PROPOSED MARRIAGE AND DIVORCE CODES FOR PENNSYLVANIA

General Assembly of the Commonwealth of Pennsylvania
JOINT STATE GOVERNMENT COMMISSION
Harrisburg, Pennsylvania
June 1961

The Joint State Government Commission was created by Act of 1937, July 1, P. L. 2460, as last amended 1959, December 8, P. L. 1740, as a continuing agency for the development of facts and recommendations on all phases of government for the use of the General Assembly.

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THE PROPOSED CODES

INTRODUCTION

The General Assembly, at its 1955 Session, by Senate Concurrent Resolution No. 145, which was adopted finally in the House of Representatives on December 14, 1955, noted that the laws affecting domestic relations are many and varied and that no one court has jurisdiction to hear and determine the causes arising out of such laws but the parties involved are required to submit to the jurisdiction of several courts; that such divided jurisdiction in matters of family relationships leads to delay, expense, multiplicity of action and confusion; and directed the Joint State Government Commission to study and investigate the jurisdiction of the several courts of the Commonwealth concerning and arising out of the family relationship.

The Joint State Government Commission appointed a task force to conduct this study and to inquire into other phases of court procedure and administration which the General Assembly also requested.

To aid in this over-all inquiry, the Commission appointed a task force and an advisory committee of trial and appellate court judges, teachers of law, and attorneys, giving representation to the appellate courts, the metropolitan and rural area courts, the six Pennsylvania law schools, the State Bar Association, and the local bar associations in each of the eight classes of counties.

The advisory committee authorized its chairman to appoint a special subcommittee to consider the problems of family law. This subcommittee, with Professor Henry H. Foster, Jr., of the University of Pittsburgh School of Law, as Reporter, undertook the drafting of a proposed marriage code and a proposed divorce code. Accordingly, the codes were prepared and submitted to the advisory committee which, after review, reported the same to the task force.

The proposed codes attempt to modernize the Pennsylvania marriage and divorce laws so that they will be more in harmony with the needs of present times. This was not a new venture in this field of jurisprudence. New Jersey, Ohio, California, Illinois, Michigan, New York and many other states have been making critical evaluations of this area.

The proposed codes seek to (1) establish proper require-

ments for the issuance of marriage licenses and to provide for the elimination of unlicensed or so-called common law marriages; (2) effectuate economic justice and equality between husband and wife so that each has the capacity to deal with separate property; (3) eliminate the immunity provision between husband and wife and parent and child; (4) impose the duty to support realistically, taking into account actual need and financial ability of the obligor; (5) provide all relevant data concerning the family and the welfare of the child and for the equitable handling of custody cases; (6) eliminate the status of illegitimacy where there is a purported marriage; (7) consolidate actions concerning divorce, marital property, support and custody of children; and (8) establish a domestic relations division for each court which has jurisdiction over matrimonial matters. In addition, the proposed Divorce Code substitutes for the present inadequate divorce laws, based upon rights or wrongs of the parties, a concern as to whether or not the particular marriage is "totally bankrupt or can be preserved."

The task force, in its report to the Executive Committee of the Joint State Government Commission, recommended, as a preliminary step, that The Divorce Law (1929, May 2, P. L. 1237) and The Pennsylvania Civil Procedural Support Law (1953, July 13, P. L. 431), be amended to consolidate actions concerning divorce, marital property, support and custody of children.

The 1959 Session of the General Assembly amended The Divorce Law to provide for the consolidation of actions concerning divorce, marital property, support and custody of children (1959, December 30, P. L. 2055); and adopted an act providing for the legitimation of children born of void or voidable marriages (1959, December 17, P. L. 1916). The provisions of both of these measures are contained in the proposed codes.

The task force, in its report to the Executive Committee of the Joint State Government Commission, also recommended that the proposed codes be introduced. The proposed Marriage Code of 1959 and the proposed Divorce Code of 1959 were introduced on April 7, 1959, as House Bills 1181 and 1180, respectively, and were referred to the Committee on Judiciary.

Interest in the proposed codes has continued and these were reintroduced in the 1961 Session as House Bills 183 and 182, respectively.

The codes are printed herewith, together with the Comments of the drafters, for further study. While substantial work has gone into the preparation of these codes, the very nature of the subject demands critical examination by numerous groups having a specialized knowledge of the subject, as well as by practitioners and the public, generally. Suggestions, criticisms, and recommendations should be addressed to the Joint State Government Commission, Post Office Box 61, Harrisburg, Pennsylvania.

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The Proposed Marriage Code

AN ACT*

Consolidating, revising and amending the marriage laws of the Commonwealth of Pennsylvania.

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The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

ARTICLE I

PRELIMINARY PROVISIONS

SECTION 101. *Short Title.*—This act shall be known and may be cited as the "Marriage Code."

Comment: The short title of the 1953 Act (48 P. S. § 1–1) is "The Marriage Law."

SECTION 102. *Legislative Intent; Administration; Judicial Construction.*—Whereas marriage is a status conferred by law upon assenting parties having requisite capacity and there is a paramount public concern in the institution of marriage and public and private interest in the requirements for marriage and the rights, privileges, disabilities, immunities, duties and responsibilities attendant to such status, and whereas certainty as to such status and its incidents is highly desirable, it is hereby declared to be the policy of the Commonwealth of Pennsylvania to seek attainment of the following objectives:

(1) The establishment of just and equitable requirements for the issuance of marriage licenses and the elimination of unlicensed or so-called common law marriages;

(2) The effectuation of economic justice and equality between wife and husband so that each has capacity to deal with separate property without interference from the other;

(3) The recognition that it is a fundamental principle of justice that ordinarily for every wrong there should be a remedy and that such principle should apply to those within the family relationship;

(4) The effective imposition of the duty to support spouse

and children realistically taking into account their actual need and the financial ability of the obligor and making all of his assets, of whatever nature, liable for such support;

(5) The just and equitable handling of custody cases and wherever practicable obtaining all relevant data concerning the family and the welfare of the child, including that of a sociological and psychological nature;

(6) The elimination insofar as possible of the status of illegitimacy which in the past has been a stigma imposed upon the innocent;

(7) The establishment of a domestic relations division for each court which has jurisdiction over matrimonial matters, which division shall assist the court in making investigations and reports, in compiling and preserving records and data concerning cases and matrimonial matters, in seeking an amicable adjustment of support and where practicable attempting to effect reconciliations, and to otherwise give such assistance as is requested and directed by the court;

(8) The clarification, modernization, and elimination of existing statutes where such change or elimination is desirable.

The objectives above set forth shall be considered in construing any provisions of this act and shall be regarded as expressing the legislative intent.

Comment: This is new and sets forth the legislative intent as to policy with respect to the marriage relationship.

SECTION 103. *Constitutionality; Severability.*—The provisions of this act are severable and, if any of the provisions hereof are held to be unconstitutional, such decision shall not be construed to impair any other provision of this act. It is hereby declared as the legislative intent that this act would have been adopted had such unconstitutional provision not been included herein.

Comment: There is no corresponding section in the 1953 Act.

SECTION 104. *Construction.*—The provisions of this act, so far as they are the same as those of existing laws, are continued and are to be deemed a continuation of such laws and not as new enactments. The provisions of this act shall not affect any suit or action pending, but the same may be proceeded with and con-

cluded either under the laws in existence when such suit or action was instituted, notwithstanding the repeal of such laws by this act, or, upon application granted, under the provisions of this act.

Comment: There is no corresponding section in the 1953 Act.

SECTION 105. *Definitions.—*

"Court" as used in this act, unless otherwise specified, means the court of common pleas of any county, except in those instances where jurisdiction over the particular matter has been committed to the orphans' court or the Municipal Court of Philadelphia or the County Court of Allegheny County.

"Act" means the Marriage Code and "law" includes both common and statute law.

"Domestic relations division" means the division which is hereby established in the court of common pleas for each county or in the Municipal Court of Philadelphia or County Court of Allegheny County, for the purpose of gathering, recording and keeping information, records, and statistics, and assisting in the investigation and processing of matrimonial matters, including annulment, divorce, support, and custody matters, and in performing such other services and functions as directed by the court.

"Probation officer" shall include any officer now or hereafter serving in any court at the direction of the court in the domestic relations division of such court.

"Marriage," as used in this act, means the legal status created by operation of law between a man and woman who have capacity and who have consented to be united in such relationship.

"Void marriage" means a purported marriage whose validity may be questioned in a collateral proceeding or in an annulment action and which is expressly declared void by Section 303 of this act.

"Voidable marriage" means a purported marriage which may be questioned only in an annulment action but not by collateral attack, and then only during the lifetime of the parties thereto, and which is expressly declared voidable by Section 304 of this act.

"Spouse" means either husband or wife.

ARTICLE II

MARRIAGE REQUIREMENTS

SECTION 201. *License Necessary to Marry.*—No person shall be joined in marriage in this Commonwealth until a marriage license shall have been obtained from the clerk of the orphans' court of any county. A license so issued shall authorize a marriage ceremony to be performed in the county where the license is issued or in any other county of this Commonwealth. Prior to issuance of said license, the clerk of the orphans' court shall be satisfied as to the identity of both of the applicants *and that the requirements provided for in this act have been complied with.*

Comment: This is Section 2 of the 1953 Act (48 P. S. § 1–2) with the addition of the italicized words to stress and emphasize the clerk's duty.

SECTION 202. *Application for License to Marry.*—No license to marry shall be issued by any clerk of the orphans' court except upon written and verified application made by both of the parties intending to marry.

SECTION 203. *Form of Marriage License Applications.*—Applications for marriage licenses shall be in form substantially as follows and shall include the following information, to wit:

Commonwealth of Pennsylvania
County of .....

We, the undersigned, in accordance with statements hereinafter contained and the facts set forth herein, which we and each of us do solemnly swear are true and correct to the best of our knowledge and belief, do hereby make application to the ..... of ..... County, Pennsylvania, for a license to marry. We further swear that our application for a marriage license has not been rejected in any county in Pennsylvania (except under the circumstances stated below).

Signature of *Male* applicant .....

Signature of *Female* applicant .....

From the *Male* Applicant	From the *Female* Applicant
Full name	Full name .....
..... Race or color	..... Race or color .....
Usual residence	Usual residence .....
street address or R.F.D. No.	street address or R.F.D. No.
....	....
city or town county, state, country	city or town county, state, country

Date of birth ..... Age .....
month day year last birthday

Usual occupation .....

Industry or business .....

Place of birth .....

Religious denomination .....

Full name of FATHER .....

..... Race or color .....

Residence .....

Occupation .....

Birthplace .....

Full name of MOTHER .....

..... Race or color .....

Residence .....

Occupation .....

Birthplace .....

Maiden name of mother .....

Male applicant affirms this is his ..... marriage. number

Previous marriages were ended by:

manner	date	place

Children by prior marriages .....

Are you under guardianship by reason of unsound mind? .....

Have you within the past five years been an inmate of an institution for weak-minded, insane or persons of unsound mind? .....

Have you been convicted and sentenced for failure to support lawful dependents? .....

Are you under the influence of intoxicating liquor or narcotic drug? .....

Your blood relationship to other applicant, if any? .....

If prior application rejected in another county, state reasons: .....

Date of birth ..... Age .....
month day year last birthday

Usual occupation .....

Industry or business .....

Place of birth .....

Religious denomination .....

Full name of FATHER .....

..... Race or color .....

Residence .....

Occupation .....

Birthplace .....

Full name of MOTHER .....

..... Race or color .....

Residence .....

Occupation .....

Birthplace .....

Maiden name of mother .....

Female applicant affirms this is her ..... marriage. number

Previous marriages were ended by:

manner	date	place

Children by prior marriages .....

Are you under guardianship by reason of unsound mind? .....

Have you within the past five years been an inmate of an institution for weak-minded, insane or persons of unsound mind? .....

Have you been convicted and sentenced for failure to support lawful dependents? .....

Are you under the influence of intoxicating liquor or narcotic drug? .....

Your blood relationship to other applicant, if any? .....

If prior application rejected in another county, state reasons: .....

Sworn and subscribed to before me this ..... day of ..... A.D., 19.....

.....
Signature

.....
Title

Future Address
Enter here exact future address after marriage, if known

.....
street address

....
city or town state

Comment: The adoption of a standard application form throughout the State will facilitate the collection of marriage statistics by the State Department of Health under the *Vital Statistics Law of 1953.* If detailed statistical studies are to be made on a sampling of county records, it would be much easier if all the forms were the same.

All of the information, except the date of the marriage and the officiant, could be obtained from this one document.

The items of information called for in this section are somewhat expanded in other parts of the proposed Marriage Code (Sections 209 and 213) particularly as to previous marital history.

Full Name. This is a slight simplification of the wording of the law.

Race or Color. The law states simply "race." The term which is used as a standard in this regard is "race or color" on birth and death certificates, and in other data collections. It is the recommended term of the Public Health Conference on Records and Statistics. The answers to this would be "White," "Negro," or other specified grouping such as "Chinese," "Indian."

Usual Residence. The addition of the word usual is also recommended in order to avoid the reporting of temporary residences, such as hotels, places of visitation, and the like. It is also a standard term in statistical usage.

Age. It is useful to know the exact date of birth.

Usual Occupation, Industry or Business. This joint question is much more useful statistically. Again this is a standard practice in the U. S. Census collections and in vital statistics work. Knowing the business or industry helps in the statistical classification of the occupations. The *usual* occupation is desired especially for temporarily unemployed workers, persons in military service at present, those in hospitals or traveling, retired workers, and those not at present engaged in their customary occupation.

Religious Denomination.

It would be most useful to obtain this information. No attempt should be made, however, to compel the parties to answer this question.

The U. S. Bureau of Census has recently obtained such information in population surveys. In Canada this kind of information has been gathered for years without public opposition. In Iowa this item has been on their marriage and divorce forms since 1953.

Many courts in Pennsylvania handling juvenile and domestic cases currently collect such information on the parties and also give a statistical report on their number. This is helpful to religious agencies working in the area of social services. In the matter of child custody and adoption, the religious affiliations of the parents can play an important role.

Religious groups themselves are vitally interested in the fact of mixed marriage, and a number of studies have been made by different denominations. For a number of years the Roman Catholic group has published figures on the number of mixed marriages performed within the church. A broadly derived figure on such marriages would be much more useful.

Marital History of Bride and Groom.

These are very useful items in a statistical sense. They are also quite pertinent to the probable legal issues in a marriage. Throughout the proposed Marriage Code all of the items are specified.

The manner (death or divorce or annulment), the exact date, and the place are useful statistically and could tell a great deal about the circumstances of remarriage. The tracing of records for prior decrees of divorce, annulment (or decedence) would be facilitated also.

Future Address (Box).

This device is used on the New York State forms. It should be of considerable help to the court clerks in running down licenses which are not returned for registration, perhaps through oversight of the officiant.

SECTION 204. *Preparation of Forms.*—Applications for licenses to marry, consent certificates, marriage licenses, and other necessary forms, shall be supplied to the clerk of the orphans' court by the county commissioners, at the expense of the county, and shall be uniform throughout the Commonwealth, as prepared by the Department of Health. Statements of physicians and laboratories rela-

tive to examination for syphilis, as prepared by the Department of Health, shall be furnished from time to time to the several clerks of the orphans' court of this Commonwealth.

Comment: This is Section 18 of the 1953 Act (48 P. S. § 1–18).

SECTION 205. *Statistics.*—Each clerk of the orphans' court shall furnish the Department of Health, not later than the fifteenth day of each month, with a transcript or record of each marriage license issued, together with the application therefor, and each return of the celebration of a marriage received or filed in his office during the preceding calendar month.

The transcripts or records required to be furnished shall be made by the clerk of the orphans' court on forms prepared from time to time by the Department of Health, and shall contain such information as the department may require. The forms so prepared shall be furnished to the clerks of the orphans' court by the Department of Health.

The records so furnished to the Department of Health shall not be open to public inspection, except as authorized by the regulations of the Advisory Health Board. The Department of Health shall from time to time compile and publish statistics from such records for public information.

Comment: This is based on Section 22 of the 1953 Act (48 P. S. § 1–22).

SECTION 206. *Waiting Period After Application for License.*—No license to marry shall be issued until or after the third day following the making of application therefor, except in case of emergency or extraordinary circumstances when a judge of the orphans' court, or a master duly appointed by said court, may authorize a license to be issued at any time before the third day following the making of the application.

Comment: This is Section 4 of the 1953 Act (48 P. S. § 1–4).

