married under the old fault system; and second, to determine exactly how much the new laws changed the old system. A few early decisions settled the constitutional question,[3] but the patchwork created by imposing new

*Professor of Law, University of Wyoming College of Law. A.B., 1942, U.C.L.A.; J.D., 1969, University of Wyoming College of Law. The author expresses her appreciation for the assistance of Michael R. Smith in the preparation of this article.

1. CAL. CIV. CODE § 5000 (West 1983).
2. WYO. STAT. § 20-2-104 (1977).
3. *See* Ryan v. Ryan, 277 So. 2d 266 (Fla. 1973); Gleason v. Gleason, 26 N.Y. 2d 28, 308 N.Y.S. 2d 347, 256 N.E.2d 513 (N.Y. Ct. App. 1970).

statutes on top of old ones raises questions that have taken much longer to decide.

Is Wyoming a no-fault divorce state? Or are there irreconcilable differences in Wyoming divorce law? In *Grosskopf v. Grosskopf*,[4] the Wyoming Supreme Court answered these questions by severely limiting the no-fault aspects of the divorce statutes. The court not only held that the trial court may consider evidence of fault when both parties seek a divorce decree, it also held that the no-fault concept did not apply to the other incidents of a divorce action—such as property division, alimony, and child support and custody.[5] The case has also decided for Wyoming one of the more controversial domestic relations questions of the day: Is an advanced degree or professional education or the increased earning capacity resulting from them marital property to be divided at divorce? In affirming the trial court's decision that a master's degree in accounting is not property because it does not have the attributes of property, the supreme court joined the majority of United States jurisdictions.[6] The court nevertheless recognized that sometimes equities between the parties need to be adjusted because one spouse worked while the other earned the degree.[7] This article, however, will focus on the other issues decided by the court.

Given only the ambiguous condition in which the Wyoming divorce statutes were left by the extensive 1977 revision, this decision might have been expected. But in the 1980 case of *Paul v. Paul*,[8] the court had said:

> The wife concedes that Wyoming is now a no-fault divorce jurisdiction but argues that the legislature intended to retain the issue of fault in property settlements because Section 20-2-114 still directs the court to have regard "for the merits of the parties." We are not persuaded. The trial judge has great discretion in dividing the property and he is not to use the property division to punish one of the parties.[9]

The *Grosskopf* decision must have startled attorneys who were relying on the *Paul* dictum, as Mrs. Grosskopf's attorney apparently did.[10] The questions settled by the *Grosskopf* decision are only part of the larger policy questions of what property should be distributed at divorce, what criteria the trial court should use to determine the distribution, and how broad the court's discretion should be.

In *Grosskopf*, the supreme court has questioned the significance of no-fault divorce in Wyoming. The decision compels a suitable response by the legislature if Wyoming is to have a meaningful no-fault divorce law. In order to guide the legislature and practicing attorneys, the history

4. 677 P.2d 814 (Wyo. 1984).
5. *Id.* at 819.
6. *Id.* at 822.
7. *Id.*
8. 616 P.2d 707 (Wyo. 1980).
9. *Id.* at 715.
10. Brief for Appellant at 19, Grosskopf v. Grosskopf, 677 P.2d 814 (Wyo. 1984).

and policy of no-fault divorce and equitable distribution will be reviewed in this article. The state of divorce law in Wyoming will then be assessed in light of the *Grosskopf* decision. Finally, appropriate amendments to title 20 of the Wyoming Statutes will be proposed in order to effectuate the apparent intent of the 1977 legislature in adopting a no-fault divorce statute.

HISTORY OF THE WYOMING STATUTORY GROUNDS FOR DIVORCE

Section 20-2-104 of the Wyoming statutes provides: "A divorce may be decreed by the district court of the county in which either party resides on the complaint of the aggrieved party on the grounds of irreconcilable differences in the marital relationship."[11] This section substitutes the term "irreconcilable differences" for the eleven fault grounds for divorce listed in its predecessor, section 20-38 of the Wyoming statutes,[12] and the two-year separation grounds in former section 20-40, now repealed.[13] Except for those substitutions, section 20-2-104 closely follows the wording of former section 20-38 and has retained the requirement of an "agrieved [sic] party" ever since its adoption by the Seventh Legislative Assembly of the Wyoming Territory in 1882.[14]

The reasons usually given for adopting the no-fault system of divorce are 1) to eliminate the bitterness caused by the fault-statute requirement that intimate marital unpleasantness be recited to justify the divorce, and 2) to eliminate the general adversarial character of the typical divorce obtained on fault grounds.[15] For instance, in many no-fault states the decree is not granted to either party; the decree simply recognizes that the marriage is irretrievably broken.[16] The aim is to release the parties from a marriage dead in fact and allow them to go forward to a new life with as little trauma as possible. A state achieves this objective by eliminating the requirements that one party be awarded the decree and that the divorce be "justified."

If Wyoming legislators intended to reduce the trauma and bitterness associated with the traditional divorce obtained on fault grounds, they defeated their own purpose by leaving remnants of the old fault system on the statute books in 1977. The effect of the statutes after the *Grosskopf* decision is that they reintroduce into Wyoming divorce proceedings *at least* all of the fault evidence that was ever admissible under the fault system. This unfortunate result is probably due in part to the legislative process followed in revising the divorce law.

---

11. WYO. STAT. § 20-2-104 (1977).
12. WYO. STAT. § 20-38 (1957).
13. 1977 WYO. SESS. LAWS ch. 152.
14. 1882 WYO. SESS. LAWS ch. 40, § 5.
15. *See* Whaling, *The No Fault Concept: Is the Final State in the Evolution of Divorce*, 47 NOTRE DAME LAW. 959 (1971); Reppy, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 U.C.L.A. L. REV. 1306 (1970); Tenney, *Divorce Without Fault: The Next Step*, 46 NEB. L. REV. 24 (1967).
16. *See* CAL. CIV. CODE § 4503 (West 1983); COLO. REV. STAT. § 14-10-105(2) (1973).

The 1977 revision of title 20, entitled "Domestic Relations," did not undergo the procedure the legislature customarily follows when rewriting a statutory title.[17] When revising an entire title, the legislature will normally assign it to the Joint Judiciary Interim Committee at the end of a legislative session so that the Committee can hold hearings and consider differing points of view before recommending changes at the next legislative session.[18] In 1976, however, title 20 was merely given to the Legislative Service Office with instructions to eliminate gender references, archaic language, and surplusage. The Legislative Service Office was to make no substantive changes.[19] The Legislative Service Office did as instructed, combining some sections of the title and renumbering them, effectively clarifying and simplifying some of the language and eliminating surplusage but making no substantive changes.[20]

With the non-substantive changes prepared by the Legislative Service Office, title 20 became Senate File 76, sponsored by the Joint Judiciary Interim Committee in the 1977 Legislature.[21] Because no substantive changes were anticipated, the Committee did not hold hearings before introducing Senate File 76 on January 12, 1977. On January 11, Representatives Walter Urbigkit and John Hursh had introduced House Bill 57, "deleting certain specific grounds for divorce; providing for incompatibility as a ground for divorce; removing the requirement of corroboration of witnesses; [and] providing for the presumption of legitimacy of children. . . ."[22]

House Bill 57 was referred to Committee No. 1 (House Judiciary Committee), where it died,[23] but many of the ideas were nonetheless incorporated by amendments in committee and on the floor into the title 20 revision finally enacted.[24] Former Representative Hursh has recently said that to the best of his recollection, he and the other sponsors of House Bill 57 thought their potentially controversial statutory changes would face less opposition if they were included in the originally non-controversial title 20 revision then going forward, instead of being contained in a separate bill.[25]

When Senate File 76 was introduced on January 12 then, it did contain some of the no-fault ideas of the defunct House Bill 57. It was an act, among other things, "deleting certain specific grounds for divorce;

17. Interview with Rep. Matilda Hansen, Secretary of the 1976 Wyoming Joint Judiciary Committee, in Laramie, Wyoming (Aug. 10, 1984).

