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The 1958 General Assembly passed Senate Bill 11, and the bill became law when the Governor failed either to sign or veto it. The bill represents the combined efforts of a large number of lawyers who at one time or another have served on the Colorado Bar Association's Domestic Relations and Legislative Committees or who have made constructive suggestions to them, and of many laymen who have collaborated in its preparation.

It is not a cure-all. It does not furnish a solution to the basic problems of imperfect marriages. But it is hoped that it has eliminated some of the problems inherent in the old law.

MARRIAGE COUNSELLING

Section 46-1-1 is new. It provides: "It is, and shall be, the policy of the State of Colorado to discourage divorce and to promote and foster the marriage relationship and reconciliation of estranged spouses; nothing in this act shall be construed to prevent, prohibit, or inhibit domestic relations counselling services by the courts, by agencies of government, by private agencies or groups, or by any other qualified source. It is further declared to be the policy of the State of Colorado to encourage the establishment of facilities to assist in the reconciliation of estranged spouses."

Note that there is nothing mandatory about its terms. It is merely a statement of policy, without any positive implementation.

GROUNDS FOR DIVORCE

Section 46-1-2 (Colo. Rev. Stat. § 46-1-1, 1953) restates the grounds for divorce. The discretionary language of the old law is retained in the opening paragraph, which reads:

> "Any marriage may be dissolved and divorce granted for any one or more of the following named reasons; and for no other cause:"

Thus it is apparent, as before, that even if the grounds are proved the trier of the facts is still not obligated to grant a divorce.

As to specific grounds, the former grounds of impotency (at time of marriage, or after marriage "through immoral conduct"), adultery, wilful desertion without reasonable cause for one year, mental or physical

cruelty, and non-support of family for one year, are in the new law without word change, as grounds (1), (2), (3), (4), and (5), respectively.

Only slight changes appear in the old grounds of one year's habitual drunkenness or drug addiction [new (6)] and conviction of a felony [new (7)]. The words "drug fiend" in the old law were changed to "drug addict." Conviction of a felony since the marriage was broadened to include conviction of "a felony in a court of record in any state, territory, federal district, or United States possession since marriage."

The ground of insanity was reworded [new (8)]. The main changes were to reduce the period from 5 to 3 years, to eliminate the necessity for medical testimony as to incurable insanity, and to change the wording from "adjudged insane" and proved "incurably insane" to a wording "adjudicated an insane, mentally ill, or mentally deficient person, or a mental incompetent." It also spells out the requirement of proof that the spouse "has not, prior to the entry of decree of divorce, been adjudicated restored to reason or competency." The caution as to the continuing duty of the divorcing husband to support the wife remains in the law "unless she has sufficient property or means to support herself."

The old ground of bigamy is left out of the new law for obvious reasons. Proof of a valid marriage has always been considered a prerequisite to qualify for a divorce. The 1957 law pertaining to annulment and determination of marital status amply covers this situation.

A new ground [new (9)] provides:

> "That the parties have lived separate and apart for a period of three consecutive years, or more, next prior to the commencement of the action for divorce, *by force of a decree of a court of record* in any state, territory, or United States possession or district."

The italicized words are the key phrase. Mere living apart is insufficient, unless it has been pursuant to a court decree.

The safeguard provision assuring legitimacy of children of divorce and their inheritance rights is retained without change.

JURISDICTION

Section 46-1-2 deals with jurisdiction. The wording of the old law is considerably changed, but there is little change in substance. It should be noted, however, that the concurrent jurisdiction of the county and superior court specifies "actions for divorce wherein the complaint shall aver that the plaintiff does not seek alimony, child support, and division of property, or either of them, in excess of two thousand dollars in value." Previously it had been undecided whether the county court had jurisdiction when cumulative child support could exceed the two thousand dollar limit. Under the new law, it lacks jurisdiction.

Former provisions relating to procedure for transferring the action to the district court and for pleading an answer were eliminated. The new law allows the normal procedure applicable to other civil actions to apply here, stating:

> "The process, practice, and proceedings shall be in accordance with the rules of civil procedure, except as expressly modified or otherwise provided in this article."

A new paragraph has been added which applies when the adverse party is mentally ill, etc. It specifies that in such a case "the court shall appoint a guardian ad litem for such spouse; service shall be obtained on such spouse, on the guardian ad litem, and on the conservator of such spouse, if any." It then sets out as a requirement that "if any relief other than divorce or child custody is sought, a conservator shall be a party to the action."

RESIDENCE — VENUE OF ACTION

Section 46-1-3 should be studied carefully to avoid misunderstanding. There are three significant changes in the old law on this subject.

Formerly, the residence of the plaintiff was the controlling factor, although this had been widened by court decision to allow a non-resident defendant to secure by counterclaim a divorce from a resident plaintiff.[1] The new law allows a divorce if "one spouse has been a bona fide resident of this state during the one year next prior to the commencement of the action."