SECTION 207. *Restrictions on the Issuance of Marriage Licenses.*—No license to marry shall be issued by any clerk of the orphans' court:

(a) Until there shall be in the possession of the clerk of the orphans' court a statement or statements, signed by a duly licensed

physician of the Commonwealth of Pennsylvania, or any commissioned medical officer in the Armed Forces of the United States, or any physician of the Public Health Service of the Federal Government, that each applicant, within thirty days of the application for the marriage license, has submitted to an examination to determine the existence or nonexistence of syphilis, which examination has included a standard serological test or tests for syphilis, and that, in the opinion of the examining physician, the applicant is not infected with syphilis, or, if so infected, is not in a stage of that disease which is likely to become communicable. The physician's statement shall be accompanied by a statement from the person in charge of the laboratory making the test, or from some other person authorized to make such statement, setting forth the name of the test, the date it was made, the exact name and address of the physician to whom a report was sent, the exact name and address of the person whose blood was tested, but not setting forth the result of the test, and such other facts as the Department of Health may deem necessary to determine whether the applicant is infected with syphilis in a stage of that disease likely to become communicable.

Comment: This is based on Section 5(a) of the 1953 Act (48 P. S. § 1–5(a)) and is the same except for the designation of the medical officer in the "Armed Forces of the United States."

(b) If either of the applicants for a license is under the age of sixteen years, unless a judge of the orphans' court shall decide that it is to the best interest of such applicant, and shall authorize the clerk of the orphans' court to issue the license, *and any purported marriage of any person under the age of sixteen years unless so authorized shall be voidable and subject to annulment, but only if action therefor is commenced within sixty days after reaching the age of sixteen years.*

Comment: This is Section 5(b) of the 1953 Act (48 P. S. § 1–5(b)), to which the italicized portion has been added in order to invalidate and make voidable nonage marriages where permission of the court was not obtained. Under existing statutes, at least in the case of common law marriages and perhaps in the case of licensed marriages where age was falsified and such error does not void the marriage, Pennsylvania retains the common law with reference to nonage

which is that all marriages of a child under seven are void, those between seven and twelve in the case of a girl and seven and fourteen in the case of a boy are inchoate or imperfect marriages but capable of ratification or confirmation upon reaching the latter age, and over twelve and fourteen respectively are valid. It is time that the Commonwealth foreclosed the possibility of such child marriages and the existence of discretion in the court to make meritorious exception is sufficient to take care of unusual circumstances.

(c) If either of the applicants is under the age of twenty-one years, unless the consent of a parent or guardian of said applicant shall be personally given before the clerk, or be certified under the hand of a parent or guardian, attested by two adult witnesses, and, in the latter case, the signature of the parent or guardian shall be acknowledged before an officer authorized by law to take acknowledgments, *or unless a judge of orphans' court shall decide that it is to the best interest of such applicant and shall authorize the clerk of the orphans' court to issue the license.* When any such minor has no parent or guardian, and a judge of the orphans' court is absent or not accessible for any reason, the clerk of the orphans' court, or a duly appointed assistant clerk of said court, may appoint for such minor a guardian pro hac vice. *At the discretion of the court any marriage of such person under twenty-one years which is not so authorized shall be subject to annulment by such minor or his parent or guardian if petition for such annulment is filed during such minority and within sixty days after such unauthorized marriage, but otherwise the validity of such a marriage may not be questioned.*

Comment: This is Section 5(c) of the 1953 Act (48 P. S. § 1-5(c)) to which the italicized portions have been added. The premise is that easy marriage promotes easy divorce and that except in rare cases consent of parent or guardian to a minor's marriage should be essential. In meritorious cases, the judge of orphans' court may authorize a minor to marry, even in the absence of parental consent. The provision making marriages of minors voidable if petition for annulment is filed during minority and within sixty days, recognizes a qualified form of ratification and at the same time gives ample time for annulment where a teenage marriage was ill-advised. Moreover, parents or guardian, as well as the minor in question, may seek annulment, thus making more meaningful what otherwise

is but a nominal requirement of parental consent. Legitimacy of any issue will be saved under other provisions in the code.

(d) If either of the applicants for a license at the time of application is weak-minded, insane, of unsound mind, or is under guardianship as a person of unsound mind.

Comment: This is Section 5(d) of the 1953 Act (48 P. S. § 1–5(d)). At common law the marriage of an idiot is void. The usual test of capacity to marry is whether or not there is ability to comprehend the nature of the relationship and at least, in a general way, its consequences. Under prior statutes, it was held that the clerk could not refuse a license to a moron. *In re Marriage Licenses,* 67 D. & C. 281 (1949). Section 5(d) of the 1953 Act permits refusal of a marriage license where an applicant is "weak-minded," without defining the term. This is desirable as it leaves wide discretion and it would be difficult, if not impossible, to be more explicit without occasioning hardship in individual instances.

(e) If either of the applicants is or has been within five years preceding the time of application, an inmate of an institution for the weak-minded, insane, or persons of unsound mind, unless a judge of the orphans' court shall decide that it is for the best interests of such applicant and the general public to issue the license, and shall authorize the clerk of the orphans' court to issue the license.

Comment: This is Section 5(e) of the 1953 Act (48 P. S. § 1–5(e)). The Act of June 21, 1957, P. L. 378, No. 201, amended 5(e) of the 1953 Act so as to eliminate epilepsy as a disqualification for a marriage license.

(f) If either of the applicants for a license is or has been *convicted and sentenced for failure to support lawful dependents when ordered so to do by a court having jurisdiction,* unless a judge of the orphans' court shall determine that *despite such conviction and sentence said applicant is financially able to discharge his duty to support his existing dependents and shall authorize the clerk of the orphans' court to issue the license, and such judge shall have authority to require that the applicant post sufficient security to insure the performance of his support obligation to his existing dependents.*

Comment: This takes the place of Section 5(f) of the 1953 Act (48 P. S. § 1–5(f)). The italicized portions have been added and reference to "an inmate of an institution for indigent persons" has been

deleted, so that poverty is no ground for denying a license but nonpayment of support may be an obstacle to acquiring an additional family. The subsection of the 1953 Act is unrealistic because the assistance program has replaced the poorhouse, hence the apparent object of existing law is incapable of fulfillment. The view which is here advanced rejects such ground as a basis for withholding a marriage license and in lieu thereof substitutes a policy which may restrict a remarriage of a nonsupporter, but permits an exception where the judge decides that it is in the best interest of all concerned to issue the license.

(g) If, at the time of making application, either of the applicants is under the influence of intoxicating liquor or narcotic drug.

Comment: This is Section 5(g) of the 1953 Act (48 P. S. § 1–5(g)).

(h) To applicants within the following prohibited degrees of consanguinity, whether related by the whole or half blood, which degrees are as follows:

Degrees of Consanguinity

A man may not marry his mother.
A man may not marry his father's sister.
A man may not marry his mother's sister.
A man may not marry his sister.
A man may not marry his daughter.
A man may not marry the daughter of his son or daughter.
A woman may not marry her father.
A woman may not marry her father's brother.
A woman may not marry her mother's brother.
A woman may not marry her brother.
A woman may not marry her son.
A woman may not marry the son of her son or daughter.

Comment: This is based on Section 5(i) of the 1953 Act (48 P. S. § 1–5(i)).

1. Degrees of affinity are deleted and omitted from this code. As of 1951, there were but 20 American jurisdictions (including Pennsylvania) which recognized affinity as an impediment to marriage: Alabama, Connecticut, District of Columbia, Georgia, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, and West Virginia. There is wide disagreement and substantial variation among these

20 jurisdictions as to just what degree of affinity shall constitute an impediment, and cases differ as to whether the impediment is removed when the former marriage is dissolved by death or divorce so as to terminate the affinity and permit marriage. *Walter's Appeal,* 70 Pa. 392 (1872), perhaps the leading Pennsylvania case on affinity, held that the marriage of a man and the widow of his deceased son was voidable. Cases are collected and discussed in L.R.A. 1916C 723. See also 35 Am. Jur. § 141 on Marriage, which states: "Modern statutes quite generally discard affinity relationship as an impediment to marriage."

Historically, the concept of affinity is an outgrowth of the religious notion that upon marriage husband and wife become one flesh and blood and hence the relatives of each become the blood relatives of the other and therefore any sexual relationship between such relatives would be incestuous. A similar concept occurs in some primitive cultures due to the policy of requiring marriage outside the immediate family to gain members and strength for the family unit and perhaps to raise a taboo in order to discourage "affairs" within the family unit.

Today, the reasons of genetics and social policy which support continuation of consanguinity as an impediment to marriage do not support affinity as an impediment to marriage, except to such extent as the mystical notion of husband and wife being one flesh still persists. Genetically, there can be no objection to a marriage of in-laws. It may also be noted that the Christian concept of affinity is opposed to Jewish law.

It would seem that under present social values and standards of morality, there would be no objection to a man marrying his deceased wife's sister, or a widow marrying her former brother-in-law, and that in fact there might be many social, economic, and other reasons which affirmatively support such a union. It is felt that any in-law competition for the affections of an existing spouse is too remote to justify the wholesale adoption of the affinity impediment, that other sanctions already exist to deter such attempts, and that if such other deterrents are not successful, an affinity bar is not apt to be efficacious.

Note: When this code is adopted, Section 507 of the Act of June 24, 1939, P. L. 872, (18 P. S. § 4507), *The Penal Code,* which prohibits marriage within degrees of affinity, should be conformed.

2. The degrees of consanguinity should include not only the blood relationships specified, but in addition such relationships by

the half blood. As so extended, this subsection would cover those relationships which according to today's values are the ones wherein religious and community sentiment condemn such unions as well as those in which there are reasons of genetics for prohibiting such marriages.

3. The prohibition against marriage of first cousins is herein abolished by striking it from the degrees of consanguinity table. The present situation in Pennsylvania regarding the marriage of first cousins is peculiar and anomalous. Although such a marriage is declared consanguineous under the 1953 Act, it is not made incestuous by the Act of June 24, 1939, P. L. 872, Section 507, (18 P. S. § 4507), *The Penal Code.* Moreover, in addition to this difference between the 1953 Act and *The Penal Code,* there is a further difference in construction of The Marriage Law in the case of first cousin marriages. Although other marriages within the prohibited degrees of consanguinity have been regarded as void due to the statute and decisions, first cousin marriages performed in Pennsylvania since the prohibition have been regarded as merely voidable. See *McClain v. McClain,* 40 Pa. Superior Ct. 248 (1909) (marriage of first cousins merely voidable, a matter for divorce, requiring a judicial decree). And where the first cousins leave Pennsylvania and get married in a state which permits such marriages, the Pennsylvania courts will treat it as a valid marriage. See *Schofield v. Schofield (No. 1),* 51 Pa. Superior Ct. 564 (1912).

Furthermore, Pennsylvania long considered first cousin marriages as valid and had no statute proscribing them. It was the Act of June 24, 1901, P. L. 597, Section 1, which first barred such marriages, and this act was repealed by the enactment of the 1953 Act. Pennsylvania deliberately chose in the Act of March 31, 1860, P. L. 382, to omit any reference to first cousin marriages and it did so again in enacting *The Penal Code* of 1939. See discussion in *The Marriage of First Cousins Domiciled in Pennsylvania,* 53 Dick. L. Rev. 330 (1949).

Regardless of the variances and discrepancies in existing statutes and decisions, retention of first cousins within the degrees of consanguinity table in The Marriage Law should be continued if supported by genetics or reasons of morality. Dr. Herluf H. Strandskof, member of the Zoology Department at the University of Chicago, and world famous scholar in the field of genetics, has stated that practically there is no reason for retaining such a prohibition today; that there is, however, a possibility that where there are unfavorable recessive characteristics in the family a marriage

of first cousins may bring out such characteristics in offspring; but that this is offset, from the standpoint of the geneticist, by the consideration that if such recessive characteristics are to be cleaned up, they must be brought to light. In substance, the possibility of bringing forth unfavorable characteristics in offspring is also offset by the possibility of bringing forth favorable characteristics which were recessive. It works both ways. The conclusion to be drawn from modern genetics, therefore, is that in the case of first cousins there is no scientific reason why they should not marry, although there is a slight possibility that recessive characteristics may appear in offspring, and such characteristics may be favorable or unfavorable.

From the standpoint of the sociologist or anthropologist, the reasons for taboo being extended to first cousins in primitive cultures are not present in contemporary society. Today, the American family usually is centered around a husband and wife and their children; occasionally a grandparent or some other relative lives in the household. It would be extremely rare to find first cousins living in the same household, and even more rare to find a love affair between them which disrupted the domestic order. Of course, taboos related to blood feuds have no application.

As of 1931, I VERNIER, AMERICAN FAMILY LAWS, 173–174, reported that some 29 American jurisdictions (out of 51) prohibited the marriage of first cousins. It is believed that there has been a gradual decrease in the number of such jurisdictions and it definitely is known that many of such states have circumvented the prohibition by construing it merely to make such marriages voidable, as Pennsylvania has done. See *Walker v. Walker,* (Ohio 1948) 84 N.E. 2d 258, noted 18 U. Cin. L. Rev. 549 (1949); *Meisenhelder v. Chicago & N.W.R.Y. Co.,* (Minn. 1927) 213 N.W. 32, noted 26 Mich. L. Rev. 327 (1928); *In re Miller's Estate,* (Mich. 1927) 214 N.W. 428, noted 12 Minn. L. Rev. 70 (1927); *Garcia v. Garcia,* (S.D. 1910) 127 N.W. 586; and *Fensterwald v. Burk,* (Md. 1916) 98 A. 358, 3 A.L.R. 1562. Cases holding the marriage of first cousins void, include: *Arado v. Arado,* (Ill. 1917) 117 N.E. 816, 4 A.L.R. 28; and *In re Mortenson's Estate,* (Ariz. 1957) 316 P. 2d 1106, noted 10 S.C.L.Q. 505 (1958).

Existing statutory provisions and court decisions in Pennsylvania show that there is not as strong a public policy against the marriage of first cousins as there is in the case of persons more closely related by blood. Confusion is occasioned by listing first cousins in the table of degrees. There is no scientific, moral, or

social reason which urges retention of the bar. In Pennsylvania under existing law it is a simple matter to circumvent the present provision by merely having the ceremony performed in a state which permits such unions. The existing provision may be an affront to some religious faiths which permit or sanction such marriages, and the interests of society would best be served by deleting first cousins from the table of consanguinity.

SECTION 208. *Tests for Syphilis; Physician's Statement; Appeals; Filing.—*

(1) For the purpose of this act, a standard serological test for syphilis shall be a test approved by the State Department of Health, and shall be made at a laboratory approved to make such tests by the State Department of Health. Such laboratory tests as are required to be made by this act shall, on request of the physician submitting the sample and on his certificate that the applicant is unable to pay, be made without charge by the State Department of Health.

(2) Any applicant for a marriage license, having been denied a physician's statement as required by this act, shall have the right of appeal to the Department of Health of the Commonwealth of Pennsylvania for a review of the case, and such department shall, after appropriate investigation, issue or refuse to issue a statement in lieu of the physician's statement required by Subsection (1) of this section.

(3) The statements of the physician who examined the applicant and the laboratory which made the serological test shall be uniform throughout the state, and shall be upon forms provided therefor by the State Department of Health. These forms shall be filed by the clerk of the orphans' court separately from the applications for marriage licenses, and shall be regarded as absolutely confidential by any and every person whose duty it may be to obtain, make, transmit or receive such information or report.

(4) Any judge of an orphans' court within the county in which the license is to be issued is authorized and empowered, on joint application by both applicants for a marriage license, to waive the requirements as to medical examination, laboratory tests, and certificates, and to authorize the clerk of the orphans' court to issue the license, if all other requirements of the marriage laws have been complied with, and the judge is satisfied, by affidavit or other

proof, that the examination or tests contrary to the tenets or practices of the religious creed of which the applicant is an adherent, and that the public health and welfare will not be injuriously affected thereby.

Comment: This is Section 6 of the 1953 Act (48 P. S. § 1–6), to which Subsection (4) is added.

SECTION 209. *Examination of Applicants.*—Each of the applicants for a marriage license shall appear in person before the clerk of the orphans' court of the county in which the license is to be issued, or before an alderman or justice of the peace of that county or in any county of this Commonwealth. At the time of such appearance, the applicant, or both of them if they appear together, shall be examined under oath or affirmation as to:

(a) The legality of the contemplated marriage;

(b) Any prior marriage or marriages and its or their dissolution;

(c) All the information required to be furnished on the application for license as prepared and approved by the Department of Health;

(d) The restrictions set forth in Section 207 of this act.