18. *Id.*

19. Telephone Interview with Joseph B. Meyer, Wyoming Legislative Service Office (Aug. 10, 1984).

20. Revision of Title 20, 77 LSO-393.01 (1977).

21. DIGEST OF SENATE JOURNAL OF THE FORTY-FOURTH STATE LEGISLATURE OF WYOMING 106 (1977).

22. DIGEST OF HOUSE JOURNAL OF THE FORTY-FOURTH STATE LEGISLATURE OF WYOMING 92 (1977).

23. *Id.*

24. ENGROSSED ACT, Revision of Title 20, Wyo. Senate File No. 76, 77 LSO-393 (1977).

25. Telephone Interview with Rep. John Hursh, co-sponsor of HB 57, Forty-Fourth State Legislature (1977) (Oct. 8, 1984).

providing irreconcilable differences as grounds for divorce; [and] removing the requirement of corroboration of witnesses."[26] The other substantive changes finally enacted came later in the process. Because the changes were proposed during the session, without prior committee study, they aroused little debate and passed with little opposition. This legislative history may explain some of the anomalies in the statutes and the difficulties that they can cause.

HISTORICAL OVERVIEW OF PROPERTY DISTRIBUTION AT DIVORCE

Some states apply their no-fault provisions to property distribution, but others do not. Before *Grosskopf,* Wyoming's position was unclear. Now Wyoming has joined the small majority of jurisdictions holding that "the enactment of a no-fault divorce statute which does no more than provide no-fault grounds for divorce, does not modify the traditional, existing grounds for determining child custody, support, alimony, attorneys fees, and division of property."[27] In order to clarify Wyoming's current position, this section will trace the history of property distribution at divorce in general and of Wyoming's statute in particular.

Wyoming is somewhat unusual in having had an equitable distribution statute, both as a territory and as a state, for more than one hundred years.[28] An equitable distribution statute allows the court to divide property between the spouses as it deems just and equitable, without the common-law requirement that the property be given to the legal titleholder. Wyoming's early statute may well have represented the partnership view of marriage when a frontier wife put in as long and as hard a work-day as her husband, which the early legislators may have felt entitled her to a share in the property accumulated during the marriage, no matter how the legal title was held.

Wyoming's equitable distribution statute was enacted when many states had been adopting special property acts to abrogate the common-law disabilities of married women.[29] All of this legislation represented a recognition that married women needed property rights now that absolute divorce had become available.[30] Under the common law, women would be left with little or nothing after divorce because their husbands were the legal title-holders or controlled nearly all the property.[31] When married women acquired property rights under these eighteenth century statutes, courts in equitable distribution jurisdictions had to determine exactly what property to divide. Some states set up dual property regimes—

26. DIGEST OF SENATE JOURNAL OF THE THE FORTY-FOURTH STATE LEGISLATURE OF WYOMING 106 (1977).

27. Grosskopf v. Grosskopf, 677 P.2d 814, 819 (Wyo. 1984).

28. 1882 WYO. SESS. LAWS ch. 40, § 15.

29. For instance, the Council and House of Representatives of the Territory had passed *An Act to Protect Married Women in Their Separate Property and the Enjoyment of the Fruits of Their Labor* on December 4, 1869. WYO. COMP. LAWS ch. 82 (1876).

30. W. WEYRAUCH & S. KATZ, AMERICAN FAMILY LAW IN TRANSITION 314 (1983).

31. *Id.*

separate and marital[32]—while others, like Wyoming, allowed their courts to reach all property owned by the couple.[33]

Historian T. A. Larson tells us, however, that the Territorial Legislature in 1869 had before it the statutes of Colorado, Nebraska, and Nevada as models.[34] It cannot be mere chance that to this day the Nevada property distribution provision[35] contains almost the exact words of the present Wyoming section 20-2-114 as they were before the non-substantive 1977 revisions.[36] Perhaps Wyoming merely copied the Nevada statute without much thought, but the legislature must have had some reason for preferring it to the Colorado statute,[37] or the Nebraska statute.[38] Both the Colorado and the Nebraska statutes emphasized alimony, rather than property division, as a way of supporting a wife and children after divorce, and neither provided equitable distribution. The Wyoming legislature's preference for the Nevada approach has been carried down to the present day in both the Wyoming statutory law and case law.[39] "An award of property is a preferable, modern substitute for alimony."[40]

Nevada's statute was originally adopted on November 28, 1861.[41] Cases decided under this statute and its successors using the same language indicate that, as in Wyoming, the trial court has wide discretion in property division and that discretion will not be disturbed unless it has been abused.[42] In Nevada, as in Wyoming, the trial court has almost unlimited authority to award property for support of wife and children.

Vermont's property disposition statute also reflected the language of the Wyoming and Nevada statutes as early as 1917,[43] until it was amended in 1981.[44] The 1981 amendment lists twelve factors to be considered in equitable distribution, retaining the "merits of the parties" as one of them.[45] As in Nevada, Vermont cases before 1981 indicate that a trial court had wide discretion and could decree the property division as it deemed just. The trial court's decree was allowed to stand on review unless it appeared that its discretion had been abused.[46]

---

32. *See* VA. CODE § 20-107.3 (1950); MINN. STAT. ANN. § 518.58 (West 1969).
33. *See* N.D. CENT. CODE § 14-05-24 (1943); NEB. REV. STAT. § 42-365 (1943).
34. T. A. LARSON, HISTORY OF WYOMING 74 (1965).
35. NEV. REV. STAT. § 125.150(1)(b)(2) (1983).
36. WYO. STAT. § 20-63 (1957). "In granting a divorce, the court . . . just and equitable, having regard to the respective merits of the parties and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens, if any imposed upon it for the benefit of the wife and the children." *Id.*
37. COLO. REV. STAT. ch. XXVI, § 6 (1867).
38. NEB. REV. STAT. ch. 25 (1881).
39. *See* Grosskopf v. Grosskopf, 677 P.2d 814, 821 (Wyo. 1984); Paul v. Paul, 616 P.2d 707, 713 (Wyo. 1980); Young v. Young, 472 P.2d 784, 786 (Wyo. 1970).
40. Paul v. Paul, 616 P.2d 707, 713 (Wyo. 1980).
41. COMP. LAWS OF NEV. ANN. 505 § 25 (1861-1900).
42. *See* Lake v. Bender, 18 Nev. 361, 7 P. 74 (1884); Cunningham v. Cunningham, 61 Nev. 93, 95, 116 P.2d 188, 189 (1941); Sweeney v. Sweeney, 42 Nev. 431, 179 P. 638 (1919).
43. 1917 Vt. Acts 49 *as quoted in* II C. VERNIER, AMERICAN FAMILY LAWS 221 (1932).
44. VT. STAT. ANN. tit. 15, § 751 (Supp. 1984).
45. *Id.*
46. *See* Lafko v. Lafko, 127 Vt. 609, 256 A.2d 166 (1969); Wacker v. Wacker, 114 Vt. 521, 49 A.2d 119 (1946).

Vermont's experience led that state's legislature to structure its trial courts' unbridled discretion by listing twelve specific factors which the courts may consider in making a property settlement.[47] Unfortunately Vermont did include the "merits of the parties" as one of the twelve statutory factors to be considered. If that phrase were understood to include both favorable and unfavorable evidence about the parties, it would be less objectionable. For instance, Justice Cardine defined "merit" in *Grosskopf* as " deservedness, goodness," but in that case neither the trial court nor the supreme court talked about anything but fault.[48] Human nature being what it is, that might be the usual result.

Many eastern and southern states have only recently adopted the partnership or shared-enterprise concept of marriage.[49] They have done so by abandoning a strict title approach, which awarded property at divorce to the party who held the record title, in favor of equitable distribution statutes.[50] Lawrence J. Golden, author of *Equitable Distribution of Property*, regards these enactments as a "sweeping reform" attributable to the "social, cultural, and political changes which have been sweeping the country in the last two decades," the women's rights movement, and the redefinition of traditional male and female roles in daily marital arrangements.[51] He might also have included the great increase of married women in the labor force since World War II.[52]

According to Golden the "new" concept of marriage, and the equitable distribution statutes adopted because of it, have their roots in the community property system of the civil law.[53] Going back further than Golden,

---

47. VT. STAT. ANN. tit. 15, § 751 (Supp. 1984).

48. 677 P.2d 814, 819 (1984).