The old law had specified that the action could be commenced only in the county of the plaintiff's or the defendant's residence or in which the defendant last resided. This had been determined to be jurisdictional, and divorces obtained in counties other than the ones so designated have been held void by our supreme court.[2]

The new law makes no mention of the county in which the action shall be filed, and it goes further, to provide: "The venue of the action shall be as provided by the rules of civil procedure."[3]

It is submitted that it was the intention in this new law to overrule the old decisions that venue was jurisdictional in divorce actions.

A new sentence appears in the new law, providing that:

> "The wife shall not be considered to have the residence of the husband based merely on the marriage relationship."

This provision may have far-reaching implications. Its application to service marriages is at once apparent.

DEFENSES TO DIVORCE

This is an entirely new section, supplanting old sections 4 and 8.

The only defenses to a divorce action are spelled out in Section 46-1-4. By its limitations, recrimination (denying a divorce when both parties are guilty [old section 4]) is no longer a defense or a bar to a divorce.

The other common law defenses, not previously contained in the statute but generally recognized as available, are set forth in the new law. These are (1) Lack of jurisdiction, (2) Failure to establish a case, (3) Collusion (4) Condonation, (5) Connivance, and (6) Fraud on the court. Collusion, condonation and connivance are specifically defined in the law, but with the usual common law definitions.

The new law specifies that:

> "In no event shall a party be precluded from introducing evidence to show extenuation, provocation, mitigation, or justification concerning the acts complained of by the other party."

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[1] Harms v. Harms, 120 Colo. 209 P.2d 552 (1949).

[2] People ex rel. Plunkett v. District Court, 127 Colo. 483, 258 P.2d 483 (1953); Hilliard v. Klein, 124 Colo. 479, 238 P.2d 882 (1951); Branch v. Branch, 30 Colo. 499, 71 Pac. 632 (1902); People ex rel. Lackey v. District Court, 30 Colo. 123, 69 Pac. 597 (1902).

[3] See Colo. R. Civ. P. 98 (c).

This appears to remedy the present situation where, for failure to plead the above, on occasions the party has been barred from introducing such evidence. On the other hand, it appears to regard such matters not as affirmative defenses but merely as negations or minimizations of opposing evidence.

A significant new provision is in the last paragraph which shows how completely the old theory of recrimination has been reversed. It provides that:

> "If, upon the trial of an action for divorce, either or both of the parties shall be found guilty of any one, or more, of the grounds for divorce, then a divorce may be granted to either, or both, of said parties in accordance with such findings."

Note that the trier of facts still has discretion—the word "may" is included. The concept of a "guilty" party—inherent in the adversary theory of civil actions—is retained, but much of the stigma is removed by allowing the granting of a divorce to either or both. This same idea is repeated in new Section 46-1-9.

ALIMONY — CUSTODY OF CHILDREN — PROPERTY DIVISION

Decisions of the Colorado Supreme Court have done little to clarify the law concerning alimony and property division and the time for seeking and obtaining the same.[4] The new law, new Section 46-1-5, it is hoped, presents a clearer statement.

Paragraph (1) specifies that:

> "At all times after the filing of the complaint, whether before or after the issuance of a divorce decree, the court may make such orders, if any, as the circumstances of the case may warrant for:
>
> "(a) Custody of minor children;
>
> "(b) Care and support of children dependent upon the parent or parents for support;
>
> "(c) Alimony;
>
> "(d) Suit money, court costs, and attorney fees; and
>
> "(e) Any other matters (except division of property) in controversy between the parties."

This eliminates the confusing wording in the old law providing for "alimony and counsel fees pendente lite" and for alimony, etc. "when a divorce has been granted." Desirable or not, the new law permits these matters to be taken care of "whether before or after divorce." Subject to court discretion, it appears to allow a wife or ex-wife (in the absence of a release or waiver) to seek alimony for the first time at a date considerably later than the entry of a decree, and to assure that her attorney has a right to fees on matters arising after the divorce. No change is made, however, in basic law pertaining to what must be alleged in the original complaint, or in the consequences from not having a sufficiently inclusive prayer in the complaint. Obligation for support of "children" appears to be extended beyond minority in the situation where such child is "dependent . . . for support."

Paragraph (2) sets the time for dividing the property—which is far

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[4] Vines v. Vines, 10 Colo. Bar Ass'n Adv. Sh. 329 (1958) (Separate maintenance case); Rodgers v. Rodgers, 323 P.2d 892 (1958); Gregory v. Gregory, 130 Colo. 489, 276 P.2d 750 (1954); Ikeler v. Ikeler, 84 Colo. 429, 271 Pac. 193 (1928).

from clear in the old law. The new law specifies that it shall be done "at the time of the issuance of a divorce decree, or at some reasonable time thereafter as may be set by the court at the time of the issuance of said divorce decree."

No definite formula is prescribed, the reasonable discretion of the court remaining the only controlling factor, in the wording "such orders, if any, as the circumstances of the case may warrant relative to division of property, in such proportions as may be fair and equitable."