The application or applications shall thereupon be completed in accordance with such examination and duly sworn or subscribed to by the applicants.

Upon the completion of any application or applications taken before an alderman or justice of the peace, such application or applications shall be promptly transmitted to the clerk of the orphans' court of the county in which the license is to be issued.

The clerk of the orphans' court wherein the license is sought, when properly completed applications on behalf of each of the parties to the proposed marriage have been taken before him or duly forwarded to him by an alderman or justice of the peace, shall, if there is no legal objection to the marriage, grant a license. Such license shall not be granted until or after the third day following the date of the most recent of the two applications therefor.

The clerk of the orphans' court shall provide application blanks upon request to aldermen and justices of the peace.

Comment: This is Section 7 of the 1953 Act (48 P. S. § 1–7).

SECTION 210. *Finding That Spouse of Applicant is Presumed Decedent.—*

(1) Finding of Death. When the spouse of an applicant for marriage license has disappeared, or is absent from his place of residence without being heard of after diligent inquiry, an orphans' court judge, aided by the report of a master if necessary, upon petition of the applicant for marriage license, may make a finding and decree that the absentee is dead and the date of his death; Provided, That notice to the absentee has been given as provided in Subsection (4) of this section; Provided further, That either of the applicants is and for one year or more prior to the application has been a resident of Pennsylvania.

(2) Presumption from Absence. When the death of the spouse of an applicant for a marriage license is in issue, his unexplained absence from his last known place of residence and the fact that he has been unheard of for five years may be sufficient ground for finding he died five years after he was last heard from.

(3) Exposure to Specific Peril. The fact that an absentee was exposed to specific peril of death or has been reported by military authorities as missing in action may be a sufficient ground for finding that he died less than five years after he was last heard from and as of the date of the peril.

(4) Notice to Absentee. The court shall require such advertisement in such newspapers as the court, according to the circumstances of the case, shall deem advisable, of the fact of such application for the marriage license, together with notice that at a specified time and place the court, or a master appointed by the court for that purpose, will hear evidence concerning the alleged absence, including the circumstances and duration thereof.

(5) Effect of Decree. Even though the spouse so declared to be presumed dead is in fact alive, the marriage performed pursuant to a license issued by virtue of such decree shall be valid and for all intents and purposes as though the former marriage between said presumed decedent and the applicant had been terminated as by a final decree of divorce from the bonds of matrimony. Any and all property of the absentee presumed decedent shall be administered and disposed of as provided by the Fiduciaries Act of 1949, as amended.

Comment: This is based on Section 8 of the 1953 Act (48 P. S. § 1–8). With the advent of modern mass communication and transportation facilities, police departments, and better investigating agencies, the *seven* year period, which was devised under wholly different circumstances, is lowered to *five* years. *The Fiduciaries Act of 1949* (1949, April 18, P. L. 512; 20 P. S. §§ 320.1201–320.1205) provides for a presumption of death from absence after *seven* years. It appears that the *Fiduciaries Act* presently applies where a spouse is found to be presumed dead and that the survivor must comply with that act in order to reach his separate property except in those instances under support laws where he is a deserter and has abandoned wife and family. It may be useful, nonetheless, to specifically refer to the applicable statute as a cross reference.

This provision has an interrelation to Sections 301, 303 and 802 of the proposed Divorce Code, which have been clarified. Section 802 of the proposed Divorce Code is the key provision which integrates all of these sections. See Comment to that section for a discussion of policy.

SECTION 211. *Orphans' Court to Pass Upon Refusal of Clerk to Issue License.*—In those cases where it appears that the applicants do not have a right to a license, the clerk of the orphans' court shall refuse to issue the same. Upon request of the applicants, the clerk of the orphans' court, immediately after such refusal, shall certify the proceeding to the orphans' court of the county without formality or expense to the applicants.

Such application for a license to marry shall thereupon, at the earliest possible time, be heard by a judge of said court, without a jury, in court or in chambers, during the term or in vacation, as the case may be. The finding of the court that a license ought to issue or ought not to issue shall be final, and the clerk of the orphans' court shall act in accordance therewith.

The true intent of this section is to secure for applicants an immediate hearing before the orphans' court without delay or expense on the part of the applicants.

Comment: This is based on Section 9 of the 1953 Act (48 P. S. § 1–9).

SECTION 212. *Recording Application and Consent Certificate.*—The applications for license and all consent certificates shall be immediately filed with the clerk of the orphans' court in permanent

files with a docket reference thereto, at the cost of the county, which shall be a public record, open to inspection or examination by the public at all times during business hours. Any person may make a copy or abstract of the entries contained in the said marriage license docket for the purpose of publication in any regularly published daily or weekly newspaper, and it shall be lawful to publish said copy or abstract in any regularly published daily or weekly newspaper printed within the Commonwealth.

Comment: This is Section 10 of the 1953 Act (48 P. S. § 1–10).

SECTION 213. *Form of Marriage License; Marriage Certificate.—*

(1) The marriage license as issued by the clerk of the orphans' court shall not be valid for a longer period than sixty days from the date of issue, and shall be in form substantially as follows to wit:

Commonwealth of Pennsylvania }
County of } ss: No.

To any person authorized by law to solemnize marriage:

You are hereby authorized to join together, in holy state of matrimony, according to the laws of the Commonwealth of Pennsylvania, A... B..., of full age and never heretofore married, and C... D..., likewise of full age and never heretofore married.

Given under my hand and seal of the orphans' court of said county of ..... at .....
this ..... day of ..... one thousand .....

If either of said parties is not of full age of twenty-one years, then in lieu of the words "of full age," his or her age shall be stated, and the fact of consent of parent or guardian or, in the alternative, the authorization of the orphans' court for the minor to marry shall likewise be stated, and if either of said parties shall have been married previously to the issuing of such license, then in lieu of the words "never previously married" there shall be stated the number of times he or she shall have been previously married, and the mode by which said prior marriage or marriages was or were dissolved, the date or dates of divorce or death, and if by divorce, the cause thereof. If either of said parties is under the

age of sixteen years and a judge of the orphans' court shall have authorized the license to be issued, then in lieu of the words "of full age," his or her age shall be stated, and the fact that a judge authorized the license to issue shall likewise be stated, in addition to the consent of a parent or a guardian.

(2) The license shall have appended to it two certificates, numbered to correspond with said license (one marked original and one marked duplicate), which shall be in form substantially as follows:

I hereby certify that on the ..... day of ....., one thousand nine hundred and ..... at ....., Pennsylvania,..... and ..... were by me united in marriage, in accordance with license issued by the clerk of the orphans' court of ..... county, Pennsylvania, numbered .....

Signed .....
(Title of person solemnizing the marriage)

Address .....

Comment: This is based on Section 11 of the 1953 Act (48 P. S. § 1–11) and is substantially the same.

SECTION 214. *Forms Where Ceremony Performed by Parties to Marriage.*—In all cases in which the parties intend to solemnize their marriage by religious ceremony without an officiating clergyman, no such marriage shall take place until the clerk of the orphans' court shall certify their right so to do in a declaration in substantially the following form:

To A..... B..... and C..... D..... No. .....
Legal evidence having been furnished to me, in accordance with law, this certifies that I am satisfied that there is no legal impediment to you joining yourselves together in marriage.

Signed .....
Clerk of the Orphans' Court

In lieu of the certificate before set forth, there shall be appended to such declaration two certificates, numbered to correspond to the declaration of the clerk of the orphans' court, in the following form:

We hereby certify that on the ..... day of ....., one thousand nine hundred and ....., we united ourselves in marriage, at ..... in the county of ....., Pennsylvania, having first obtained from the clerk of the orphans' court of ..... county, Pennsylvania, a declaration numbered ..... that he was satisfied that there was no existing legal impediment to our so doing.

Signed A..... B.....
Signed C..... D.....

We, the undersigned, were present at the solemnization of the marriage of A ..... B ..... and C ..... D ....., as set forth in the foregoing certificate.

D ..... E .....
E ..... F .....

Comment: This is based on Section 12 of the 1953 Act (48 P. S. § 1–12) and is substantially the same.

SECTION 215. *Persons Qualified to Solemnize Marriages.*— The chief justice and each justice of the Supreme Court, the president judge and each judge of the Superior Court, the president judge and each judge of the court of common pleas, the president judge and each judge of the orphans' court, the president judge and each judge of the Allegheny County Court and the Municipal Court of Philadelphia, each magistrate, alderman, justice of the peace, mayor of any city, and burgess of any borough of this Commonwealth, and each minister, priest or rabbi of any regularly established church or congregation, is hereby authorized to solemnize marriages between such persons as produce a marriage license issued by the clerk of the orphans' court.

Every religious society, religious institution or religious organization in this Commonwealth may join together in marriage

such persons as are members of the said society, institution or organization, or when one of such persons is a member of such society, institution or organization, according to the rules and customs of the society, institution or organization to which either of them belongs. *The validity of any licensed marriage shall not be affected because of the lack of authority of any judge, official, minister, priest, or rabbi, if there was reasonable appearance of authority and one or both parties to such marriage in good faith participated in such ceremony.*

Comment: This is based on Section 13 of the 1953 Act (48 P. S. § 1–13) and is substantially the same, with the addition of the italicized portion and states case law upon the subject, removing all doubt as to validity where there is color of authority. See *Knapp v. Knapp,* 149 Md. 263, 131 A. 329 (1925), discussed in 39 Harv. L. Rev. 782 (1926) and 21 Ill. L. Rev. 181 (1926).

SECTION 216. *Registers of Baptisms and Marriages by a Bishop.*—Baptisms and marriages which have been or may be solemnized by any bishop within this state may be entered by him on the register of any church of which the said bishop has supervision, and the same when entered on the said register, *if the requirements of this act have been complied with,* shall have the same legal effect and operation as if the said marriage or baptism had been solemnized by a clergyman having charge of the said church, and been by him entered on the register thereof.

Comment: This is Section 5 of the Act of March 17, 1838, P. L. 80, (48 P. S. § 161), except for the italicized provision, which is added to make it clear that there must be a marriage license for such marriages.

SECTION 217. *Returns of Marriage.*—The certificate marked "original" shall, by the person solemnizing the marriage, be duly signed and be given to the parties contracting the marriage, and the certificate marked "duplicate" shall, by the person or by a member of the religious society, institution or organization solemnizing the marriage, be duly signed and returned to the clerk of the orphans' court who issued the license, within ten days after the solemnizing of said marriage. If the marriage was solemnized by the parties themselves, the certificate marked "original" shall be signed by the parties to the marriage and be attested by two wit-

nesses and be retained by the parties contracting the marriage, and the certificate marked "duplicate" shall be signed by the parties to the marriage and be attested by the same two witnesses and be returned to the clerk of the orphans' court issuing the same within ten days.

The clerk of the orphans' court, upon receiving the "duplicate" certificate, shall record the same in the permanent marriage license files.

Comment: This is Section 14 of the 1953 Act (48 P. S. § 1–14).

SECTION 218. *Marriage License Needed to Officiate.*—No person qualified to perform marriages shall officiate at a marriage ceremony without the parties having obtained a license properly issued by the clerk of the orphans' court authorizing the right to marry.

Comment: This is Section 15 of the 1953 Act (48 P. S. § 1–15).

SECTION 219. *Marriage Within Degrees of Consanguinity.*—All marriages within the prohibited degrees of consanguinity as set forth in this act are hereby declared void to all intents and purposes, but when any of said marriages shall not have been annulled during the lifetime of the parties, the unlawfulness of the same shall not be inquired into after the death of either of the parties thereto.

Comment: This is based on Section 16 of the 1953 Act (48 P. S. § 1–16), with all disqualification upon the ground of affinity deleted. See discussion *supra* in Comment to Section 207(h). This is consistent with Section 303, which makes marriages within degrees of consanguinity "void" rather than "voidable" as provided in Section 16 of the 1953 Act. Since this code eliminates affinity, consangineous marriages are made void rather than voidable.

SECTION 220. *Marriages Within Degrees of Affinity Legalized.*—All marriages heretofore contracted between parties within the degrees of affinity heretofore prescribed by statute are hereby declared to be valid and any such marriages shall not be subject to divorce or annulment because of any relationship by affinity, and all issue of any such marriages are hereby proclaimed to be legitimate from date of birth with all the rights, privileges and duties of children otherwise born in lawful wedlock. After the effective

date of this act, relationship within any degree of affinity shall not be a reason for refusing to issue a marriage license nor be regarded as any impediment to marriage. Nothing in this act shall be construed to relate to marriages within the degrees of consanguinity which are prohibited by law.

Comment: This is new and is necessary because the prohibition of marriages within degrees of affinity has been eliminated.

SECTION 221. *Marriage During Existence of Former Marriage; Ratification; Legitimacy.*—If a person, during the lifetime of a husband or wife with whom a marriage is in force, enters into a subsequent marriage pursuant to the requirements of this act, and the parties thereto live together thereafter as husband and wife, and such subsequent marriage was entered into by one or both of the parties in good faith in the full belief that the former husband or wife was dead, or that the former marriage has been annulled or terminated by a divorce, or without knowledge of such former marriage, they shall, after the impediment to their marriage has been removed by death of the other party to the former marriage, or by annulment or divorce, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and immediately after the removal of such impediment *and any children born to such parties shall be held to be their legitimate issue whether birth occurred before or after removal of such impediment.*

Comment: This is Section 17 of the 1953 Act (48 P. S. § 1–17), with the addition of the italicized portion which is added to avert the consequence of illegitimacy which otherwise might follow and thus protects innocent issue which are treated as if born in lawful wedlock. The Act of December 17, 1959, P. L. 1916, No. 695, adopted this principle.

SECTION 222. *Fees.*—The fee to be charged by the clerk of the orphans' court in various counties for issuing a marriage license or declaration and for returns thereof to the Department of Health shall be three dollars, two dollars and fifty cents of which shall be for the use of the clerk of the orphans' court of the county wherein such license is issued, and fifty cents for the use of the Commonwealth. In addition, the clerk shall make the usual charge for affidavits. All monies collected by the said clerk for the use of the

Commonwealth shall, on or before the tenth day of the following month, be transmitted to the State Treasurer, to be placed in the General Fund for the use of the Commonwealth.

Comment: This is Section 19 of the 1953 Act (48 P. S. § 1–19).

SECTION 223. *Certified Copies of Records; Evidence.*—A certified copy of the record of a marriage license, under the hand of the clerk of the orphans' court and the seal of such court, or under the hand of the Secretary of Health and the seal of the Department of Health, shall be received in all courts of this Commonwealth as prima facie evidence of the marriage between the parties therein named.

Comment: This is Section 20 of the 1953 Act (48 P. S. § 1–20).

SECTION 224. *Penalties.*—

(1) Any clerk of the orphans' court who shall wilfully issue a marriage license in any manner except as provided in this act, or who shall refuse or neglect to enter upon the marriage license docket any marriage license application or any marriage license issued from his office immediately after it is issued, or to enter any consent certificate or authorization of a judge of the orphans' court, or shall fail to keep the marriage license docket open for inspection or examination by the public, or shall prohibit or prevent any person from making a copy or abstract of the entries in the marriage license docket for the purpose of publishing the same in any regularly published daily or weekly newspaper, shall, upon conviction in a summary proceeding be sentenced to pay a fine not exceeding fifty dollars and costs for each offense.

(2) Any applicant for a marriage license, physician or representative of a laboratory who shall misrepresent any of the facts described by Subsection (1) of Section 208 of this act, or any licensing officer failing to receive the statements prescribed by such subsection, or who shall have reason to believe that any of the facts thereon have been misrepresented and shall nevertheless issue a marriage license, or any person who shall disregard the confidential character of the information or reports required by such subsection, or any other persons who shall otherwise fail to comply with the provisions of such subsection, shall, upon conviction thereof in a summary proceeding in the county wherein such offense was

committed, be sentenced to pay a fine of not less than twenty dollars nor more than one hundred dollars and the costs of prosecution, and upon failure to pay such fine and costs, shall be imprisoned not less than ten days nor more than thirty days.

(3) Any person solemnizing a marriage who shall neglect or refuse to return the "duplicate" certificate of marriage to the clerk of the orphans' court within ten days after the marriage was solemnized shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of fifty dollars and the costs of prosecution.

(4) If any person shall solemnize any marriage ceremony, or shall be a party or an attesting witness to the same, without the parties to the marriage having first obtained the proper license as provided in this act, he, she or they so officiating, contracting or attesting shall, upon conviction in a summary proceeding, be sentenced to pay a fine not exceeding fifty dollars.