49. *See* N.Y. DOM. REL. LAW § 234 (McKinney 1977); W. VA. CODE § 48-2-32 (Supp. 1984); N.C. GEN. STAT. § 50-20 (Supp. 1983).

In 1939 only seventeen states had equitable distribution statutes. The others awarded property at divorce to the title-holder. In fifteen of the seventeen states, the court had the discretion to divide all of the property of the parties. Dagget, *Division of Property Upon Dissolution of Marriage*, 6 LAW AND CONTEMP. PROBS. 225, 227 (1939). The Wyoming courts have had this discretion since 1927. Lovejoy v. Lovejoy, 36 Wyo. 379, 387, 256 P. 76, 79 (1927).

By 1976, forty states had equitable distribution statutes. Foster and Freed, *From a Survey of Matrimonial Laws in the United States: Distribution of Property Upon Dissolution*, 3 COMM. PROP. J. 231, 232-34 (1976). Now, except for Mississippi (no statutory authority to distribute property at divorce) and the eight community property states, all states and the District of Columbia have equitable distribution statutes. [Reference File] FAM. L. REP. (BNA) 400: iii-iv (1983).

Considering the new Louisiana and New York property regimes as typical of the recent blending of civil and common law concepts, Professor Younger has pointed out that in Louisiana, the spouses are equal partners in marital assets during marriage and take equal shares at death or divorce, while in New York "partnership principles" come into play only at divorce. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 80-82 (1981). The court must consider "the circumstances of the case and of the respective parties" as well as nine specific factors and "any other factor which the court shall expressly find to be just and proper." *Id.*

50. L. GOLDEN, EQUITABLE DISTRIBUTION OF PROPERTY 2 (1983).

51. *Id.*

52. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, 61 PC 80-1-C1 1980 CENSUS OF POPULATION Table 86 (1983). According to the Bureau of the Census, approximately one-half of women over sixteen were in the labor force in 1980. *Id.*

53. L. GOLDEN, *supra* note 50, at 3.

Professor Judith T. Younger has traced the convergence of the civil and common law marital regimes, largely accomplished by the end of the nineteenth century, when all states had married women's property acts abrogating the common law idea that wife and husband were one, and that "one" was the husband.[54] At any rate, the ever-increasing trend has been to adopt the partnership approach of the civil law. The early Wyoming legislators should be applauded for their forward-looking approach in 1882, when more populous and supposedly more advanced states have only adopted that approach in recent years. The experience of the past century has shown, however, that without careful legislation the equitable distribution approach can be too discretionary and fault-oriented.

FAULT AS A FACTOR IN EQUITABLE DISTRIBUTION

In 1892 the subjects of marriage and divorce were first suggested to the Commissioners on Uniform State Laws as appropriate for their consideration. Only in 1970, however, did they recognize the trends toward no-fault divorce and equitable distribution by promulgating the Uniform Marriage and Divorce Act (UMDA).[55] In promulgating the UMDA, the Commissioners criticized the traditional reliance on assigning blame, both in granting a divorce and in distributing marital property. The Commissioners explained in their Prefatory Note why fault should be eliminated from the dissolution of marriage.

> [T]he Act has totally eliminated the traditional concept that divorce is a remedy granted to an innocent spouse, based on the marital fault of the the other spouse which has not been connived at, colluded in, or condoned by the innocent spouse. . . . [T]he legal dissolution of a marriage should be based solely on a finding that factually the marriage is irretrievably broken. This standard will redirect the law's attention from an unproductive assignment of blame to a search for the realities of the marital situation.
>
> The Act's elimination of fault notions extends to its treatment of maintenance and property division. The distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership. . . . [B]ecause of its property division provisions, the Act does not continue the traditional reliance upon maintenance [alimony] as the primary means of support for divorced spouses.
>
> Throughout the Act an effort has been made to reduce the adversary trappings of marital litigation. . . . [T]he parties are encouraged to make amicable settlements of their financial affairs. . . .[56]

---

54. Younger, *supra* note 49.

55. UNIF. MARRIAGE AND DIVORCE ACT Commissioners' Prefatory Note, 9A U.L.A. 91, 93 (1979).

56. *Id.* § 7, at 93-94.

Although fewer than ten states have adopted the Act,[57] many of its ideas have influenced or at least coincided with ideas expressed in state statutes or state case law during the past fifteen years.[58] For example, Wyoming divorce law has mirrored the Uniform Act in deemphasizing alimony. As the supreme court noted in *Grosskopf*, ordinarily "one spouse should not have a perpetual claim on the earnings of the other; . . . divorce, insofar as possible should sever the ties of the parties and they should begin . . . their lives anew. Thus, there has been a tendency away from alimony, and if some additional sum is necessary to adjust equities between the parties, it is better that that be done with an award of property."[59] In *Storm v. Storm*, the Wyoming court expressly adopted this idea from the Washington Supreme Court,[60] which also held in several more recent cases that all property of the couple, both separate and jointly owned, is before the court for just and equitable distribution at divorce.[61]

The Uniform Marriage and Divorce Act offers two alternatives for distributing property in section 307: alternative A, recommended for general adoption, and alternative B, for community property states wishing to keep the distinction between community property and separate property.[62] Both subsections 307A and 307B provide that the property shall be distributed without regard to marital misconduct. Both subsections list factors to be considered in equitably apportioning joint assets between the parties, although alternative A divides separate property as well, and alternative B does not. A factor in both subsections 307A and 307B is the contribution of a homemaker spouse, a new idea in Anglo-American law.[63]

According to many observers, today's marital partners typically expect that a homemaker should own part of the marital property, even without having made a monetary contribution to it. Moreover, Dean Susan Westerberg Prager concluded in 1977 that sharing principles inherent in the marriage relationship would continue to apply even in two-career families where partners earning equal incomes might be expected to acquire and own property separately.[64] Thus, the partnership idea expressed in Wyoming's hundred-year old equitable distribution statute accords with the most modern thinking, even though the factors used to distribute the property may not.

Most scholars and commentators agree that fault, defined as marital misconduct, should not be a factor in property distribution. In their much-

57. 9A U.L.A. 55 (Supp. 1984).
58. Younger, *supra* note 49, at 73.
59. 677 P.2d 814, 821 (Wyo. 1984).
60. Storm v. Storm, 470 P.2d 367, 369 (Wyo. 1970) *citing* Lockhart v. Lockhart, 145 Wash 210, 212-13, 259 P. 385, 386 (1927).
61. *See* Merkel v. Merkel, 39 Wash. 2d 102, 115, 234 P.2d 857, 864 (1951); Armstrong v. Armstrong, 71 Ariz. 275, 278, 226 P.2d 168, 170 (1951); LeClert v. LeClert, 80 N.M. 235, 236, 453 P.2d 755, 756 (1961).
62. UNIF. MARRIAGE AND DIVORCE ACT Commissioners' comment, 9A U.L.A. 91, 144 (1979).
63. *Id.*
64. Praeger, *Sharing Principles and the Future of Marital Property Law*, 25 U.C.L.A. L. REV. 1 (1977).

heralded new book, *American Family Law in Transition*, Professors Walter O. Weyrauch and Sanford N. Katz point out, however, that most often women are at a disadvantage in a pure no-fault system if property distribution is uncertain and alimony rarely available.[65] These authors argue that fault is still significant everywhere, as we have seen in Wyoming, even if courts in no-fault jurisdictions will not acknowledge it.[66] They suggest also that "[i]n the last analysis conceptions of moral blame still seem to be needed emotionally, although the underlying issues are more often than not economic."[67] They do not specify, however, whether assigning moral blame satisfies the emotional needs of the bench, the bar, the litigants or the American public, a large portion of which pays lip-service to the ideal of life-long marriage while practicing, at best, sequential monogamy.