The old law limited the right to security to orders for alimony.[5] The new law, in paragraph (3) gives the court "the power to require security to be given to insure enforcement of its orders"—thus covering any and all orders in the action.

There was previously much uncertainty, to say the least, as to the right of a court after entry of decree to go into matters which could not have been passed on due to lack of personal jurisdiction over the defendant. Paragraph (4) of the new law specifies that the court "shall retain jurisdiction of the action . . . for the purpose of hearing any matters recited in (1), (2) and (3) of this section which it was unable to determine at earlier hearings for lack of personal jurisdiction over one of the parties." This is also extended to clarify its rights to reopen for other reasons, retaining jurisdiction in the court to hear any of such matters "which it was unable to determine . . . for lack of knowledge or information, or because of fraud, misrepresentation, or concealment."

Any doubts about the rights to modify or change previous orders are resolved in the wording that "the court shall retain jurisdiction of the action for the purpose of such later revisions of its orders pertaining to . . . [custody, support, alimony, suit money, court costs, attorney fees, other matters (except division of property), and requirements for security] as changing circumstances may require."

Paragraph (5) repeats the old law about termination of rights to alimony on remarriage, but makes it apply even if the remarriage is "void or voidable." It allows the parties to provide otherwise by "written agreement or stipulation."

Paragraph (6) affects the old decision[6] which held that, on failure to set forth verbatim in the decree the provisions of an agreement, the divorce court lacked the power to enforce the agreement. The new law specifies that:

> "Any written agreement or stipulation by the parties as to any of the above matters, when incorporated in an order or decree or when filed in the action and referred to and approved and adopted in any order or decree, shall become a part of such order or decree."

TRIAL NINETY DAYS AFTER SERVICE — DISMISSAL

The old law had specified that there could be no trial until 30 days after filing the action. New Section 46-1-7 specifies:

> "No trial for an action for divorce shall be had until at least 90 days after service of process; provided, however, upon

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[5] Brown v. Brown, 131 Colo. 280, 283 P.2d 951 (1955); cf. Vines v. Vines, note 4 supra.

[6] Campbell v. Goodbar, 110 Colo. 403, 134 P.2d 1060 (1943); McWilliams v. McWilliams, 110 Colo. 173, 132 P.2d 966 (1942); Hall v. Hall, 105 Colo. 227, 97 P.2d 415 (1939); Kastner v. Kastner, 90 Colo. 280, 9 P.2d 290 (1932).

motion of either party, the court shall continue said trial for an additional 30 days, and the court may, upon motion of either party, or upon its own motion, grant other and additional continuances, from time to time."

And opponents called this a *Quickie Divorce Bill!*

The new law also provides for dismissal with prejudice if not tried within a year after commencement of the action. This is mandatory ("shall be dismissed") "on motion of the court or of either party, except for good cause shown."

DECREE FINAL ON ENTRY

Old Section 46-1-9 made the decree final six months after entry of interlocutory decree, and allowed dismissal within that period for good cause shown. "Good cause" had been interpreted as any reason at all, if requested by the "innocent" party.[7]

New Section 46-1-9 provides for only one decree, final on entry. It states:

"After the trial of an action for divorce, the court shall enter a judgment or decree dismissing the action or granting a final decree of divorce to either or both parties."

SECTIONS RETAINED UNCHANGED

Old Section 46-1-11 (appeals as in other civil cases) and Section 46-1-15 (indigent women may sue without payment of costs) are unchanged.

SECTIONS REPEALED

Former Section 46-1-6 (jury trial may be waived) comes out as unnecessary. R.C.P. applies as in other civil actions. Note, jury trial requests are probably now required within the standard 10 day rate.

Old Section 46-1-8 (dismissal in event of collusion) is repealed. The gist is included in new Section 46-1-4 on defenses.

Former Section 46-1-10 (decree final in 6 months, separate final decree not required) is eliminated. See new Section 46-1-9.

Old Section 46-1-12 (applicability to pre-1933 proceedings) goes out as no longer necessary. See new Section 10.

Former Section 46-1-13 (policy to resolve divorce actions) is repealed. The new policy (favoring reconciliation) is set forth in the opening section of the 1958 law.

Old Section 46-1-14 (one year to set aside divorce, except for lack of jurisdiction or fraud on court) is eliminated. R.C.P. applies as in other civil actions.

EFFECTIVE DATE — EARLIER ACTIONS

By Section 46-1-11 of the new law, the act "shall take effect and be in force from and after July 1, 1958." It is submitted that the safest interpretation is that July 2 is the effective date.

Section 46-1-10 of the 1958 law makes its provisions apply only to actions commenced after the effective date: "Statutes in effect prior to the effective date of this act shall apply to all actions commenced prior to said date."

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[7] Doty v. Doty, 103 Colo. 543, 88 P.2d 573 (1939).