(5) Any person who shall knowingly perform a marriage ceremony between parties when either of said parties is intoxicated or under influence of narcotic drugs shall be guilty of a misdemeanor, and, upon conviction thereof, shall pay a fine of fifty dollars or be imprisoned not exceeding sixty days, or both, *and the marriage of any such person shall be voidable unless ratified by subsequent cohabitation when such person no longer is under the influence of drugs or intoxicating liquor, and such ratification shall be conclusively presumed unless a petition for annulment is filed within sixty days after the date of such marriage ceremony.*

(6) Any alderman or justice of the peace who shall knowingly insert or permit to be inserted any false statement in any application for marriage license shall, upon conviction in a summary proceeding, be sentenced to pay a fine not exceeding fifty dollars and costs of prosecution.

(7) All fines and penalties collected pursuant to this act shall be for the use of the county in which the marriage license was issued.

(8) *The validity of any marriage which is otherwise valid shall not be impaired solely because of the false statements of any applicant in procuring a marriage license but such applicant may be subject to the pains and penalties of perjury or false swearing as provided by law.*

(9) *Any applicants whose application for a marriage license has been rejected in any county of the Commonwealth and who apply for a marriage license in another county of the Commonwealth and who wilfully conceal the fact of such rejection shall, upon conviction thereof in a summary proceeding in the county wherein such offense was committed, be sentenced to pay a fine of not less than twenty dollars nor more than one hundred dollars and the costs of prosecution, and upon failure to pay such fine and costs shall be imprisoned not less than ten days nor more than thirty days.*

Comment: This is based on Section 21 of the 1953 Act (48 P. S. § 1–21) and is substantially the same except for the italicized portion and the addition of Subsections (8) and (9). The addition to Subsection (5) is recommended in order to have a clear statement of the common law rule that a valid marriage is not affected where one party was incapable of assent, but at the same time to provide for ratification in such cases where there is subsequent cohabitation and failure to make timely petition for an annulment. Otherwise, "under the influence" might be utilized as a pretext for securing annulment.

Subsections (8) and (9) make it clear that perjury or falsification of facts in procuring a license, in and of itself, is insufficient to invalidate the marriage. Such a marriage must also be contrary to a strong public policy, as for example, where there is an existing spouse, a party is under the age of consent, or a minor lacks parental consent. It is such policy, not the false statement, which should make the marriage subject to a decree of nullity. In addition, applicants are warned by this section that prosecution for perjury may lie under *The Penal Code* (1939, June 24, P. L. 872, § 322; 18 P. S. § 4322) if they falsely swear to the facts given to the clerk. To the same effect, Subsection (9) warns against failure to disclose rejection in another county.

ARTICLE III

VOID AND VOIDABLE MARRIAGES; REMEDIES

SECTION 301. *Common Law Marriages Abolished; Certificate of Common Law Marriage.*—From and after the first day of January, ——, all marriages contracted within this Commonwealth must

be licensed and entered into in accordance with the terms of this act, and all purported common law marriages thereafter attempted in this Commonwealth shall be null and void. Any parties who claim to have contracted a common law marriage before said date or to have contracted such marriage in a state permitting the same, may appear together before a clerk of the orphans' court of the county of their residence and upon swearing to the facts as to the time, place and circumstances of such common law marriage may be given a certificate to the effect that they are husband and wife which certificate shall be recorded and shall be conclusive evidence of such facts.

Comment: This replaces Section 23 of the 1953 Act (48 P. S. § 1–23). Common law marriages contracted before the effective date continue to be valid. Only fifteen other states and the District of Columbia still permit common law marriages. States retaining common law marriages include: Alabama, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Texas. The other states have abolished common law marriages. Michigan took this action effective January 1, 1957. Authorities are virtually unanimous as to the desirability of abolition and insistence upon license. Even in Pennsylvania, the strict requirements for recognition of common law marriages indicate judicial disapproval. There is no articulate group in society that advocates retention. Religious leaders and leaders of ethnic groups agree that at mid-twentieth century there is no justification for such an informal method of entering into a solemn relationship. Abolition will not affect the religious ceremonies of such groups as the Society of Friends since such marriages are licensed and comply with specific provisions of this code. In an era when a church or parson were hard to find or difficult to go to, there may have been some practical reason for common law marriages, but today, with modern methods of transportation, the prevalence of churches, and the availability of civil authorities, there is no such justification. Moreover, experienced lawyers and judges agree that bona fide common law marriages are rare, but the claim of such a relationship presents difficult problems, and the mere existence of the institution lends itself to fraudulent claims which may be difficult to disprove.

The second portion of this section is inserted to take care of meritorious situations where there has been a bona fide common

law marriage. It permits parties to such a common law marriage to obtain a certificate to the effect that they are man and wife if the claimed common law marriage occurred in Pennsylvania prior to the effective date of this act or in a state permitting such marriages, and such certificate shall be conclusive proof of such status.

SECTION 302. *Effect of Noncompliance upon Validity of Marriage.*—Unless otherwise expressly provided, a failure to comply with the marriage requirements set forth in this act or fraud or mistake in obtaining or issuing a marriage license, shall not affect the validity of any marriage which is performed pursuant to a license issued by the clerk of the orphans' court, regardless of the penalties which may otherwise attach.

Comment: This is new. Although penalties may accrue under Section 224 *supra,* where a clerk or applicant fails to comply with the requirements of this code or fraud or mistake is involved, the validity of the marriage is not impaired except in those cases where such a marriage is declared void or voidable for other reasons. For example, all marriages under the age of consent (sixteen), unless permitted by the orphans' court, are declared voidable, and the marriage of minors under twenty-one without parental consent are voidable, because of the public concern as to teen-age marriages. Public policy also favors holding that the marriage of an insane person or an incestuous marriage is void. On the other hand, an error in issuing a license two days instead of three after application, or some defect in the processing of the serological test, or the failure of the clerk to get the statistical information required by Section 209, or some error in the recording of the marriage, should not affect its validity, and will not, under this section.

SECTION 303. *Void Marriages; Annulment and Invalidity; Issue Legitimate.*—Where there has been no confirmation by cohabitation following the removal of an impediment as provided in Section 221 of this act, the purported marriage of any person shall be deemed void in the following cases:

(a) Where either party at the time of such purported marriage had an existing spouse and the former marriage has not been annulled nor had there been a divorce from the bonds of matrimony, except where such person had obtained a decree of presumed death of the former spouse under Section 210 of this act;

(b) Where the parties to the purported marriage are related

within the prohibited degrees of consanguinity set forth in Section 207(h) of this act;

(c) Where one or both parties to such purported marriage was incapable of consenting to the marriage relationship by reason of insanity, mental disease or disorder, or otherwise lacked capacity to consent or did not intend to assent to such marriage relationship.

In all such cases of purported marriages which are void, either party to such purported marriage may seek and obtain an annulment of such purported marriage or its invalidity may be declared in any collateral proceeding, and the children of such a marriage shall be deemed the legitimate issue of such parties and upon decree of nullity the court may require such distribution of property and may award such an allowance for support as is just and equitable under the circumstances.

Comment: The traditional impediments to a valid marriage—which make a purported marriage void—are specified by this section. Such purported marriages are called *"void"* because they are contrary to a strong public policy. Some of the common law consequences of "void" marriages have been mitigated. For example, the legitimacy of issue of "void" marriages is declared so that the unfortunate consequence of the common law is avoided. (See Act of December 17, 1959, P. L. 1916, No. 695.) Moreover, a modern sense of justice favors an equitable adjustment of property rights between parties to even a void marriage and the property which has been accumulated through joint effort or joint expenditure should be divided between them and in some instances the court which issues the decree of annulment should have discretion as to whether or not an allowance should be ordered in favor of a party to the purported marriage who has actual need and the other party has sufficient financial ability. The latter matter is more fully developed in Section 504 of the proposed Divorce Code, which provides for discretion to award such an "allowance" in some cases. Express reference also is made to Section 221 which accepts the doctrine of ratification after removal of impediment as converting an ostensible marriage into a valid one.

Section 105 of this code, in defining void marriages, provides that a void marriage is one whose validity may be questioned in a collateral proceeding or by an annulment action. Section 105 of the proposed Divorce Code gives the same definition. However, in some instances there is an express limitation on collateral attack even in

the case of void marriages. For example, under Section 219 of this code, if a marriage within the prohibited degrees of consanguinity is not annulled during the lifetime of the parties, it cannot be inquired into after death of either. Thus, to that extent, collateral attack is barred by the death of either. Moreover, under Section 221 of this code, a marriage which initially was bigamous may become a valid marriage after removal of the impediment (death of former spouse or divorce or annulment of first marriage) where at least one of the parties married in good faith. To that extent, collateral attack is barred after removal of the impediment and even a direct attack (annulment) is precluded. Similarly, under Section 802 of the proposed Divorce Code and Section 210 of this code, a decree of presumed death renders a second marriage valid and precludes attack even though otherwise it would be bigamous, and under Section 802 cohabitation after removal of the impediment has the same effect as under Section 221 of this code. The net result is that although "void" marriages usually may be questioned by annulment proceedings or by collateral attack, and are so defined, nonetheless in the stated instances due to express provision they may not be so vulnerable to attack because of overriding public policy.

SECTION 304. *Voidable Marriages; Annulment; Issue Legitimate.*—The marriage of any person shall be deemed voidable and subject to annulment in the following cases:

(a) Where either party to such marriage was under sixteen years of age, unless such marriage was expressly authorized by a judge of the orphans' court, as provided in Section 207 of this act;

(b) Where such person, although sixteen years of age, is a minor under twenty-one who lacked the consent of parent or guardian or permission of the orphans' court and has not subsequently ratified such marriage upon reaching majority and such proceeding of annulment is commenced within sixty days after the ceremony as provided in Section 207 of this act;

(c) Where either party to such marriage was under the influence of intoxicating liquor or narcotics and a petition for annulment has been filed within sixty days after the date of such marriage ceremony;

(d) Where either party to such marriage is and was impotent at the time of such marriage, unless known to the other party at the time of the marriage;

(e) Where either party was induced to enter into such marriage due to the fraud, duress, coercion, or force, attributable to the other party, and there has been no subsequent voluntary cohabitation after knowledge of such fraud or release from the effects of duress, coercion, or force;

(f) Where the purposes of marriage are frustrated immediately because either the law or action of some jurisdiction prevents the parties from living together as husband and wife, or the physical condition of either party is such as to endanger the life or seriously impair the health of either.

In all such cases of marriages which are voidable, either party thereto, or where authorized a parent or guardian, may seek and obtain an annulment of such marriage, but unless and until such nullity decree is obtained from a court of competent jurisdiction, the validity of such marriage shall not otherwise be questioned and the marriage shall be regarded as valid and subsisting. The validity of such a voidable marriage shall not be subject to attack or question by any person if it is subsequently confirmed by the parties thereto or after the death of either party to such marriage, and the issue of such marriage shall be deemed legitimate for all purposes regardless of any annulment of such marriage. A court granting an annulment of such marriage may require such distribution of property and may award such an allowance for support as is just and equitable under the circumstances.

Comment: Both Sections 303 and 304 conform to the proposed Divorce Code which permits the annulment of void *or voidable* marriages, and fraud, duress, coercion, and force are grounds for annulment rather than divorce, as is the case of impotence. Legitimacy of issue and a bar to attack after death of either party has been preserved here as well as in Section 303. (See Act of December 17, 1959, P. L. 1916, No. 695.) The traditional distinction between void and voidable marriages, that is, that the latter marriages may be invalidated only in annulment proceedings and are not subject to collateral or other attack, has been retained in this section. In addition to those situations which usually make a marriage voidable, a new ground has been added in clause (f). It is provided that annulment should be permitted, especially since issue will not be rendered illegitimate, where the purposes of marriage have been frustrated either by law or physical conditions

and hence it is impossible, through no fault of the parties, to consummate the marriage. The case of *Kenward v. Kenward,* (1950) 2 All Eng. R. 297, 66 T.L.R. 157 (Part 2, 1950), illustrates the situation where a marriage is frustrated. There an English sailor married a Russian woman in Archangel during the war, sailing almost immediately thereafter. After cessation of hostilities in Europe, he sought to get her to join him in England but Russian authorities forbade her leaving Russia and hence the law to which she was subject prevented the marriage from being fulfilled. A marriage also may be frustrated because the physical or mental condition of one party is such as to render cohabitation dangerous to the life or health of either or both parties. This section makes Pennsylvania policy revert to the annulment rather than divorce of voidable marriages. See Comment following Section 303 in the proposed Divorce Code. Section 504 of the proposed Divorce Code provides for an allowance to be given upon annulment if actual need on the one hand and ability to pay on the other are established.

SECTION 305. *Proceedings to Determine Marital Status.*—When the validity of any marriage shall be denied or doubted by either of the parties, a bill or petition in the nature of a declaratory judgment action may be filed in the court having jurisdiction over divorce and annulment matters, seeking a declaration of the validity or invalidity of the marriage, and upon due proof of the validity or invalidity thereof it shall be declared valid or invalid by decree or sentence of such court, and, unless reversed upon appeal, such declaration shall be conclusive upon all persons concerned.

Comment: This section reverses present Pennsylvania practice of not permitting a declaratory judgment action to determine the validity of a marriage and is patterned after § 42–120 of the Rev. Stats. of Nebraska. In addition to Nebraska, the following have permitted suits to affirm a marriage: California, District of Columbia, Iowa, Kentucky, Maine, Massachusetts, Michigan, Montana, Nevada, Oregon, South Carolina, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming, some 18 in number. It is felt that such a provision comports with sound public policy because it provides a convenient way to eliminate all doubt as to status—a matter about which certainty is of great importance to both the parties and the public. This section permits a decree of invalidity as well as a declaration of validity. This is in order to take care of those rare instances where, without justification, a person holds herself or

himself out as the wife or husband of another. The decree, however, is not a substitute for an annulment which is the applicable procedure if there has been an ostensible marriage which is void or voidable under applicable law.

ARTICLE IV

SUBSTANTIVE RIGHTS OF MARRIED WOMEN

SECTION 401. *Property and Contract Rights of Married Women.*—Hereafter a married woman shall have the same right and power as a married man to acquire, own, possess, control, use, convey, lease, or mortgage, any property of any kind, real, personal, or mixed, either in possession or in expectancy, or to make any contract, in writing or otherwise, and may exercise the right and power in the same manner and to the same extent as a married man. The provisions of this section shall not affect any act done, liability incurred, or right accrued or vested, prior to October 15, 1957.

Comment: This is based on the Act of July 17, 1957, P. L. 969, No. 417, (48 P. S. § 32.1). This section is intended to eliminate the need for having a husband join in a conveyance or mortgage.

SECTION 402. *Conveyances to Husband.*—It shall be lawful for a married woman to make conveyances of real estate to her husband or her husband and herself jointly as if she were a feme sole.

Comment: This is the Act of May 31, 1947, P. L. 352, No. 160, amending the Act of June 3, 1911, P. L. 631, (48 P. S. § 71).

SECTION 403. *Married Women Entitled to Their Separate Earnings.*—The separate earnings of any married woman of the State of Pennsylvania, whether said earnings shall be wages as labor, salary, property, business or otherwise, shall accrue to and enure to the separate benefit and use of said married woman, and be under the control of such married woman independently of her husband, and so as not to be subject to any legal claim of such husband, the same as if such married woman were a feme sole.

Comment: This is based on the Act of May 3, 1872, P. L. 35, No. 24, Section 1, (48 P. S. § 34).

SECTION 404. *Married Women May Transfer Loans and Stocks.*—A married woman shall have complete freedom to own, sell, transfer or otherwise dispose of any bonds, loans or shares of stock or securities of any corporation whatsoever, the same as if she were unmarried.

Comment: This is based on the Act of April 1, 1874, P. L. 49, No. 9, Section 1, as amended, (48 P. S. § 36) removing the restriction to loans of this Commonwealth or the City of Philadelphia or stock of Pennsylvania corporations. This section is included as a matter of caution, notwithstanding the Act of July 17, 1957, P. L. 969, No. 417, and the stock transfer provisions of the *Uniform Commercial Code,* (1953, April 6, P. L. 3, Article 8, as amended; 12A P. S. § 8–101, *et seq.*). In any event, this section states existing law.

SECTION 405. *Married Women May be Declared Feme Sole Traders upon Husband's Desertion or Failure to Support.*—Whenever any husband neglects or refuses to provide for and support his wife, or deserts her, said wife may petition the court of common pleas of the county wherein she resides for a certificate declaring her to be a feme sole trader, and if the court issues such certificate any interest which her husband may claim by curtesy or statutory share in lieu thereof in her real property shall be terminated and the wife shall have complete freedom of disposition as to her own property and if she dies intestate such property shall go to her next of kin as if her husband were previously dead.