Indeed, it can be argued that moral blame should not be removed from the divorce laws—that someone is always at fault for a marriage break-up, and that person should bear the brunt of the hardships resulting from it. One answer to this argument is that marital conflicts are rarely so one-sided; ample fault and blame ordinarily exist for each spouse to have a healthy portion. Yet, even if blame must be assigned, for emotional or other reasons, are the often over-burdened courts the proper agency to make such moral determinations? If they are, then attorneys as officers of the court have an obligation so much the greater to bring all possible fault evidence to the court's attention. Fortunately courts, considered as human beings and not as inanimate institutions, have shown a notable disinclination to listen to the type of evidence that the Wyoming statutes make inevitable.[68] Regardless of the courts' disinclination, however, attorneys must introduce fault evidence if a jurisdiction does not exclude it.

JUDICIAL DISCRETION IN EQUITABLE DISTRIBUTION

Judicial discretion is always a salient feature of equitable distribution. The broad discretion given trial courts in most equitable distribution states has been severely criticized.[69] Although actually reporting on studies of alimony awards in Ohio and Maryland in 1939, a commentator applied the following broad conclusion to property distributions as well. "Behind the discretionary power lies the fault and penalty idea. The judge awards the divorce decree to the non-offending or the less-offending spouse, presumably. He then makes the property settlement as an award for virtue and a punishment for vice in the marital relationship."[70]

Though perhaps no longer true in some jurisdictions or in some individual instances, this logical description of the usual process emphasizes

65. W. WEYERAUCH & S. KATZ, *supra* note 30, at 314.
66. *Id.* at 319.
67. *Id.* at 338.
68. For example, the trial judge in Paul v. Paul, was upheld in his discretion to refuse to permit the parties "to air their dirty laundry in court." 616 P.2d 707, 715 (1980).
69. *See, e.g.*, Brake, *Equitable Distribution vs. Fixed Rules: Marital Property Reform and the Uniform Marital Property Act*, 23 B.C.L. REV. 761, 776 (1982).
70. Dagget, *Division of Property Upon Dissolution of Marriage*, 6 LAW & CONTEMP. PROBS. 225, 227 (1939).

the paradox of the Wyoming Supreme Court's instructions to the trial courts that "judicial discretion should not be so exercised as to reward one party and punish the other."[71] When this admonition is coupled with the statutory[72] and case law instructions to consider the "merits of the parties" only to determine that the property distribution is just and equitable,[73] Wyoming district courts are faced with a dilemma indeed. To comply with these almost impossibly paradoxical instructions, the courts may need the nearly unlimited discretion the case law and the statutes have given them. In *Paul*, the supreme court said, "The trial court's discretion won't be disturbed except on clear grounds,"[74] and "As an appellate court, we consider that our power to disturb a property settlement fixed by a trial judge is limited indeed. There must be a clear abuse of discretion before we will upset or adjust such a settlement. We consider 'abuse of discretion,' to be such abuse as shocks the conscience of the court. It must appear so unfair and inequitable that reasonable persons could not abide it."[75] This standard of review is so broad that no case has been found in which the Wyoming Supreme Court reversed a trial court's property disposition for abuse of discretion.

Illinois Appellate Court Justice Craven wrote a provocative dissenting opinion on whether or not abuse of discretion is the proper standard of review for marital property dispositions.[76] Although he did not persuade his judicial colleagues, his views are worth considering. Justice Craven wrote that a broadly defined abuse-of-discretion standard (e.g., in his case, no abuse as long as reasonable men could differ) has a particular place in American jurisprudence in reviewing decisions of trial and administrative procedure. In those areas where appellate courts lack expertise, he said, judicial economy favors little interference. Furthermore, "rarely will a trial court's ruling in these areas affect the individual's right to justice concerning the underlying cause, which is largely why an abuse of discretion standard is usually associated with questions of procedural—not substantive—law."[77] He concluded that the majority's broad or undefined abuse of discretion standard of review would defeat the purpose and objectives of the Illinois equitable distribution statute.[78]

The objectives of the 1977 Illinois Marriage and Dissolution of Marriage Act[79] were to remove a large part of the trauma long associated with divorce, to allow the parties to dissolve a marriage with greater dignity, and to reduce acrimony.[80] Equitable distribution under this Act replaced

71. Storm v. Storm, 470 P.2d 367, 371 (Wyo. 1970); Paul v. Paul, 616 P.2d 707, 712 (1980).
72. WYO. STAT. § 20-2-114 (1977).
73. Paul v. Paul, 616 P.2d 707, 712 (Wyo. 1980).
74. *Id.*
75. *Id.* at 714.
76. *In re* Marriage of McMahon, 82 Ill. App. 3d 1126, 403 N.E.2d 730 (Ill. App. Ct. 1980) (Craven, J., dissenting).
77. *Id.* at 1137, 403 N.E.2d at 738.
78. Illinois Marriage and Dissolution of Marriage Act, ILL. REV. STAT. ch. 40, § 503(c) (1977).
79. Illinois Marriage and Dissolution of Marriage Act, ILL. REV. STAT. ch. 40 (1977).
80. ILL. REV. STAT. Historical and Practice Notes (1977).

the modified common law title doctrine[81] in order to remove the "glaring inequities"[82] of the former law and "replace the concept of post-marital support through alimony with one of post-marital stability through a just distribution of marital property and assets."[83] Justice Craven found a broad abuse-of-discretion standard of review inappropriate for achieving these objectives.[84]

Although lacking a formal legislative history, we can reasonably assume that the 1977 Wyoming Legislature enacted the no-fault provisions in the Wyoming divorce statutes for the same reasons the Illinois legislature reformed its divorce laws in the same year. In addition, although Wyoming never had the common law system of awarding property to the spouse who held title to it, we can probably assume that Wyoming adopted an equitable distribution statute in 1882 for many of the same reasons Illinois adopted one in 1977.

Even though Illlinois, long known as a state conservative in family law matters, rejected no-fault grounds for divorce at that time, the legislature did adopt no-fault principles for adjudicating property distribution and the other incidents of divorce.[85] The Wyoming Supreme Court standard (no abuse of discretion unless it shocks the conscience of the court or unless it is so unfair and inequitable that reasonable persons could not abide it) is even more stringent than the Illinois standard Justice Craven criticized. If that standard defeated the Illinois statutory purposes, the Wyoming standard is probably also defeating the Wyoming statutory purposes.

Justice Craven cited the administrative law authority, Kenneth Culp Davis,[86] who has written that "we should eliminate much unnecessary discretionary power and . . . we should do much more than we have been doing to confine, to structure, and to check necessary discretionary power."[87] Davis might well say of our abuse-of-discretion standard of review that it is so broad as to result in almost no review at all.

Admittedly, the Wyoming Supreme Court should not substitute its judgment for that of the trial court, which had an opportunity to judge the credibility of the witnesses, but is the present unfettered trial court discretion the best way to facilitate substantial and uniform justice in all the judicial districts of the state? Even assuming the best will and the most conscientious effort in the world, to some degree the district judges will inevitably make varying and unpredictable decisions. And to the extent that decisions are unpredictable, lawyers and clients will have dif-

81. Illinois Marriage and Dissolution of Marriage Act, ILL. REV. STAT. ch. 40 §§ 18, 19 (1975).

82. Kujawinski v. Kujawinski, 711 Ill. 2d 563, 576, 376 N.E.2d 1382, 1388 (1978).

83. *Id.*

84. *In re* Marriage of McMahon, 82 Ill. App. 3d 1126, 403 N.E.2d 730 (Ill. App. Ct. 1980) (Craven, J., dissenting).

85. Illinois Marriage and Dissolution of Marriage Act, ILL. ANN. STAT. ch. 40, Historical and Practice notes XXI (Smith-Hurd 1980).

86. *In re* Marriage of McMahon, 82 Ill. App. 3d 1126, 1139, 403 N.E.2d 730, 739 (Ill. App. Ct. 1980) (Craven, J., dissenting).