Comment: This section is intended to modernize existing law relating to feme sole traders (48 P. S. § 41–44) and to eliminate other features covered in these statutes for which there is no need, since such matter is fully covered by the support provisions found in Section 601 of this code.

SECTION 406. *Wife May Acquire Separate Domicile of Choice.*—A wife who is living separate and apart from her husband may acquire a domicile of choice regardless of the cause of separation and the fact that she may intend to file a matrimonial action at such place shall not prevent her from acquiring such domicile.

Comment: The Act of July 11, 1923, P. L. 1034, No. 417, (48 P. S. § 51), now repealed, simply provided that a married woman for the purpose of voting or holding office might have her domicile determined as if she were unmarried. This section removes any

doubt as to a wife's capacity to acquire her own domicile of choice if she is separated from her husband and presence and requisite intent concur. In some of the older Pennsylvania cases, it was held that a wife who was herself a deserter could not acquire a domicile of choice, but that if she were not a deserter, she might. See cases cited in PENNSYLVANIA ANNOTATIONS TO RESTATEMENT OF CONFLICTS OF LAWS, § 28 (1936). However, the RESTATEMENT § 28 and the leading case of *Williamson v. Osenton,* 232 U. S. 619 (1914), opinion by Mr. Justice Holmes, eliminate the fault element in determining her capacity to acquire a separate domicile of choice. Most authorities agree. See, for example, GOODRICH ON CONFLICTS OF LAWS (3d ed. 1949), § 36. Due to the elusive character of "fault" it is highly impractical to have jurisdiction hinge on such concept. This section, therefore, permits a wife who has separated from her husband—for whatever cause or reason—to acquire her own domicile.

SECTION 407. *Property of Wife Not Liable for Husband's Debts; Husband Not Liable for Wife's Antenuptial Debts or Torts.* —All real and personal property of the wife shall continue to be her property as fully after marriage as before, and all such property of whatever description which shall accrue to her during coverture, by will, descent, deed of conveyance, purchase by her own funds, or otherwise, shall be owned, used and enjoyed and may be disposed of by the wife as her own separate property, and shall not be subject to levy and execution for the debts or liabilities of her husband, unless she has undertaken to be bound therefor as provided by law. A husband shall not be liable for the debts of the wife contracted before marriage or for any torts committed by her before, during or after coverture unless liability is otherwise imputable to him as a matter of law.

Comment: The provisions of the Act of February 22, 1718, 1 Sm.L. 99, (48 P. S. §§ 61–63) have been deleted as obsolete and because their substance is covered elsewhere in this code. The provisions of the Act of April 11, 1848, P. L. 536, Section 6, (48 P. S. § 64) are modernized but remain substantially the same, except that the concluding sentence provides that the husband is not liable for his wife's torts except where her fault is imputable to him as a matter of law, *i.e.,* according to the law of agency. There may be some value in retaining a clear statement of her status as to separate property and his nonliability for antenuptial debts and torts.

SECTION 408. *Real Estate Subject to Statutory Share Not to be Levied on for Other Spouse's Debts During Lifetime.*—The real estate of either spouse shall not be subject to execution for any debts of the other spouse regardless of any statutory interest either may have in the property of the other which is in lieu of or full satisfaction for common law dower or curtesy.

Comment: This is based on the Act of April 22, 1850, P. L. 549, Section 20, (48 P. S. § 65) redrafted to reflect current law. Under the *Intestate Act of 1947,* Section 5, (a) and (b), (1947, April 24, P. L. 80; 20 P. S. § 1.5) the widow's share of her husband's real estate is in lieu of and in full satisfaction for her dower at common law and she gets the same share in real estate aliened by the husband during his lifetime, without joining her in the conveyance, as she does in the real estate of which the husband dies seised, unless she has waived such interest. The husband also gets a statutory share of his wife's real estate in lieu of and as satisfaction for his curtesy at common law. Such has been the law in Pennsylvania since the *Intestate Act of 1917,* although frequently lawyers and others continue to speak of "dower" and "curtesy." The suggested section more accurately refers to "statutory share" and continues the exemption from execution as it presently exists.

SECTION 409. *Judgment Against Spouse Does not Bind Other's Real Estate or Affect Statutory Share Therein.*—No judgment obtained against a spouse, before or after marriage, shall bind or be a lien upon the real estate of the other spouse or upon any statutory interest in the property which serves in lieu of dower or curtesy.

Comment: This is based on the Act of April 1, 1863, P. L. 212, Section 1, (48 P. S. § 66) and is modernized to effect existing law.

ARTICLE V

REMEDIES AND LIABILITIES OF MARRIED WOMEN

SECTION 501. *Right to Sue and Be Sued.*—A married woman may sue and be sued civilly, in all respects, and in any form of action and with the same effect, results and consequences as an unmarried woman; but neither spouse may sue the other, except in a matrimonial action, or in a proceeding to protect and recover

separate earnings or property, in which case either spouse may be a competent witness against the other.

Comment: This is based on the Act of June 8, 1893, P. L. 344, Section 3, as amended, (48 P. S. § 111) and is redrafted to eliminate archaic language without changing substantive law. At common law the fiction of identity precluded the treatment of a wife as a person *sui juris* and barred interspousal suits. Since the enactment of Married Women's Acts (in Pennsylvania in 1848) some suits have been permitted but others such as personal torts, have been barred because of another fiction. The fiction is that it would disturb domestic tranquillity if such suits were permitted. "This is on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; . . . " (PROSSER ON TORTS (2d ed. 1955) p. 674.) While most states still adhere to the immunity, there is a trend away from the extreme position of Pennsylvania case law. See *Ritter v. Ritter,* 31 Pa. 396 (1858), where it was predicted that if suits were permitted between spouses: "The flames which litigation would kindle on the domestic hearth would consume in an instant the conjugal bond, and bring on a new era indeed—an era of universal discord, of unchastity, of bastardy, of dissoluteness, of violence, cruelty, and murders."

As of 1955, the following 18 states permitted suits between husband and wife, even for personal torts: Alabama, Arizona, Arkansas, Colorado, Connecticut, Idaho, Kentucky, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, and Wisconsin. (See 43 A.L.R. 2d 632).

In Pennsylvania, there is a somewhat illogical pattern. To a large extent, *Ritter v. Ritter* remains law, but substantial inroads have been made. For example, *Kaczorowski v. Kaczorowski,* 321 Pa. 438, (1936), permitted such an action for wrongful death; *Heckman v. Heckman,* 215 Pa. 203, (1906), permitted an action for fraud; and *Freiler v. Kear,* 126 Pa. 470, (1889), permitted an action for waste. In addition, the Act of May 1, 1913, P. L. 146, No. 97, Section 1, (48 P. S. § 114) has been construed by some trial courts to permit tort actions by a *deserted* wife against her husband. See *Paskevich v. Paskevich,* 5 Northum. 266 (1920); *Candidi v. Candidi,* 87 D. & C. 96 (1953); *Waterman v. Waterman,* 3 D. & C. 2d 126 (1954); *contra, Ellis v. Brenninger,* 71 D. & C. 583 (1950).

In view of the trend, the question of policy is presented and offers the alternatives from existing law of either removing im-

munity entirely or permitting a spouse to sue for *intentional, wanton, or reckless injury* inflicted by the other spouse and, perhaps, for *gross negligence.* The recent case of *Parks v. Parks,* 390 Pa. 287 (1957) shows that statutory change will be necessary if interfamily torts are to become actionable. Because of the important policy question involved, the matter might properly be considered in separate legislation.

The provisions of Section 3 of the Act of April 11, 1856, P. L. 315, (48 P. S. § 112) which permit a married woman to maintain an action against her husband for slander or libel or for the recovery of her separate earnings or property are now covered by the provisions of this section and Section 502. Moreover, the provisions of the Act of April 25, 1850, P. L. 569, Section 39, (48 P. S. § 113) regarding manner of bringing suit are obsolete and can best be covered by a rule of civil procedure and, hence, are eliminated.

SECTION 502. *Deserted Wife May Sue Husband on any Cause of Action; Competency as Witness; Right of Survivorship Not Destroyed.*—Any wife who has been deserted, abandoned, or driven from her home by her husband, may sue her husband civilly, in any court of this Commonwealth having the jurisdiction, upon any cause of action now existing or hereafter accruing, with like effect as if such wife were a feme sole; and in such case the wife shall be a competent witness against the husband; Provided, however, That nothing contained herein shall be deemed to destroy the right of survivorship in any land heretofore or hereafter conveyed to such wife and husband jointly.

Comment: This is based on the Act of May 1, 1913, P. L. 146, Section 1, (48 P. S. § 114) and is substantially the same. Section 2 of the Act of June 11, 1879, P. L. 126, No. 129, (48 P. S. § 115), which provides that a deserted wife may sue without trustee or next friend, is eliminated from this code as superfluous and as properly a matter for a rule of civil procedure.

SECTION 503. *Proceedings in Case of Debts Contracted for Necessaries.*—If a spouse having the duty to support and maintain shall fail to discharge such duty, it shall be lawful for the dependent spouse to contract for such necessaries at such spouse's expense, and the creditor may either sue the spouse owing the primary duty to support and maintain, or join such spouse and the dependent spouse in an action for recovery of the purchase price

of such necessaries, and, after obtaining judgment, have execution against the nonsupporting spouse. If no property of such spouse be found, the officer executing the writ shall so return, and thereon an alias execution may be issued, which may be levied upon and satisfied out of the property of the dependent spouse; Provided, however, That judgment shall not be rendered against the dependent spouse, in such joint action, unless it shall have been proved that the debt sued for in such action was contracted by the dependent spouse, or incurred for articles necessary for the support of the family.

Comment: This is based on the Act of April 11, 1848, P. L. 536, Section 8, (48 P. S. § 116). The section is redrafted to modernize existing law to take into account the possibility that the wife of a disabled husband may owe the duty to support and maintain if she has sufficient financial ability and he and the family have actual need. The effect of notice to a merchant not to charge to the husband's credit is left for decisional law. See *Wanamaker v. Lipps,* 3 D. & C. 451 (1922).

SECTION 504. *Action Against Deserted Wife of Nonresident; Service; Judgment and Execution.*—A creditor who supplies necessaries for the support and maintenance of the family of a married woman whose husband has deserted her and is absent from and living out of the county in which she resides, or who upon request renders services or repairs or improves her separate estate, may sue such wife alone for such debt and need not join her husband in such action, and any judgment against her shall be collectible out of her separate estate.

Comment: This is based on the Act of June 12, 1878, P. L. 206, No. 237 Section 1, (48 P. S. § 117) and retains the law substantially the same, except for the deletion of the requirement that the wife be deserted for one year. Section 501 provides that a married woman may sue and be sued civilly, in all respects, and in any form of action, and with the same effect, results and consequences as an unmarried person. In view of this, Section 504 may be superfluous but due to the common law history of actions for necessaries, it is deemed advisable to have an express provision so that necessaries may be supplied to the deserted family.

ARTICLE VI

ACTIONS FOR SUPPORT; DOMESTIC RELATIONS DIVISION; ENFORCEMENT OF SUPPORT

SECTION 601. *Rights of Action for Support; Jurisdiction; Spouses Competent Witnesses.*—It shall be the legal duty of a husband having sufficient financial ability to provide suitable support and maintenance for his wife provided that they are not separated and living apart due to the primary fault of the wife and provided further that there is actual need for such support and maintenance. It shall be the legal duty of the wife to support and maintain her husband if she has sufficient financial ability and through no fault of his own he is unable to support himself and has actual need and they are not separated and living apart due to his primary fault.

The legal duty of a father having sufficient financial ability, shall be to provide suitable support for his children regardless of whether or not he is separated from his family for whatever cause, and in the event that the father is unable to support his children or fails to do so, it shall be the legal duty of a mother having sufficient financial ability to support her children and she may have a cause of action against the father who fails to support his children for the amounts so expended.

The legal duty of a spouse to pay alimony, maintenance or allowance, shall be such as is imposed by the court having jurisdiction which grants an annulment of the marriage or a divorce from the bonds of matrimony or from bed and board or otherwise makes an award under the provisions of the divorce laws.

The legal duty of a person to support an indigent dependent shall be such as is provided by The Support Law of June 24, 1937, P. L. 2045, as amended.

Any person who neglects or refuses to perform such legal duty of support and maintenance may be ordered and compelled to do so by the court of common pleas of the county where service may be had on the defendant or the county where the other spouse or children reside, as provided by The Pennsylvania Civil Procedural Support Law. Any person who neglects or refuses to comply with an order requiring him to pay support, alimony, maintenance

or allowance award may be adjudged in contempt and the court shall make and enforce such orders and decrees as the equities of the case demand, and in the execution of such order, decree or award, proceedings may be had against any and all property of the defendant, including property real and personal, whether held by entireties or not, and the wages of such defendant may be attached in the manner provided by The Pennsylvania Civil Procedural Support Law of July 13, 1953, P. L. 431, Section 9, as amended. In any such action at law or in equity, the husband and wife shall be fully competent witnesses.

Criminal proceedings may be brought against any father or husband who neglects or refuses to perform such legal duty of support and maintenance in accordance with the Act of June 23, 1939, P. L. 872, Section 727.

Any person who is arrested or is the subject of an attachment for contempt of court for failure to comply with its orders or decrees shall be brought before the court forthwith, but in any event within forty-eight hours of the time said person is taken in custody, and if his failure to comply is found to be wilful he may be committed to the county jail or house of correction until compliance with said order, but in any case for a period not exceeding six months, and the court in its order shall state the condition which upon fulfillment will result in the release of such person. The court of common pleas having jurisdiction may order the defendant to give security to insure compliance with its orders, but in no instance shall the defendant be imprisoned for failure to give security unless and until the court finds on substantial evidence that the defendant is possessed of real or personal property in sufficient amount and in such form as to enable him to give the required security and that the defendant is likely to dissipate his assets or flee the jurisdiction. In each instance in which security for compliance is ordered, the court shall enter upon the record the findings on the basis of which the order is made.

Whenever any person having a duty of support has left the county or his whereabouts are unknown, the court having jurisdiction may order, and direct a seizure and sale, or mortgage, of as much of his property as will provide the necessary funds to satisfy a support order of such court and to insure future support payments. Service upon such person may be had by publication, as

provided by the Pennsylvania Rules of Civil Procedure governing actions in equity.

Comment: This is based on the Act of May 23, 1907, P. L. 227, Section 1, as amended, (48 P. S. § 131) and sets forth in one basic statute the economic obligations of husband and wife and parent and child. The legal duty of a husband and father, wife and mother, as to support and maintenance, is declared. Because of its close relation, and because the same procedures should apply, alimony and allowance, which are provided for by Article V of the proposed Divorce Code, are included. Reference is also made to the legal duty to support indigent dependents under the support law.

The procedure provided for, as under existing law, includes actions at law and in equity and jurisdiction is given to the court of common pleas of the county where the defendant may be served or where the other spouse or children reside. It is also specified that all of defendant's property, of whatever nature, is subject to execution and that his wages may be attached as under *The Pennsylvania Civil Procedural Support Law*. The recent amendments to *The Pennsylvania Civil Procedural Support Law* which pertain only to Philadelphia County are extended to all actions under this section, where an arrest for contempt or imprisonment for failure to provide bond is involved. This is essential to protect the civil liberties of defendants.

SECTION 602. *Probation Officers and Domestic Relations Division.*—Every court having jurisdiction over matrimonial causes, including divorce from the bonds of matrimony, from bed and board, annulment, custody, support, maintenance, allowance, property settlement, and any related matters, shall establish and maintain a domestic relations division as provided by The Pennsylvania Civil Procedural Support Law of July 13, 1953, P. L. 431, Section 4, and shall appoint such qualified probation officers and other assistants as are necessary for the efficient and useful operation of such domestic relations division. The investigations and reports of such probation officers and assistants may be considered by the court and shall be received in evidence in any action if no objection is made and copies of such reports are made available to all interested parties five days before trial or hearing. If objection is made to such reports, said reports may be received into evidence only if the person making such reports is made avail-

able for cross-examination by the objecting party. The court shall require that full and complete reports be made in any case involving the custody of children, the support of dependents, and the dissolution of any marriage where there are children under fourteen years of age, and may request such reports in any action where it would assist the court; Provided, however, That where a probation officer is performing the function of a marriage counsellor in an attempt to effect a reconciliation, statements of a confidential nature made to him by a party shall be privileged and inadmissible as evidence, unless the party concerned waives such privilege at the trial or at the time the statement is made.

Comment: This section ties in with Section 201 of the proposed Divorce Code and that portion added to the 1929 Act (The Divorce Law) by the amendment of December 30, 1959, P. L. 2055, Section 2, (23 P. S. § 19). The amendment created a domestic relations division for common pleas courts.

It is intended that the hearsay rule be modified so that the reports of probation officers and staff may be received in evidence under the limitations expressed in this section. Parties who might be adversely affected by such reports are protected by the requirements that copies be made available five days before trial and that the author of the report must be present for cross-examination if objection is made to the report. Substantially the same modification of the hearsay rule is in effect in family courts in several jurisdictions including Ohio and Minnesota. Especially where there is no jury involved, the proposed modification of the hearsay rule is reasonable and adequately protects the interests of all concerned.

The proviso is added to encourage resort to marriage counselling and for the same reasons which are set forth in the Comments to Sections 201 and 804 of the proposed Divorce Code. See Comments to those sections.

SECTION 603. *Execution of Order or Judgment for Support, Maintenance or Allowance; Seizure and Sale of Estate Held by Entireties; Wage Attachment.*—The court of common pleas in execution of any order for support, maintenance or allowance, against a spouse or parent may issue a writ of execution against any real property owned by the defendant and held in tenancy by the entireties, and the purchaser at the sheriff's sale of such estate by entireties shall be vested with lawful title to such property. Said

court also may for the purpose aforesaid issue a writ of attachment execution attaching any rents, issues or profits of such estate held by the entireties in whosoever's hands such may be. The proceeds of such sale, or of any attachment execution, after the satisfaction of such order or judgment, shall be divided equally between the husband and wife who had held the property by entireties. The wages, salary, or commissions of any defendant ordered to pay support, maintenance or allowance, may be attached in the manner provided by The Pennsylvania Civil Procedural Support Law of July 13, 1953, P. L. 431, Section 9.

Comment: This is based on the Act of June 11, 1913, P. L. 468, Section 1, (48 P. S. § 133) and, as revised, is in accord with Section 601 and provides expressly for wage attachment.

SECTION 604. *Execution to Enforce Orders and Decrees for Support, Maintenance and Allowance; Spendthrift or Other Trusts Subject to; Lien; Exemptions; Procedure.*—Whenever any court having jurisdiction has made an order or entered a decree or judgment against any person requiring him or her to pay support, maintenance or allowance to the other spouse, or children, or both, the court may issue the appropriate writ of execution against any property, real or personal, belonging to such person who is in arrears to enforce said order, decree, or judgment, or writ in the nature of attachment execution, against any money or property to which said defendant is entitled, whether under what is known as a spendthrift trust or otherwise; and the said writ of attachment execution if the court so provides shall become a lien and continuing levy upon any money or property to which he may be in any way entitled, whether under what is commonly known as a spendthrift trust or otherwise; and, in cases of levy on, or attachment of, any trust, said levy or attachment shall only be for fifty per centum thereof, and unless otherwise ordered shall remain a continuing levy until the order, decree, or judgment has been paid in full, with costs; and, in cases where the order, decree, or judgment requires the payment of stated sums at stated intervals, said writ of attachment execution, unless otherwise ordered, shall remain a lien and continuing levy until the last payment due has been made, with costs. The person against whom such an order, decree, or judgment is made shall not be entitled to the benefits of any

exemption law now in force or hereafter passed. The provisions of this act shall apply to any trust, whether it is such a trust as is known as a spendthrift trust or otherwise, whether such trust was created or came into existence before or after the passage of this act. Where an attachment execution is issued, the further proceedings thereon shall be in the manner heretofore practiced and allowed in cases of foreign attachment.

Comment: This is based on the Act of May 10, 1921, P. L. 434, Section 1, (48 P. S. § 136) modified to include alimony and allowance provided for in Article V of the proposed Divorce Code, to make it applicable to wife as well as husband, and to give the court some discretion where imposition of a lien might work hardship.

SECTION 605. *Entry of Support Order or Decree in Court of Common Pleas; Execution Against Realty Held by Entireties.*— Whenever a husband and wife shall hold real estate by entireties and the wife has heretofore secured or shall hereafter secure a sentence, order, or decree of court against the husband for the support of herself and a child or children of her said husband, or either or any of them, and a copy of such sentence, order, or decree has been certified to any court of common pleas of any county in this Commonwealth in which the real estate so held by entireties is situate, the said order, decree, or judgment shall be entered in the said court of common pleas as a judgment therein with like force and effect as if the same had been recovered therein as a judgment of the latter court; and it shall be lawful to issue execution on such judgment against such real estate so held by entireties and to sell the same in the manner provided by law for the sale of real estate on execution issued on a judgment, but, in any such writs of execution thereon, the defendant therein shall not be entitled to the benefit of any exemption laws, and said real estate may be sold without inquisition. The sale of any such real estate, under the provisions of this act, shall convey to the purchaser or purchasers thereof a good and valid title to such real estate, and shall vest in him or them the entire title of both the husband and wife in the same manner and to the same effect as if both husband and wife had joined in the conveyance of same.

Comment: This is the Act of May 24, 1923, P. L. 446, Section 1, (48 P. S. § 137).

SECTION 606. *Plaintiff Spouse's Share of Proceeds of Sale; Proceedings; Husband and Wife Competent Witnesses.*—The plaintiff spouse shall be entitled out of the proceeds of such sales to such sum of money as represents plaintiff's share in such property, based upon the proportionate part of the original purchase money furnished by plaintiff for the purchase of such property. Such spouse may petition the court of common pleas of the county where such real estate is situate, either before or after the sale of such property by execution, setting forth plaintiff's claim, and the said court shall fix a day to hear the same. Service upon the defendant in such case shall be made personally, or in the manner provided by the Pennsylvania Rules of Civil Procedure, and, upon hearing the claim, the court shall make such decree as it shall deem proper. In such hearing both husband and wife shall be competent witnesses. If such hearing be held before the sale of the property on the judgment, the court shall determine the proportionate part of the real estate that belongs to the plaintiff spouse.

Comment: This is based on the Act of May 24, 1923, P. L. 446, Section 2, (48 P. S. § 138) and is substantially the same except that the "plaintiff spouse" has been substituted for "wife" since support or allowance may be ordered against a wife under Section 601; and reference is made to the Pennsylvania Rules of Civil Procedure.

SECTION 607. *Trustee to Receive Proceeds of Sale; Payments to Plaintiff Spouse.*—The court of common pleas shall at the time of the hearing, or thereafter, appoint a trustee, who shall receive from the sheriff the proceeds of the sale of such property after the costs have been paid. Such trustee shall, out of such funds, pay to the plaintiff spouse such amounts of money as the court may have decreed to plaintiff as plaintiff's share in the property sold, or if such decree has been made prior to the sale, then such proportionate part of the said proceeds as the court has found that the plaintiff spouse contributed towards the purchase of the property, and also such sums of money, and interest thereon from the time the respective items making up the same became due and payable, which are then due and payable by virtue of the order of support, and the trustee shall also pay to plaintiff such further sums as plaintiff may be entitled to under any order of court for support from the defendant spouse.

Comment: This is based on the Act of April 24, 1923, P. L. 446, Section 3, (48 P. S. § 139) and is substantially the same.

SECTION 608. *Plaintiff Spouse as Purchaser; Credits on Price; Assignment of Sums Due.*—Should the plaintiff spouse become the purchaser at said execution sale, plaintiff shall be entitled to a credit on the purchase price thereof for such sums as may have been found by the court to represent plaintiff's share in such property, and also for such sum or sums of money as may be due plaintiff from the defendant, under the order of support upon which the execution was issued, at the time of said sale, together with interest on said sums which are due and unpaid. Such credit shall be allowed by the sheriff, or plaintiff may assign the several sums due, as aforesaid, to the purchaser of said property, whereupon credit shall be given the purchaser by the sheriff in the amount so assigned.

Comment: This is based on the Act of April 24, 1923, P. L. 446, Section 4, (48 P. S. § 140) and is substantially the same.

ARTICLE VII

CONTROL AND CUSTODY OF CHILDREN; RIGHT OF CHILD TO SUE PARENT; CUSTODY AWARDS; INVESTIGATIONS AND REPORTS

SECTION 701. *Mother to Have Same Power and Control Over Minor Child as Father; Right to Custody; Right of Action for Injuries to Child; Parents Liable to Child for Intentional Torts.*—A mother shall have the same and equal power, control and authority over her child and the same and equal right to its custody and services and earnings, as the father of such child, provided she is a fit and proper person for such control and custody. The father or mother of a minor child may maintain an action for injuries to such child, for the loss of its services and expenses incidental thereto, in the manner provided by the Pennsylvania Rules of Civil Procedure. A child shall have an action against a parent who intentionally, recklessly, or wantonly inflicts an injury upon him, such action to be maintained in the manner provided by the Pennsylvania Rules of Civil Procedure.

Comment: Rule 2250 of the Pennsylvania Rules of Civil Procedure provides that the Act of June 26, 1895, P. L. 316, Section 1, as amended, is "suspended absolutely." There is need for a specific provision to the effect that a mother is entitled to equal rights as to her children since the common law gave preference to the father and her rights depend upon a finding that the father was unfit. Reference is made to the Pennsylvania Rules of Civil Procedure rather than to former procedure. Finally, a right of action against a parent is given recognition. The minor is given a cause of action against a parent who intentionally, recklessly, or wantonly inflicts injury. There is no bar to suit where the child has reached majority or is emancipated at time of the tort. Certainly, if the conduct of the parent is so flagrant as to evidence an abandonment of the parental relation, suit should be permitted. The above is the trend but still a minority position in the United States. The following states permit a child to sue a parent for an intentional or willful tort: Indiana, Maryland, Minnesota, Missouri, Pennsylvania (some instances), Rhode Island, Vermont, West Virginia, Nebraska, Arkansas, New Hampshire, New York, and Oregon. Such suits for mere negligence are permitted in: Louisiana, Nebraska, West Virginia, and New Hampshire. See 43 A.L.R. 2d 632. Well-reasoned recent cases holding that a parent who abandons parental responsibility becomes liable in tort at suit of child include: *Mahnke v. Moore,* 197 Md. 61, 77 A. 2d 923 (1951), and *Cowgill v. Boock,* 189 Ore. 282, 218 P. 2d 445 (1950). In *Minkin v. Minkin,* 336 Pa. 49, (1939) the Pennsylvania Wrongful Death Act was construed to permit a son to sue his mother for death of father due to her negligent driving.

Since the reason usually advanced for disability is the preservation of domestic tranquillity, and since a parent who commits an intentional or reckless tort has already impaired such presumed tranquillity, it seems clear—and commentators are unanimous—that actions should be permitted where the reason for the rule is nonexistent. Such reason does not exist where the child is an adult or emancipated, nor where a parent is guilty of such flagrant misconduct that it is tantamount to emancipation. The only real issue is whether a child should be permitted to sue a parent for ordinary negligence, *viz.,* injuries occasioned by negligent driving. This is a controversial issue, and more properly a subject for separate legislation.

The rule of immunity was not established until *Hewellette v. George,* 68 Miss. 703, 9 So. 885 (1891), and it has been almost

universally condemned by commentators. See PROSSER ON TORTS (2d ed. 1955) § 101.

SECTION 702. *Judges to Decide Disputes as to Child Custody and Visitation Rights; Investigations and Reports.*—Wherever there is at issue a dispute as to the custody of a minor child, whether between father and mother or otherwise, the court shall award such custody to a fit and proper person according to the best interests of the child. Custody may be awarded to persons other than the father or mother whenever such an award serves the best interests of the child and any person who has had de facto custody of the child in a wholesome home and is a fit and proper person shall prima facie be entitled to an award of custody. Where the child has sufficient capacity to reason, his wishes as to custody shall be given due weight by the court and shall be respected if his preference is a fit and proper person. Whenever practicable the court shall require investigation and reports which will enable it factually to determine what actually is to the best interests of the child. Probation officers and assistants attached to the domestic relations division established by this act when directed by the court shall cooperate in making investigations and reports, which reports shall be made available to all interested parties at least five days before hearing, and which may be received in evidence if no objection is made, and if objection is made, may be received in evidence provided the persons responsible for such report are made available for cross-examination. The court may also hear the testimony of any expert, produced by any party or upon its own motion, whose skill, insight and experience is such that such testimony is relevant to a just determination of what is to the best spiritual, mental, physical, emotional, and social interests of the child whose custody is at issue. Any custody award shall be subject to modification or change whenever the best interests of the child require or warrant such modification or change, and wherever practicable the same judge who made the original custody award shall hear any petition for modification of the prior award. Visitation rights may be awarded at the discretion of the court where it is shown that such will not be detrimental to the best interests of the child.

Comment: Section 202 of the proposed Divorce Code provides that children may be represented in divorce proceedings by a guardian ad litem, who may introduce evidence bearing on custody. Section 408

of the proposed Divorce Code and existing law require that custody matters be heard by the court rather than a master.

There is no more delicate and difficult problem than that of determining custody of children. Factors to be considered are so variable and situations are so diverse that the law has been forced to resort to somewhat meaningless generalizations in the formulation of rules. All courts are agreed that the "best interests of the child" is determinative, but nonetheless "property concepts" has intruded into this area. Judgment—if not based upon factual information —is no sure guide and intelligent laymen or judges may differ as to what is to the best interests of a child. It appears impracticable to attempt to set up definite or rigid standards to guide the discretion of the court. However, this section does expressly provide that custody need not be awarded to a parent, and that one who has had de facto custody shall prima facie be entitled to retain custody, and that the wishes of a child of sufficient age to reason shall be given preference if his choice is a fit and proper person. Thus, without making any hard-and-fast rule, markers are pointed out for judicial discretion in the hope that some of the serious errors of judgment of the past may be avoided in the future. The recent *Kraus Case* in Pittsburgh is a case in point. There the father had three successive marriages and the second wife had raised the child in question from infancy and the child wished to remain with her. Nonetheless, apparently due to the shibboleth that "blood is thicker than water" the trial court took custody from the foster mother and awarded it to the natural mother who over a period of years had manifested no interest in the child, even though the foster mother was a fit and proper person. It is proposed that wherever resources are available, that they be used to help the court in its exercise of discretion. Dr. Henry W. Brosin, Director of the Western Psychiatric Institute, and a leading American authority on psychiatry and family matters, believes that because of the delicacy and complexity of the problem of child custody, no court should determine such an issue without the assistance of a report by persons expert in the field of psychology and the family. Section 702 applies to *all* custody cases.

ARTICLE VIII

LEGITIMACY OF CHILDREN; LEGITIMATION

Section 801. *Legitimacy of Children of Ostensible Marriages*

Which Are Void or Voidable.—The children of any ostensible or purported marriage which has been entered into pursuant to the license required by this act shall be deemed the legitimate children of each parent from date of birth regardless of whether said marriage is or may be annulled as voidable or void under this act, and such children shall have and enjoy all rights and privileges as if they had been born in lawful wedlock.

Comment: This section eliminates the unfortunate consequence of annulment as at common law and is of special significance since the proposed Divorce Code, Section 303, permits the annulment of voidable marriages on grounds which hitherto have been statutory grounds for divorce in Pennsylvania. It also is consistent with Section 220 of this code which saves the legitimacy of children of an affinity marriage and Section 221 dealing with cohabitation after removal of impediment perfecting an irregular marriage and saving the legitimacy of issue. Sections 303 and 304 also are in accord.

The Act of December 17, 1959, P. L. 1916, No. 695, (48 P. S. §§ 169.1 and 169.2) adopted this principle.

Section 802. *Legitimation of Children.*—In any and every case where the father and mother of an illegitimate child or children shall enter into the bonds of lawful wedlock, such child or children shall thereby become legitimated, and enjoy all the rights and privileges as if born during the wedlock of the natural parents. In each and every case where a natural parent of an illegitimate child, in writing or publicly, acknowledges it as his own with the intention of legitimating the child, such child shall be deemed the legitimate child of such natural parent. Where a natural parent is married to someone other than the other natural parent, acknowledgment may also be effected by receiving such child into the family and otherwise treating it as if it were legitimate, with the consent of the other spouse. In each and every such case of legitimation, however effected, the legitimation shall take effect on the date of the intermarriage of the natural parents, the date of acknowledgment, or the date of reception into the family, and not from the date of birth of the child. The provisions of this section shall not be construed to affect in any way the lawful adoption of illegitimate children nor to require consent to adoption not otherwise required by existing law.