87. K. DAVIS, DISCRETIONARY JUSTICE 3-4 (1969).

ficulty agreeing on property settlements, which have long been favored by the Wyoming Supreme Court.[88] Those results seem too high a price to pay for flexibility and individualized justice.

FAULT RETURNS TO WYOMING DIVORCE LAW: GROSSKOPF V. GROSSKOPF

Facts

Although each divorce case has unique facts, divorce cases tend to fall into recognizable patterns. The facts in *Grosskopf* represent a fairly familiar pattern of two individuals who married, helped each other finish their education, had children, acquired property, then divorced after some ten or fifteen years of marriage. If courts must frequently handle similar cases, they should use their discretion in such a way as to obtain uniform results. Therefore, the *Grosskopf* case ought to be looked at in some detail.

Jeannine Marie and Loren M. Grosskopf were college students when they were married in 1968.[89] Both Grosskopfs worked part-time while in college, and Mrs. Grosskopf worked full-time during her husband's senior year. She then continued her full-time employment while he had a teaching assistantship and earned his master's degree in accounting at the University of Wyoming.[90] Mr. and Mrs. Grosskopf separated permanently in 1980 when she took their three children from Cody, Wyoming, to live near relatives of both sides of the family in Appleton, Wisconsin.[91]

Mr. Grosskopf was successful in his accounting career; at the time the divorce action was filed, his net take-home pay was approximately $2,150 per month.[92] At the time they were divorced, the Grosskopfs had some $74,000 in assets, and their liabilities amounted to approximately $45,000.[93]

The Grosskopfs' story may be all too typical of what happens in a disintegrating marriage when the spouses cannot agree on basic questions of lifestyle and money management. At trial Mrs. Grosskopf stated that, as she saw it, her husband over-emphasized material things and spent excessive time and money on outside activities that did not include her and the children.[94] She resented the job demands that frequently took him out of town.[95] She testified that they had come to Wyoming originally because he liked to hunt and fish,[96] and she had come with him because "it just made sense that one would pursue what the leader of the family wanted

88. *See, e.g.*, Beard v. Beard, 368 P.2d 953, 955 (Wyo. 1962).
89. Grosskopf v. Grosskopf, 677 P.2d 814, 816 (Wyo. 1984).
90. *Id.*
91. *Id.* at 817.
92. *Id.*
93. *Id.*
94. II Trial Record 305-06, Grosskopf v. Grosskopf, 677 P.2d 814 (Wyo. 1984) [hereinafter Trial Record].
95. *Id.* at 276.
96. *Id.* at 258.

to do,"[97] even though she had little interest in outdoor pursuits and was leaving her family and friends behind in Wisconsin.[98]

For most of the first ten years of her marriage, she worked either full or part-time. During that period she had three children and served as a parent for her husband's teenage brother as well.[99] Reading her trial testimony, one can see that she thought she had done her part in the marriage and finally began to feel that she was receiving very little consideration for it.

At that point she suggested a period of celibacy as a "therapeutic technique" while she and her husband tried to find out whether any compatibility remained in other areas of their life together. She stated that she would no longer feel she was being used as a "sexual doormat" if there was outreaching or compromise by her husband in other elements of their relationship.[100] This "therapeutic technique" is one often proposed by marriage counselors. It is likely to be successful only if both parties agree to it and will work on other aspects of their marriage at the same time, which was not the case with the Grosskopfs. In any event, the technique failed, and Mrs. Grosskopf moved to Wisconsin with her children to begin her life anew.

In addition to her testimony, Mrs. Grosskopf's attorney introduced an economist from Colorado State University as an expert witness to testify on the cost of child-rearing and on the economic value of a master's degree in accounting. Relying on Consumer Expenditure Surveys conducted by the federal Bureau of Labor Statistics and on data from the Departments of Agriculture and Education, the expert witness testified that the cost of rearing children in the Grosskopf income bracket (without including college costs), equalled 125% of the Grosskopfs' income.[101]

Referring to education as "human capital," the economist testified that the master's degree in accounting was marital property to be divided at divorce. He determined that the master's degree had a discounted present value of $105,400, assuming a 30.4 year work-life expectancy for Mr. Grosskopf, and a continually increasing earning capacity based on his earning history.[102] The economist concluded that a fair award to each party would be $74,741.50,[103] with custody and child support of approximately $1,359 per month to the mother.[104]

The trial court found Mrs. Grosskopf more at fault for the marriage break-up than her husband because she was dissatisfied with the family's home and lifestyle, she wanted her husband to quit his job and move

97. *Id.* at 257.
98. *Id.* at 258-59.
99. *Id.* at 269.
100. *Id.* at 308.
101. I Trial Record 192-99; Grosskopf v. Grosskopf, 677 P.2d 814, 816 (Wyo. 1984).
102. *Id.* at 200-05.
103. *Id.* at 212.
104. *Id.* at 211.

to Wisconsin, and because she did finally move there with the children.[105] The trial court also noted that Mrs. Grosskopf had decided to practice celibacy during the last two years of the marriage.[106] The court therefore granted the divorce to Mr. Grosskopf as the aggrieved party and took Mrs. Grosskopf's fault into consideration when it divided the property and refused to award her alimony and attorney fees.

The trial court awarded child custody and support of $750 per month to Mrs. Grosskopf, and divided the property so that each party received $36.190.70 in cash, but required Mr. Grosskopf to pay all the debts, some of which the economist had not taken into account when making his recommendation. Thus Mr. Grosskopf was left with a net liability of $8,593.30.[107] The trial court also held that the advanced degree in accounting was not marital property to be divided at divorce and that, at any rate, in this case the degree had little or no value.

Although by monetary standards alone Mrs. Grosskopf might be regarded as the winner at the trial level because she came out nearly $45,000 ahead of her husband, she appealed, contending that the evidence presented did not justify the court's finding her at fault or justify granting the divorce to her husband as the aggrieved party.[108] She also appealed the court's refusal to treat Mr. Grosskopf's increased earning capacity as marital property subject to equitable distribution.[109] In addition, she contended that the court abused its discretion in considering fault in dividing the property, awarding child support, and refusing to award her alimony and attorney fees.[110]

The Wyoming Supreme Court Opinion

The Wyoming Supreme Court affirmed the trial court's judgment in its entirety. The court held that the trial court had not abused its discretion in awarding the divorce to Mr. Grosskopf or in considering Mrs. Grosskopf's fault when it decided the other incidents of divorce.[111] The court stated that a trial court has discretion to hear or not to hear fault evidence but that, "in any event, such evidence may not be considered by the court to punish one of the parties, but only to insure that the property division is just and equitable under all the facts and circumstances of the case."[112]

Section 20-2-104 of the Wyoming statutes provides that a divorce may be decreed on the complaint of the aggrieved party.[113] The *Grosskopf* court

105. Grosskopf v. Grosskopf, 677 P.2d 814, 818 (Wyo. 1984).
106. *Id.*
107. *Id.* at 817.
108. *Id.* at 816.
109. *Id.*
110. *Id.* at 818.
111. *Id.* at 823.
112. *Id.* at 820 *citing* Paul v. Paul, 616 P.2d 707, 712 (Wyo. 1980) (a case previously regarded as a useful compendium of the court's rules for divorce cases but now brought into question by the *Grosskopf* decision).
113. WYO. STAT. § 20-2-104 (1977).

held, "It matters not which party was at fault in bringing about the differences which cannot be reconciled. All that is required is that the irreconcilable differences exist."[114] But the court said in addition that if both parties seek the divorce, the trial court must also decide which is the guiltier spouse in order to award the decree to the more aggrieved party.[115]

Although the supreme court acknowledged that both parties may be aggrieved,[116] apparently neither it nor the trial court seriously considered the possibility that the decree might have been granted to both parties. The trial court had not said that Mr. Grosskopf was without fault; it simply said that Mrs. Grosskopf's degree of fault was the greater.[117] Only two Wyoming cases have held that a divorce decree may not be granted to both parties.[118] The cases were both controlled by the now-repealed statute on recrimination, or equal fault.[119] The statute provided that no decree should be issued where the party complaining was "guilty of the same crime or misconduct charged against the defendant." Since that statute was repealed in 1977, nothing appears to prevent granting the decree to both parties in a divorce. If that is possible, fault will have no place in determining irreconcilable differences.