Comment: The first sentence is the Act of May 14, 1857, P. L. 507, No. 567, Section 1, (48 P. S. § 167) except for the deletion of *"and cohabit"* and *"they had been"* and *"their"* and insertion of *"the natural."* The purpose of eliminating *"and cohabit"* is to permit legitimation to occur by the simple act of intermarriage, regardless of subsequent cohabitation, and thus to facilitate legitimation. In addition, legitimation (or adoption) by recognition or acknowledgment is added to afford another method. In 1938, at least 24 states provided for legitimation by acknowledgment, and 19 states provided that such acknowledgment may be in writing. All states, including Pennsylvania, provide that intermarriage of natural parents effects a legitimation. See IV VERNIER, AMERICAN FAMILY LAWS §§ 243–244. Regardless of which method is used, legitimation is effective as of the time of the legitimating act and not retroactively to date of birth. The reason for thus timing legitimation is that it is feared that retroactive operation would create grave problems in the fields of intestate succession and marketability of land taken by a legitimate child or children of a person who might also have illegitimate children. In California, Idaho, Nevada, North Dakota, Oklahoma, South Dakota, and Utah, a legitimating act, such as acknowledgment, works retroactively, and the ancestor of such provisions is said to be Section 230 of the California Civil Code of 1872. See Tentative Draft No. 4, American Law Institute's RESTATEMENT OF CONFLICTS OF LAWS (2d) p. 136. Only one state, Arizona, has gone so far as to abolish the status of illegitimacy. ARIZ. ANN. CODE, 1939, § 27–401 provides: "Every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock, except the right to dwelling or residence with the family of its father, if such father be married. It shall inherit from its natural parents and from their kindred heir, lineal and collateral, in the same manner as children born in lawful wedlock. This section shall apply to cases where the natural father of any such child is married to one other than the mother of said child, as well as where he is single." Despite the warm emotional appeal of total eradication of the effects of illegitimacy, or giving it retroactive operation, it is felt that it is more practicable and expedient not to have it relate back to birth. The last sentence is inserted as a matter of caution so as to avoid any possible conflict with the adoption laws.

SECTION 803. *Legitimacy of Children Conceived by Artificial Insemination.*—A child shall be deemed to be the legitimate child of

both parties to a marriage despite the fact that it was conceived due to artificial insemination, if the husband consented to such procedure.

Comment: This is necessary to preserve the legitimacy of children who are produced by artificial insemination, which has become in recent years much more common and which poses real problems for the law and society. The above section does not make any commitment as to the moral or legal issue implicit in such procedure but leaves that to general law. All that is done is to safeguard the legitimacy of children. However, where the the father does not consent to artificial insemination of the wife by a stranger-donor (A. I. D.), the proposed section leaves the situation where it now is in the absence of statute, which means that if the father can overcome the usual presumptions he may be found not to be the father of the child. It may be argued that it would be better expressly to make the child illegitimate as to the husband and hence obviate the effect of presumptions. However, because of the great concern over eliminating the status of illegitimacy as far as possible, legitimacy is here provided where the husband consents. This section is not intended to affect the presumption of legitimacy of any child born in wedlock.

SECTION 804. *Registration of Birth as Conclusive Presumption of Legitimacy.*—The status of legitimacy shall be conclusively established where both parties to a marriage sign a birth certificate for the child or otherwise formally acknowledge paternity in a public record maintained for such purpose.

Comment: This section provides a specific method by which natural parents may insure legitimacy of the child and foreclose subsequent doubt as to status.

SECTION 805. *Act Extended to Cases Prior to Its Date.*—Any legitimating act performed after the effective date of this act shall be taken to apply to all cases of children born prior to the effective date of this act as well as thereafter; Provided, That no estate, already vested, shall be divested by this act.

Comment: This is based on the Act of April 21, 1858, P. L. 413, Section 1, (48 P. S. § 168) and is made to conform with Section 801 and to eliminate so far as possible any constitutional objection to Section 801.

ARTICLE IX

ACTIONS FOR ALIENATION OF AFFECTIONS AND BREACH OF PROMISE ABOLISHED

SECTION 901. *Actions for Alienation of Affections Abolished.*—All civil causes of action for alienation of affections of husband or wife are hereby abolished; Provided, however, That this section shall not apply to causes of action which have heretofore accrued.

Comment: This is based on the Act of June 22, 1935, P. L. 450, Section 1, as amended, (48 P. S. § 170), but the exception of "a parent, brother or sister or a person in loco parentis to the plaintiff's spouse" has been eliminated because persons coming within the exception are those most apt to be subjected to such suits. Of course, such persons are protected to a large extent by privilege and actual malice may be essential to plaintiff's cause of action, but nonetheless in order to guarantee the elimination of such suits the exception is deleted.

SECTION 902. *Actions for Breach of Promise to Marry Abolished.*—All causes of action for breach of contract to marry are hereby abolished; *Provided, however, That where a plaintiff has suffered actual damage due to fraud or deceit or a defendant has been unjustly enriched, the plaintiff may maintain an action for fraud or deceit or unjust enrichment and recover therein only the actual damage proved or for the benefit wrongfully obtained or restitution of property wrongfully withheld, where such action otherwise is maintainable under existing law.*

Comment: This is based on the Act of June 22, 1935, P. L. 450, Section 2, (48 P. S. § 171) and is substantially the same except for the italicized portion. The further exception is added because of the split in authorities interpreting such provisions. In New York and Massachusetts comparable provisions have been held to bar meritorious suits for fraud or unjust enrichment because it is held that such actions are predicated upon the breach of contract. In New Jersey, New Hampshire, California, and in some trial court opinions in Pennsylvania, actions may be maintained "despite such provision" for fraud, deceit or unjust enrichment. In Pennsylvania, interpretation of the existing provisions of the Act of 1935 remains in doubt and this section, as drafted, will resolve the problem. See 18 U. Pitt. L. Rev. 669 (1957) and 12 U. Pitt. L. Rev. 126 (1950). *Friske*

v. Cebula, 59 D. & C. 46 (1946) and *A.B.v.C.D.,* 36 F. Supp. 85 (E. D. Pa. 1940), interpreting the Act of 1935, take the position that any type of action having any relation to breach of promise to marry is barred by the Pennsylvania statute. On the other hand, *Bullen v. Neuweiler,* 73 D. & C. 207 (1949), *Weber v. Bittner,* 75 D. & C. 54 (1950), and *Bobeck v. Rushin,* 1 D. & C. 2d 710 (1954), take the position that compensatory damages for fraud or a quasi-contract action for unjust enrichment may be maintained.

It is intended that actions for deceit or quasi-contracts be permitted to prevent a defrauder from reaping the benefits of fraudulent conduct. Breach of promise suits were abolished because of jury abuse in the assessment of damages. Where recovery is limited to meritorious cases and to actual damage, such abuse is obviated. See BROCKELBANK, THE NATURE OF THE PROMISE TO MARRY, 41 Ill. L. Rev. 1, 199 (1946), and 18 U. Pitt. L. Rev. 669 (1957).

SECTION 903. *Purposes of Act.*—No act hereafter done within this Commonwealth shall operate to give rise, either within or without this Commonwealth, to any of the causes of action abolished by Sections 901 and 902 of this act. No contract to marry, which shall hereafter be made within this Commonwealth, shall operate to give rise, either within or without this Commonwealth, to any cause of action for breach thereof. It is the intention of this section to fix the effect, status, and character of such acts and contracts, and to render them ineffective to support or give rise to any such causes of action, within or without this Commonwealth.

Comment: This is the Act of June 22, 1935, P. L. 450, Section 3, (48 P. S. § 172), except for code reference.

SECTION 904. *Unlawful to File or Threaten to File Actions Barred by This Act.*—It shall hereafter be unlawful for any person, either as litigant or attorney, to file, cause to be filed, threaten to file, or threaten to cause to be filed in any court in this Commonwealth, any pleading or paper setting forth or seeking to recover upon any cause of action abolished or barred by Sections 901 and 902 of this act, whether such cause of action arose within or without this Commonwealth.

Comment: This is the Act of June 22, 1935, P. L. 450, Section 4, (48 P. S. § 173), except for code reference.

SECTION 905. *Contracts Executed, in the Payment, Etc., of Such Claims, Barred.*—All contracts and instruments of every kind which may hereafter be executed within this Commonwealth in payment, satisfaction, settlement, or compromise of any claim or cause of action abolished or barred by Sections 901 and 902 of this act, whether such claim or cause of action arose within or without this Commonwealth, are hereby declared to be contrary to the public policy of this Commonwealth and absolutely void. It shall be unlawful to cause, induce or procure any person to execute such a contract or instrument, or cause, induce or procure any person to give, pay, transfer, or deliver any money or thing of value in payment, satisfaction, settlement, or compromise of any such claim or cause of action, or to receive, take, or accept any such money or thing of value in such payment, satisfaction, settlement, or compromise. It shall also be unlawful to commence or cause to be commenced, either as litigant or attorney in any court of this Commonwealth, any proceeding or action seeking to enforce or recover upon any such contract or instrument, knowing it to be such, whether the same shall have been executed within or without this Commonwealth; Provided, however, That this section shall not apply to the payment, satisfaction, settlement, or compromise of any causes of action which are not abolished or barred by Sections 901 and 902 of this act, or any contracts or instruments heretofore executed, or to the bona fide holder in due course of any negotiable instrument which may be executed hereafter.

Comment: This is the Act of June 22, 1935, P. L. 450, Section 6, (48 P. S. § 175), except for code reference.

SECTION 906. *Penalty.*—Any person who shall violate any of the provisions of Article IX of this act shall be guilty of a misdemeanor, and, upon conviction therefor shall be punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, or imprisonment for a term of not less than one year nor more than five years, in the discretion of the court.

Comment: This is the Act of June 22, 1935, P. L. 450, Section 7, (48 P. S. § 176), except for code reference.

ARTICLE X

CONFLICT OF LAWS RULES; PRESUMPTIONS; REPEALS AND EFFECTIVE DATE

SECTION 1001. *Validity and Invalidity of Foreign Marriages; Conflict of Laws Rules.—*

(1) All marriages which are valid by the law of the state or nation where at least one of the parties was domiciled at the time of the marriage and where both intended to make their home thereafter are valid in this Commonwealth.

(2) All marriages which are valid by the law of the state or nation where the marriage took place are valid in this Commonwealth unless invalid under the law of the state or nation where at least one of the parties was domiciled at the time of marriage and where both intended to make their home thereafter.

(3) The courts of this Commonwealth may refuse to give a particular effect to a marriage contracted in another state or nation if to do so would be contrary to a strong public policy of this Commonwealth.

Comment: This section is based on Sections 121, 122, 132, 134, of Tentative Draft No. 4 of the American Law Institute's RESTATEMENT, CONFLICT OF LAWS (2d), and contains the substance of those provisions. In conformity with the Restatement's proposed provisions, only the law of the state of paramount interest will be applied to invalidate a marriage. The "state of paramount interest" is defined as one which is the domicile of at least one of the parties at the time of the marriage and where both intended to make their home thereafter. If there is no state of paramount interest (as above defined) the validity of the marriage is determined solely by the law of the state where it took place. It should be noted that ordinarily the law of the state of paramount interest will recognize as valid any foreign marriage unless it violates a strong public policy such as that reflected in statutes pertaining to polygamous, incestuous or miscegeneous marriages. The Reporter's Note to Section 132 states: "So far as is known, a marriage which complies with the requirements of the state where it took place has never been held invalid by an American court except by application of the law of a state which was the domicile of at least one of the parties at the time of the marriage and also where they intended to

make their home thereafter. A marriage which is invalid under the law of the latter state is invalid everywhere . . . to date the state of one party's domicile has refrained from applying its law to invalidate a marriage which meets the requirements of the state where it took place as well as that of the state where the other party was domiciled and where both parties intended to make their home. . . . "

Assuming that the above statement is an accurate reflection of American law and that the RESTATEMENT, *supra* will contain the substance of these provisions when finally adopted, there are obvious advantages to be obtained by a statutory enactment which embodies the Restatement's principles. It is recognized that no possible rule eliminates all hardship cases and that any certain rule may entail occasional inequities. It could be argued that for the sake of certainty and ease of application, any marriage which is valid at the place of ceremony should ipso facto be valid everywhere else. On the other hand, since this section deals with a matter of status, and traditionally such matters are governed by the law of the appropriate domicile, it is logical to assess a "paramount interest" and attribute the deepest concern to the state of domicile. As between several possible domiciles, this section singles out the one which combines both the home of one of the parties at the time of the marriage with the place where they intend to make their home thereafter, *i.e.,* the matrimonial domicile. Both factors must concur, otherwise validity is determined by the law of the place of ceremony. In effect, therefore, there is a compromise between the one view that domicile should always control, and the other extreme view that the situs of the ceremony is the place to be referred to.

Subsection (3) is based on Section 134 of the RESTATEMENT, *supra,* and is designed to permit a court to refuse to give a particular effect to a marriage, for example, barring the incident of cohabitation, without denying the validity of such marriage. Thus, it may be against public policy for foreign polygamous marriages to be enjoyed within this Commonwealth by a Moslem husband bringing his several wives along with him when he comes to Pennsylvania, yet it may be no affront to our public policy to permit children of such a marriage to inherit property which may be left by the decedent spouse in Pennsylvania. Under this provision, cohabitation within Pennsylvania by parties to a polygamous marriage might be precluded without otherwise determining validity of the marriage.

SECTIONS 1002. *Remarriage After Divorce Decree.*—If the decree of any court granting a divorce forbids either of the parties to marry again for a certain time or within the lifetime of a former spouse and such party goes to another state and within the prohibited time marries there in accordance with the requirements of that state, such second marriage shall be regarded as valid in all courts and places in the Commonwealth of Pennsylvania, provided that the decree of divorce was a final decree and the parties to the second marriage at the time of ceremony did not intend to return to the state which issued such decree or the statute or decree prohibiting remarriage is construed as having no extraterritorial effect.

Comment: This is based on Sections 130–131 of Tentative Draft No. 4 of the RESTATEMENT, CONFLICT OF LAWS (2d), and is intended to cope with the situation where a divorce decree is not complied with because a remarriage occurs within a prohibited period. If the decree was interlocutory or otherwise not final, this provision recognizes a lack of capacity to remarry. However, if the divorce decree is final but there is a prohibition against remarriage, such prohibition is effective regardless of where the second marriage occurs if the person subject to the decree still is a domiciliary; but if he had left such state permanently, it no longer has sufficient interest to control his status and capacity to marry. Thus, if a Pennsylvania spouse divorced for adultery remarries in Maryland, at that time intending to return to Pennsylvania, the marriage under existing law is void. See *Stull's Estate,* 183 Pa. 625, (1898); *Kline v. Kline,* 41 Lanc. 563, (1929). However, if such person left Pennsylvania with the intention of never returning, his remarriage, if valid under Maryland law, should be upheld because Pennsylvania no longer has any interest in such an ex-citizen.

SECTION 1003. *Presumptions as to Validity of First and Subsequent Marriages.*—It being shown that a valid marriage was contracted, it shall be presumed in all courts and places in the Commonwealth of Pennsylvania that such marriage continued in effect unless the person questioning such marriage produces clear and convincing proof that such marriage was annulled or terminated by divorce. Cohabitation and reputation as man and wife shall create a presumption that a lawful marriage was contracted. Where, however, there are successive marriages, it shall be presumed that the parties to such subsequent marriage had capacity to marry and that the first

marriage was terminated by death or divorce unless clear and convincing proof is produced to the contrary. If a person, other than the parties claiming to be a spouse, received no service or notification of any divorce or annulment proceedings and if a search of the records at the known domiciles of the spouse whose status is in question fails to reveal any such annulment or divorce, then, it shall be presumed that in fact no such annulment or divorce occurred.