Justice Cardine then went on to consider whether fault evidence could be used in distributing property. Justice Cardine stated that, in this decision, Wyoming joins a small majority which holds that "the enactment of a no-fault divorce statute which does no more than provide no-fault grounds for divorce" does not change the traditional fault grounds for determining the other incidents of divorce.[120] "The statutes and law in existence governing division of property, alimony, and attorney fees prior to the adoption of legislation providing no-fault grounds for divorce, therefore, remain in effect today."[121]

Section 20-2-114 of the Wyoming statutes, the equitable distribution statute, provides that the trial court shall have regard for "the respective merits of the parties" when it disposes of their property.[122] Justice Cardine defined "merit" as "deservedness or goodness,"[123] but apparently neither the trial court nor the appellate court considered positive evidence of deservedness or goodness; both emphasized fault. Nevertheless, under the *Grosskopf* decision, attorneys are able to present positive evidence of goodness or deservedness going to the "merits of the parties." Justice Cardine further stated that although some states have adopted no-fault disposition of property when they adopted no-fault

114. 677 P.2d at 817.
115. *Id.* at 818.
116. *Id.*
117. *Id.*
118. *See* Logan v. Logan, 396 P.2d 198 (Wyo. 1964); Eisenbarth v. Eisenbarth, 548 P.2d 887, 888 (Wyo. 1976).
119. WYO. STAT. § 20-55 (1957).
120. *Grosskopf*, 677 P.2d at 819.
121. *Id.*
122. WYO. STAT. § 20-2-114 (1977).
123. *Grosskopf*, 677 P.2d at 819.

grounds for divorce, Wyoming did not.[124] Other states like Wyoming which have adopted only the no-fault grounds for divorce have split on whether or not they are also required to make no-fault determinations of property distribution, child custody and support, alimony and attorney fees.[125]

The supreme court also affirmed the trial court's decision that an educational degree is not property subject to equitable division because it has none of the usual attributes of property.[126] Even so, the court recognized that equities sometimes must be adjusted when one spouse has worked to enable the other to earn the degree.[127] If such equities are to be adjusted, the court prefers that it be done by a property award, rather than by granting alimony.[128]

In this case, however, the court noted that both spouses had worked and contributed to family support, and the parties had been married for twelve years. During that time, Mrs. Grosskopf had already received some of the benefit from her husband's advanced degree in any case.[129] The court implied that if the divorce had taken place immediately after Mr. Grosskopf received his advanced degree and before his wife had any opportunity to share in the benefits to be gained from it, compensating her for her contributions to the degree might have concerned them more. Most important to the supreme court was that the trial court's property division left Mrs. Grosskopf with more than $36,000 in cash, and Mr. Grosskopf with the obligation to pay more than $8,000 in debt.[130] This, the supreme court thought, more than repaid her for her contributions to his education.[131] The supreme court was unable to say that this result, which Mr. Grosskopf did not appeal, was unjust and inequitable or an abuse of discretion.[132]

The *Grosskopf* case illustrates that the usefulness of fault evidence is questionable. At best, it is a phantom factor which affects a court's decision in a completely subjective fashion. The legislature or, in a proper case, the Wyoming Supreme Court ought to limit the kinds of fault evidence to be considered in property distribution to misbehavior the effects of which can be objectively quantified. For instance, fault evidence should be limited to harmful behavior like serious financial misconduct—as when a spouse gambles away family assets, or serious marital misconduct like physical or psychological spousal abuse which impairs the victim's ability to care for him or herself or the children. These limits may be hard to draw, but the petty meannesses common in a deteriorating marriage have no real place in the courtroom or in decisions that will vitally

124. *Id.*
125. *Id.*
126. *Grosskopf*, 677 P.2d 822 *citing In re* Marriage of Graham, 194 Colo. 429, 432, 574 P.2d 75, 77 (1978).
127. *Grosskopf*, 677 P.2d at 823.
128. *Id.* at 821.
129. *Id.* at 823.
130. *Id.* at 820.
131. *Id.*
132. *Id.* at 823.

affect the rest of the parties' lives. *Grosskopf* might have been the proper case in which to define the kind of fault evidence to be excluded, had the court not rested its decision on a broad interpretation of the statutory language and relied, as it usually does, so heavily on the discretion of the trial court, which was extremely fault-oriented in this case.

Practical Difficulties for the Attorney

Under the Wyoming Supreme Court's decision in *Grosskopf*, if both parties seek the divorce, the attorneys must be prepared to offer all possible fault evidence. Even if only one spouse seeks the divorce, the attorneys must still offer fault evidence to enable the trial court to take the merits of the parties into consideration when it disposes of the couple's property. Attorneys must also be prepared to offer positive evidence of the "deservedness" or the "goodness" of their clients. Of course, gathering and presenting such evidence can only prolong litigation and thereby increase expenses for all concerned. In addition, introducing this evidence will typically aggravate both the bench and the bar and cause increased trauma to the litigants and their children. These undesirable results will only add to the inefficiency and unnecessary expense of the equitable distribution system itself, but after *Grosskopf* these results seem unavoidable.

The impact of Mrs. Grosskopf's testimony upon the trial court and the Wyoming Supreme Court exemplifies the effect of permitting fault to be introduced into evidence. Both the trial court[133] and the supreme court[134] thought her celibacy idea important enough to mention and appeared to regard it as partial evidence of her greater fault for the marriage breakup. The celibacy discussion in this article demonstrates the wisdom of the United States Supreme Court's decision, in another context, that the constitutionally-protected right of privacy requires the state to stay out of marital bedrooms.[135] Even if statutes and holdings like the one in *Grosskopf* do not impair the constitutionally-protected right of privacy by requiring fault evidence to be introduced, they do raise the question of how much and what kind of fault evidence should be required or permitted.

The same problems will arise even if no one anticipates a contested case, for the prudent attorney must ferret out all the possible fault evidence on both sides in order to represent a client adequately in negotiations, if not in court. As Mrs. Grosskopf's attorney stated in his brief, she believed Wyoming to be a no-fault state and elected to admit irreconcilable differences and refrain from offering evidence of her husband's fault.[136] If the court is to consider fault in deciding issues relating to property division and alimony, the parties must be prepared to "air the dirty

133. Grosskopf v. Grosskopf, No. 83-126, slip op. at 2 (Fifth Dist. Nov. 12, 1981), *affirmed*, 677 P.2d 814 (Wyo. 1984) [hereinafter cited as Trial Court Decision Letter].

134. *Grosskopf*, 677 P.2d at 818.

135. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

136. Brief for Appellant, *supra* note 10, at 19.

laundry." Justice Cardine has now clarified that point, but the legislature might want to consider whether this is the result it intended.

The attorney's problem is compounded after *Grosskopf* under factual circumstances such as those in *Paul v. Paul*,[137] which involved a large amount of property. The husband in that case refused to comply with what he considered abusive discovery, and no sanctions were imposed on him.[138] On appeal the supreme court held: "When there are adequate assets to comfortably provide for both of the parties, the trial court does not abuse its discretion when it refuses to permit the parties to air their dirty laundry in court."[139]

The very use of the phrase "air their dirty laundry" in *Paul* seems to show that at least some judges find fault evidence so distasteful that they will not hear it if they can avoid it. The obvious problem is the fear that an attorney will prejudice his client's case by trying to introduce fault evidence at all. In addition, fault evidence was avoided in *Paul* because so much property was available for distribution. This raises the policy question of whether the courts should be applying one standard of fault for the well-to-do and another for the less fortunate. That question aside, the attorney is faced with the insoluble dilemma of deciding how much fault evidence to introduce, without knowing either what kind or amount the court will find distasteful or how much property must be involved to give the court discretion not to hear about the "dirty laundry."

SUGGESTED STATUTORY MODIFICATIONS FOR NO-FAULT DIVORCE

The reasons usually given for changing to the no-fault system of divorce have been to eliminate the acrimony and "airing of dirty laundry," as well as the general adversarial character of the typical divorce obtained on fault grounds. To this end many states have taken pains to eliminate such fault-laden terms as plaintiff and defendant, complaint, and divorce, and have replaced them with the terms petitioner and respondent, petition, and dissolution of marriage. Wyoming might well consider doing the same.

The former section of the Wyoming statutes detailing fault grounds[140] had referred to a divorce decreed on the "application" of an aggrieved party. Curiously, the 1977 Legislature changed this to the "complaint" of an aggrieved party—a term with more adversarial and fault implications—at the same time it ostensibly moved toward a no-fault system. The legislature also adopted the term "dissolution of marriage," a more neutral term than "divorce," as the title of chapter 2, title 20, and might well have substituted "dissolution" for "divorce" in all statutory sections. It certainly could have eliminated the requirement for an "aggrieved party" or at least recognized, as the supreme court did in *Grosskopf*,[141] that

137. 616 P.2d 707 (Wyo. 1980).
138. *Id.* at 715.
139. *Id.*
140. WYO. STAT. § 20-38 (1957).
141. 677 P.2d 814, 818 (Wyo. 1984).

both parties may be aggrieved. If the legislature did not wish to style divorce cases *In re Marriage of Grosskopf,* for example, it should have provided specifically that the decree may be granted to both parties.

Because the legislature eliminated the traditional grounds for granting a divorce, after *Grosskopf* a trial court must now determine for itself in each case what fault is. It seems ironic that seven years after the Wyoming legislature repealed fault grounds for divorce, some conduct that might not have been considered fault under the old system may now be so regarded. For example, the trial court's decision letter of November 12, 1981,[142] shows that the court regarded as fault Mrs. Grosskopf's moving the children to Wisconsin to be near relatives on both sides of the family. The move came after Mr. Grosskopf left the family home and sued for divorce, and after she brought the children back from a visit to Wisconsin and attempted a reconciliation, which Mr. Grosskopf refused.[143] One wonders whether this conduct, fairly typical of a spouse searching for emotional support as a marriage disintegrates, would have been considered fault under any of the eleven grounds for divorce listed under former section 20-28.[144]

The legislature did repeal the requirement that the declarations, confessions, or admissions of the parties must be corroborated,[145] and eliminated also the traditional defenses of collusion, connivance, recrimination, condonation, and laches[146]—further indications that it intended a no-fault system. Unfortunately, however, the legislature left in place a number of terms and references appropriate only for the previous traditional fault system of divorce, thus making the statutes somewhat ambiguous. Two of these are found in subsections (b) and (d) of section 20-2-106.[147] Subsection (b) still says that "[n]o separation by decree entered hereunder shall be grounds for a divorce on the grounds of desertion or two (2) year separation unless those grounds existed at the time of petitioning for judicial separation."[148] This language should be repealed because desertion and separation have been eliminated as grounds for divorce. Subsection (d) should also be repealed because it provides that "[a]ll defenses available in an action for divorce are available under this section,"[149] referring to traditional defenses that no longer exist. Title 20 should not be cluttered with these obsolete provisions. Form 15 in the Wyoming Rules of Civil Procedure should also be revised. Form 15, the divorce complaint deemed sufficient under Rule 84, still refers to the intolerable indignities ground for divorce of Wyoming statutes section 20-2-104, now repealed. Paragraph 4 should be rewritten to refer to irreconcilable differences.

142. Trial Court Decision Letter, *supra* note 133, at 2.
143. II Trial Record *supra* note 94, at 319.
144. WYO STAT. § 10-53 (1957), *repealed by,* WYO. SESS. LAWS Ch. 152 (1977).
145. 1977 WYO. SESS. LAWS ch. 152 § 1.
146. *Id.*
147. WYO. STAT. § 20-2-106(b), (d) (1977).
148. WYO. STAT. § 20-2-106(b) (1977).
149. WYO. STAT. § 20-2-106(d) (1977).

SUGGESTIONS REGARDING EQUITABLE DISTRIBUTION

Apparently many Wyoming legislators and others have forgotten that title 20 did not get the usual full revision treatment it deserved. No doubt some changes might be advisable in other parts of the title not discussed. Family law may well be the most rapidly changing area of the law and certainly occupies a large part of trial court dockets. Conscientious trial court judges might welcome additional guidance in this area. Some ideas from the Uniform Marriage and Divorce Act[150] and the Uniform Marital Property Act,[151] if not the entire Acts, might be adopted.

Structuring the trial court's discretion will lead to more uniform and predictable results. If the trial court were required to consider prescribed statutory factors, then an adequate standard of review could be applied by the supreme court. Statutory factors to be considered in equitable distribution should include some or all of the following:

1. Either dissipation of or contributions to property acquisition, preservation, or depreciation or appreciation in value, including the contribution as homemaker, wage-earner, spouse or parent;

2. Contribution of one spouse toward the other's education, career or career potential;

3. Tax consequences to the parties;[152]

4. The need of a custodial parent to occupy or own the family home and its household effects;

5. The loss of inheritance, pension or other rights upon divorce or any such rights alread vested or expected to be acquired;[153]

6. The length of the marriage;

7. The age, health and earning potential of both parties;

8. Income and property of the parties at the time of marriage and when the action is commenced, and opportunities to acquire income and property in the future;

9. Child or spousal support to be awarded at divorce;

10. Rights and obligations from former marriages;

11. Antenuptial agreements;

12. The party through whom the property was acquired;

13. Burdens imposed upon the property for the benefit of either party and the children.

---

150. 9A ULA 91 (1977).

151. 9A ULA 19 (Supp. 1984).

152. This is especially true since the Domestic Relations Tax Reform Act of 1984 has changed almost every aspect of divorce taxation. Domestic Relations Tax Reform Act, Pub. L. No. 98-369, §§ 421-1041, 98 Stat. 793 (1984) (codified as amended in various sections of 26 U.S.C.).

153. Under Storm v. Storm, 470 P.2d 367, 370 (Wyo. 1970), future property, or "a mere expectancy," is not subject to equitable distribution. It might, however, be relevant in assessing the future needs of the parties. The supreme court might also be persuaded to change its view because such entitlements as pension rights, vested or not, are often one of the largest assets a couple may have.

Some jurisdictions also include a catch-all phrase like "any other relevant factor."[154] If guidelines like these are enacted, care must be taken to aid the court, not burden it. Merely listing such guidelines, however, will encourage attorneys to introduce evidence on the subjects covered. Trial courts will then be encouraged to make more specific findings of fact than have been typical in some districts.

Fault should not be included unless it can be objectively defined. Serious financial misconduct, or physical or psychological abuse that demonstrably impaired the other spouse's ability to care for him or herself or the children might be a relevant factor. But the parties should not "air their dirty laundry" as *Grosskopf* seems to invite, if not require, them to do.

Another argument for statutory guidelines is that, if trial courts must follow them, appellate review can be more effective. The record will then contain more information on how the trial court applied those guidelines to the facts in order to exercise its discretion. With a more detailed record, the supreme court will not be forced to rely on a presumption that the trial court acted properly.[155] As has been suggested by another commentator,[156] having more evidence in the record will enable an appellate court to recognize an extreme case more readily.

Vermont's century-long experience with an equitable distribution statute like Wyoming's ought to be studied, as well as Vermont's experience with its amended version and the guidelines provided there. Operation of equitable distribution statutes in other states should be studied, and suggestions solicited from many sources. Some flexibility for the trial court should be retained, but not at the risk of unpredictable, inconsistent and unreviewable decisions.

Legislators should also be aware that in 1983 the Commissioners on Uniform State Laws promulgated another statute in the marital property field, the Uniform Marital Property Act (UMPA), a full discussion of which is beyond the scope of this article.[157] Wisconsin was the first state to enact the statute, which has also been introduced in the Indiana, Missouri and Michigan legislatures; legislators of several other states have expressed interest in it.[158] The Act is a property law, functioning to recognize, during marriage and not merely at divorce, the respective contributions made by husbands and wives. "It discharges that function by raising those contributions to the level of defined, shared and enforceable property rights at the time the contributions are made."[159]

---

154. *See, e.g.*, N.Y. DOM. REL. LAW § 236(B)(5)(d)(10) (Consol. Supp. 1983-84).

155. Note, *Property Division and Alimony Awards: A Survey of Statutory Limitations on Judicial Discretion*, 50 FORDHAM L. REV. 415, 442 (1981). *Cf.* Cooper v. Cooper, 448 P.2d 607, 608 (Wyo. 1968) (court has broad discretion in property settlements which will not be disturbed except on clear grounds); Barbour v. Barbour, 518 P.2d 12, 16 (Wyo. 1974) (trial court's judgment will be altered only in extreme cases).

156. Cooey, *The Exercise of Judicial Discretion in the Award of Alimony*, 6 LAW & CONTEMP. PROBS. 213, 224 (1939).

157. 9A U.L.A. 19 (Supp. 1984).

158. 10 FAM. L. REP. (BNA) 1347 (1984).

159. UNIF. MARITAL PROPERTY ACT Commissioner's Prefatory Note, 9A U.L.A. 19 (Supp. 1984).

Citing dramatic changes in the demography of marriage and divorce, from fault to no-fault grounds and in other statutes, including the Uniform Probate Code and the 1981 Economic Recovery Tax Act, the Commissioners express sympathy for "the equitable distribution court's demanding role in the judicial process to monitor and referee the ensuing contests in the divorce courts. Burgeoning advance sheets clearly indicate just how difficult the referee's job is when it must be done well over a million times a year!"[160]

The Act creates an immediate sharing mode of ownership during the marriage and classifies a couple's property as marital or individual, but it allows a couple to create custom marital property systems by agreements enforceable without consideration.[161] This chance for private ordering follows the trend demonstrated in the 1984 Domestic Relations Tax Reform Act (DRTRA)[162] which changes almost every aspect of divorce taxation and is the most comprehensive revision of applicable Internal Revenue Code sections since 1942. DRTRA permits the parties to agree that otherwise qualifying payments will not be treated as alimony for income tax purposes.[163] Inasmuch as the Uniform Laws Commissioners were motivated by concern for equitable distribution courts when they promulgated this new uniform law, the law should be studied before any changes are made in Wyoming's property disposition system at divorce.

OTHER POSSIBLE STATUTORY MODIFICATIONS

Wyoming courts and litigants would benefit from a summary divorce procedure that does not require the court to decide child custody and support, property division or spousal support—either because these problems do not exist or because they have been settled by a separation agreement. California and Colorado have such summary procedures, and their statutes could provide useful models for the Wyoming legislature.[164]

Although, as the Wyoming court has often said, equitable does not necessarily mean equal,[165] an equal division might be statutorily suggested as a starting point for dividing marital property, at least, as has been done in Ohio. The Ohio Supreme Court rejected a presumption of equal division but advised that "a potentially equal division should be the starting point of analysis for the trial court."[166] An informal, unscientific survey has shown that this is already the starting point of negotiations for attorneys in some parts of Wyoming.

---

160. *Id.* at 20.

161. *Id.* at 21.

162. Domestic Relations Tax Reform Act, Pub. L. No. 98-369, §§ 421-1041, 98 Stat. 793 (1984) (codified as amended in various sections of 26 U.S.C.).

163. P-H DIVORCE TAXATION, para. 452, at 483, para. 453, at 504-05 (1984).

164. CAL. CIV. CODE §§ 4550-4552 (1983 & Supp. 1984); COLO. REV. STAT. § 14-10-120.3 (Supp. 1983).

165. *See* Warren v. Warren, 361 P.2d 525, 528 (Wyo. 1961); Kane v. Kane 577 P.2d 172, 174 (Wyo. 1978); Paul v. Paul, 616 P.2d 707, 713 (Wyo. 1980); Storm v. Storm, 470 P.2d 367, 371 (Wyo. 1970).

166. *See* Cherry v. Cherry, 66 Ohio St. 2d 348, 355, 421 N.E.2d 1293, 1298-99 (1981).

One commentator has suggested, however, that in a jurisdiction like Wyoming that divides separate as well as marital property, an equal division starting point might be unfair. Only when the economic need of a spouse cannot be satisfied in any other way does a court ordinarily reach the other spouse's separate property. Therefore, this commentator suggests that to apply irrelevant partnership principles in dividing separate property would be unfair.[167] Wyoming might want to adopt a two-tier—separate and marital—property system, or to provide that partnership principles should not apply to dividing separate property.

No empirical research can be done to find out whether principles uniform throughout the state are used to determine property distribution; court records are not sufficient to show exactly what property the court had before it. Neither do the records show the amount and origin of all the property involved in a given case, even though section 20-2-114 requires the court to have regard for "the party through whom the property was acquired."[168] With the help of several students, the author attempted research on equitable property division in several of Wyoming's district courts some seven or eight years ago and found the information in court records insufficient.

As discussed above, in Wyoming and several other states, both separate and jointly-owned property of the parties is before the court for equitable distribution.[169] The court must be sure that it is aware of all the financial assets of the parties, especially if separate property is to be distributed. If Wyoming divorce litigants were required to file affidavits of their financial holdings as is done in some states,[170] district judges could have more confidence that their decisions took all the necessary facts into account, and much less pre-trial discovery would be required in cases involving substantial property. Discovery regarded as abusive might well be avoided. A statute requiring that such affidavits be filed with the complaint (or petition) and answer should increase the fairness of the property disposition and would also make it possible to find out whether or not the district courts are handling the cases uniformly.

CONCLUSION

The purpose of this article has been to alert the bench, bar and legislature to developments, both within and without the state, that have been changing domestic relations law in the past ten to fifteen years. Results in Wyoming domestic relations cases should come from a con-

167. Krauskopf, *A Theory for Just Division of Marital Property in Missouri*, 41 MO. L. REV. 164, 177 (1976).

168. WYO. STAT § 10-2-114 (1977). (With the help of several students, the author attempted research on equitable property division in several of Wyoming's district courts some seven or eight years ago and found the information in court records insufficient).

169. *See* Paul v. Paul, 616 P.2d 707, 713 (Wyo. 1980); Craver v. Craver, 601 P.2d 999, 1001 (Wyo. 1979).

170. *See* N.Y. DOM. REL. LAW §§ 236(A)(2), 236(8)(4) (Consol. Supp. 1983-84); GA. CODE ANN. § 19-5-5(B)(6) (1982).

scious effort to make the system as fair and efficient as possible, not from inadvertence or inattention to new ideas and developments in this area of law. At the very least, the system should operate with minimum harm to those caught up in it as they live through a major crisis in their lives; it should help them to begin new lives with some measure of equanimity and a feeling that they have been treated fairly. This has not always been the result in the adversarial domestic relations system in which so many people have become mired.

All United States jurisdictions but South Dakota[171] have enacted no-fault grounds for divorce. These jurisdictions recognize that society gains nothing by forcing spouses to remain together when their marriages are over for all practical purposes. Individuals, society and the legal profession all suffer when the dissolution process becomes unnecessarily adversarial or is perceived as unfair by those involved in it. The bar, the bench, and the legislature should attempt whatever changes are necessary to limit the damage divorce inevitably causes to families, many of which have their first and perhaps only contact with the legal system in the divorce court. Both altruism and enlightened self-interest indicate that the legal profession should continue to lead in divorce law reform. By means of history, analogy, and inference, the author has tried to fathom Wyoming legislative intent and to suggest statutory changes to carry it out, as well as to suggest other desirable changes. If this article helps bring about reflection and study of Wyoming law in this field, with whatever changes are deemed appropriate, its purpose will have been achieved.

171. [Reference File] FAM. L. REP. (BNA) 400: iii-iv (August 2, 1983) and 442:001 (April 10, 1984).