Comment: One of the troublesome problems which has bothered many courts is the matter of presumptions where there is no record of the marriage or where there are successive marriages. See cases collected in 34 A.L.R. 493, and *Spears v. Spears,* 178 Ark. 720, 12 S.W. 2d 875 (1928). Some states, such as Massachusetts and Wisconsin, refuse to indulge in any presumptions, and the same is true in Iowa in the case of suit between two alleged widows. But most states indulge in some kind of presumptions although there is disagreement as to what is sufficient to overcome a presumption of valid marriage. Some cases have placed an almost impossible burden of proof on the party seeking to overcome the presumption, while other courts have been more reasonable in that regard. This section takes an intermediate position which will more accurately reflect the probabilities of the situation. Pennsylvania has held that a marriage once proven to have existed will be presumed to continue to exist until the contrary is shown or until a different presumption is raised. *Wile's Estate,* 6 Pa. Superior Ct. 435 (1898). However, the presumption of the validity of a subsequent marriage will neutralize the presumption of the existence of a former marriage arising out of cohabitation and repute. *Hilton's Estate,* 263 Pa. 16, (1919); *Wallace's Estate,* 40 Pa. Superior Ct. 595 (1909). In order to sustain the validity of an alleged second marriage, the Pennsylvania courts have presumed the death of the first spouse (see *McCausland's Estate,* 213 Pa. 189, (1906), and *Thewlis's Estate,* 217 Pa. 307, (1907)) and in other cases have presumed that the first marriage was terminated by divorce (see *Thewlis's Estate,* 217 Pa. 307, (1907); *Bergdoll's Estate,* 7 Pa. Dist. R. 137, 20 Pa. C. C. 577 (1898); *West Buffalo Twp. v. Benner Twp.,* 16 Pa. Dist. R. 761, 33 Pa. C. C. 519 (1907); *Strehle's Estate,* 25 Pa. Dist. R. 572 (1916); *Wile's Estate,* 6 Pa. Superior Ct. 435 (1898)). However, in *Dentzel's Estate,* 28 Pa. Dist. R. 343 (1919), the trial court said it was doubtful whether there can be raised a presumption of divorce in cases where legitimacy is not involved. On the general subject of

presumptions that flow from marriage, see 30 Harv. L. Rev. 500, (1917) and 82 U. Pa. L. Rev. 508 (1934).

In effect, this section states Pennsylvania case law, but in the last sentence precludes the imposition of an impossible burden of proof which would prevent rebuttal.

SECTION 1004. *Repeals.*—All prior enactments and parts of enactments which are inconsistent with any of the provisions of this act are hereby repealed, except insofar as they may be revised and reenacted in this act. The following acts and parts of acts are hereby repealed as specificially indicated:

Act passed the 22nd day of February 1718, (1 Sm. L. 99) entitled, "An act concerning feme-sole traders."

Sections V and IX of the act approved the thirteenth day of March, one thousand eight hundred and fifteen (Pamphlet Laws 150) entitled, "An act concerning divorces," insofar as supplied by Sections 207, 219, 303 and any other section of this act.

Section 5 of the act approved the seventeenth day of March, one thousand eight hundred and thirty-eight (Pamphlet Laws 80), relative to the entering of the record of marriages upon church registers; absolutely.

Sections 6 and 8 of the act approved the eleventh day of April, one thousand eight hundred and forty-eight (Pamphlet Laws 536) entitled, "A supplement to an act . . . to secure the right of married women. . . , " insofar as supplied by Sections 407 and 503 of this act.

Section 20 of the act approved the twenty-second day of April, one thousand eight hundred and fifty (Pamphlet Laws 549) entitled, "An act . . . relative to the rights of married women. . . , " insofar as supplied by Section 408 of this act.

Sections 11 and 39 of the act which by operation of law became effective the 25th day of April 1850, (Pamphlet Laws 569), relating to property of married women.

Section 22 of the act approved the fifteenth day of April, A.D. one thousand eight hundred and fifty-one (Pamphlet Laws 669) entitled, "An act . . . to security for moneys loaned by wives to husbands. . . . "

Section 7 of the act approved the twenyt-eighth day of October, A.D. one thousand eight hundred and fifty-one (1852) Pamphlet Laws 724) entitled, "An act . . . relative . . . to insane married

women. . . ."

Sections 2 and 4 of the act approved the fourth day of May, Anno Domini one thousand eight hundred and fifty-five (Pamphlet Laws 430) entitled, "An act relating to certain duties and rights of husband and wife and parents and children," insofar as supplied by Section 405 of this act.

Sections 1 and 2 of the act approved the eleventh day of April, Anno Domini one thousand eight hundred and fifty-six (Pamphlet Laws 315) entitled, "An act relating to the rights of property of husband and wife," insofar as supplied by this act and Section 3 insofar as it is supplied specifically by Section 502 of this act.

The act approved the fourteenth day of May, Anno Domini one thousand eight hundred and fifty-seven (Pamphlet Laws 507, No. 567) entitled, "An act to legitimate children born out of lawful wedlock."

The act approved the twenty-first day of April, Anno Domini one thousand eight hundred and fifty-eight (Pamphlet Laws 413) entitled, "An act relating to illegitimate children," absolutely.

The act approved the first day of April, Anno Domini one thousand eight hundred and sixty-three (Pamphlet Laws 212) entitled, "A supplement to the act to secure the rights of married women, passed the eleventh day of April, Anno Domini one thousand eight hundred and forty-eight," absolutely.

The act approved the sixth day of April, Anno Domini one thousand eight hundred and sixty-eight (Pamphlet Laws 67, No. 31) entitled, "An act to validate certain marriages and legitimatize the issue thereof," absolutely.

The act approved the twenty-ninth day of February, Anno Domini one thousand eight hundred and seventy-two (Pamphlet Laws 21, No. 7) entitled, "An act enabling married women to purchase sewing machines," absolutely.

The act approved the third day of April, Anno Domini one thousand eight hundred and seventy-two (Pamphlet Laws 35, No. 24) entitled, "An act securing to married women their separate earnings," to the extent it is supplied by Section 403 of this act.

The act approved the 1st day of April, A.D. 1874 (Pamphlet Laws 49, No. 9) entitled, "An act to authorize married women owning loans of this commonwealth, or of the city of Philadelphia,

or capital stock of any corporation of this commonwealth, to sell and transfer the same," absolutely.

The act approved the 12th day of June, A.D. 1878 (Pamphlet Laws 206, No. 237) entitled, "An act to provide for the bringing of actions against a married woman, in certain cases, when the husband of such married woman shall have deserted or separated himself from her and is absent from and living out of the county in which she resides," insofar as supplied by Section 504 of this act.

The act approved the 11th day of June, A.D. 1879 (Pamphlet Laws 126, No. 129) entitled, "An act relative to actions brought by husband and wife, or by the wife alone, for her separate property, in cases of desertion," absolutely.

Section 3 of the act approved the 8th day of June, A.D. 1893 (Pamphlet Laws 344, No. 284) entitled, "An act relating to husband and wife, enlarging her capacity to acquire and dispose of property, to sue and be sued, and to make a last will, and enabling them to sue and to testify against each other in certain cases," insofar as it is supplied by Section 501 of this act.

The act approved the 26th day of June, A.D. 1895 (Pamphlet Laws 316) entitled, "An act relating to husband and wife who are the parents of minor children, enlarging and extending the power, control and authority of the mother over their minor children, under certain circumstances," insofar as it is supplied by Sections 701 and 702 of this act.

The act which became effective by operation of law June 24, 1901 (Pamphlet Laws 597) entitled, "An act making it unlawful for first cousins to be joined in marriage, and declaring all marriages contracted after the first day of January, Anno Domini one thousand nine hundred and two, in violation of this act, void."

The act approved the 23d day of May, A.D. 1907 (Pamphlet Laws 227) entitled, "An act relating to husband and wife, and to enlarge the rights and remedies of married women in case of desertion or non-support by husband," insofar as it is supplied by Section 601 of this act.

The act approved the 1st day of May, 1913 (Pamphlet Laws 146, No. 97) entitled, "An act enabling a married woman, who has been deserted, abandoned, or driven from her home by her husband, to sue her husband, upon any cause of action whatsoever; and

making such wife a competent witness against the husband in such case," absolutely.

The act approved the 11th day of June, A.D. 1913 (Pamphlet Laws 468) entitled, "An act to provide for the execution of orders of the court of quarter sessions, or other court of competent jurisdiction, for support and maintenance of a wife or children, or both, and for the execution of judgment entered upon contracts for such support and maintenance, by subjecting estates owned by the husband and wife by entireties, and the rents, issues and profits thereof, to such executions; defining the title of the purchaser at the sheriff's sale on such executions; and providing for the application of the proceeds of such sales," insofar as it is supplied by Section 603 of this act.

Section 3 of the act approved the 12th day of June, A.D. 1913 (Pamphlet Laws 502) entitled, "An act to increase the powers of courts in summary proceedings for desertion or non-support of wives, children, or aged parents, by directing that imprisonment in such cases be at hard labor in such institution as the court shall name, with the wages payable to the wives, children, or parents; providing for the disbursement of moneys collected on forfeitures of bonds, bail-bonds, or recognizances; and by empowering such courts to appoint desertion probation officers for the performance of such duties as the court shall direct; and providing for the payment of the expenses incident to the carrying out of this act," insofar as it is supplied by Section 603 of this act.

The act approved the 28th day of May, A.D. 1915 (Pamphlet Laws 639, No. 279) entitled, "An act to permit a married woman whose husband has lived separate and apart from her for one year or more, and who during that time has not been supported by her husband, to become a feme sole trader," insofar as it is supplied by Section 405 of this act.

The act approved the 10th day of May, 1921 (Pamphlet Laws 434) entitled, "An act to empower courts of competent jurisdiction to issue writs of execution against property of defendent, and attachment execution or in the nature of attachment execution against trusts, including those commonly known as spendthrift trusts, no matter when such trusts were created, in cases where an order, award, or decree has been made against a husband for the support

of his wife or children or both; making such attachment execution against trusts a continuing lien and levy for fifty per centum of such money or property until the order, judgment, or decree is paid in full with costs; and abolishing the benefit of the exemption law in such cases," insofar as it is supplied by Section 604 of this act.

Sections 2, 3, 4 and 5 of the act approved the 24th day of May, A.D. 1923 (Pamphlet Laws 446) entitled, "An act authorizing the sale of real estate held by entireties by husband and wife when an order of support has been secured against the husband who has neglected to comply with the same, or whose whereabouts is unknown; or who has absented himself from this Commonwealth; prescribing the procedure to be followed; permitting husband and wife to testify; providing for the disposition of the proceeds of such sale; and granting a divorced woman the same rights under this act as a wife," insofar as they are supplied by Sections 606, 607 and 608 of this act.

The act approved the 11th day of April, A.D. 1927 (Pamphlet Laws 181, No. 151) entitled, "An act authorizing a married woman, granted a divorce from bed and board, to convey and encumber her real estate, without the joinder of her husband."

The act approved the 22d day of June, A.D. 1935 (Pamphlet Laws 450) entitled, "An act to promote public morals; abolishing civil causes of action for alienation of affections, except in certain cases, and breach of promise to marry; making it unlawful to file, cause to be filed, threaten to file, or threaten to cause to be filed any such action; fixing a time for the commencement of such causes of action heretofore accrued; declaring void all future contracts in settlement of such actions; making it unlawful to induce the execution of such a contract or payment thereunder or institution of suit thereon; and providing penalties," insofar as it is supplied by Sections 901 to 906 inclusive, of this act.

The act approved the 22nd day of August, A.D. 1953 (Pamphlet Laws 1344) entitled, "An act relating to marriage; and amending, revising, consolidating and changing the law relating thereto."

The act approved the 17th day of July, A.D. 1957 (Pamphlet Laws 969, No. 417) entitled, "An act enlarging the rights and powers of married women as to property and contracts and repealing

certain provisions," absolutely.

SECTION 1005. *Effective Date.*—This act shall take effect on the first day of January, ——.

The Proposed Divorce Code

An Act*

Consolidating, revising and amending the divorce laws of the Commonwealth of Pennsylvania.

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The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

ARTICLE I

PRELIMINARY PROVISIONS

SECTION 101. *Short Title.*—This act shall be known and may be cited as the "Divorce Code."

Comment: The short title of the 1929 Act, Section 65, (23 P. S. § 65) is "The Divorce Law."

SECTION 102. *Legislative Intent; Administration; Judicial Construction.*—Whereas the family is the basic unit in society and the protection and preservation of the family is of paramount public concern, it is hereby declared to be the policy of the Commonwealth of Pennsylvania:

1. To encourage and effect a reconciliation and settlement of differences between spouses, especially where minor children are involved;
2. To give primary consideration to the welfare of the family rather than to the vindication of private rights or to the punishment of matrimonial wrongs;
3. To seek the causes rather than the symptoms of family disintegration and to cooperate with and utilize the services of these resources which are available to deal with family problems;
4. To effectuate economic justice between parties who are divorced or separated and to grant or withhold alimony or allowances according to the actual need and ability to pay of the parties and to insure a fair and just determination and settlement of their property rights;
5. To eliminate the fragmentation of remedies dealing with

family disorganization and to consolidate in one action the cause for divorce, the determination of custody and support of children and the settlement of property rights between husband and wife and the right, if any, to alimony or allowance.

The objectives above set forth shall be considered in construing any provisions of this act and shall be regarded as expressing the legislative intent.

Comment: The provisions of this section are new and are intended to apply to the entire code, including provisions of Section 104 relating to "Pending Proceedings."

SECTION 103. *Constitutionality; Severability.*—The provisions of this act are severable and if any of the provisions hereof are held to be unconstitutional, such decision shall not be construed to impair any other provision of this act. It is hereby declared as the legislative intent that this act would have been adopted had such unconstitutional provision not been included herein.

Comment: This is based on Section 68 of the 1929 Act (23 P. S. § 68).

SECTION 104. *Construction; Pending Proceedings.*—The provisions of this act, so far as they are the same as those of existing laws, are intended as a continuation of such laws and not as new enactments. The provisions of this act shall apply to all cases, whether the cause for divorce or annulment arose prior or subsequent to the passage of this act. The provisions of this act shall not affect any suit or action pending, but the same may be proceeded with and concluded either under the laws in existence when such suit or action was instituted, notwithstanding the repeal of such laws by this act, or, upon application granted, under the provisions of this act.

Comment: This is based on Section 67 of the 1929 Act (23 P. S. § 67).

SECTION 105. *Definitions.*—

"Court" as used in this act, unless otherwise specified, means the court of common pleas of any county, except in those instances where jurisdiction over the particular matter has been committed

to the County Court of Allegheny County or the Municipal Court of Philadelphia.

"Act" means the Divorce Code and "law" includes both common and statute law.

"Domestic relations division" means the division of the court of common pleas or the County Court of Allegheny County or the Municipal Court of Philadelphia which is created by this act and by the Marriage Code, and "probation officers" refers to employes of such division.

"Matrimonial cause" means any action directly concerned with marital status, including divorce from the bonds of matrimony, from bed and board, or an annulment of marriage or a declaration of the validity or invalidity thereof.

"Guardian ad litem" means an officer appointed by the court to represent the interests of children to the marriage.

"Alimony" means an order for support and maintenance which may be granted by the court to a wife or husband in conjunction with a divorce from bed and board.

"Allowance" means an order for support and maintenance which may be granted by the court to a wife or husband in conjunction with a divorce from the bonds of matrimony or an annulment of the marriage. "Allowance" also means an order which may be entered against a spouse who obtained a foreign ex parte divorce decree, as provided in Section 506 of this act.

"Alimony pendente lite" means an order for temporary alimony during the pendency of a divorce or annulment proceeding, as provided in Section 502 of this act.

"Domicile" means the place with which a person has a settled connection for certain legal purposes, either because his home is there, or because that place is assigned to him by law.

"Void marriage" means those purported marriages which are declared void by Section 303 of the Marriage Code or by applicable law and whose validity may be questioned in collateral proceedings or in an annulment action.

"Voidable marriage" means those purported marriages which are declared voidable by Section 304 of the Marriage Code or by applicable law and which may be questioned only in an annulment action or in an action to determine validity during the lifetime of

the parties thereto and which are not otherwise subject to question or attack.

"Grounds for divorce" means the grounds enumerated in Section 301 of this act.

"Obligor" means a party who is ordered by the court to pay an award, whether such award constitutes child support, support, alimony pendente lite, alimony, allowance, maintenance or a property settlement approved by the court.

"Obligee" means a party in whose favor an award is ordered by the court, whether such award constitutes child support, support, alimony pendente lite, alimony, allowance, maintenance or a property settlement approved by the court.

ARTICLE II

DOMESTIC RELATIONS DIVISION; HEARING; INVESTIGATION AND REPORT

SECTION 201. *Domestic Relations Division and Probation Officers.*—Every court having jurisdiction over matrimonial causes, including divorce from the bonds of matrimony, from bed and board, annulment, custody, support, alimony, allowance, property settlement, and any related matters, shall establish and maintain a domestic relations division as provided by the Pennsylvania Civil Procedural Support Law (Act of July 13, 1953, P. L. 431, Section 4, as amended) and shall appoint such qualified probation officers and other assistants as are necessary for the efficient and useful operation of such domestic relations division. The services of the domestic relations division may be made available for purposes of consultation or referral, even though no notice of intention to file a complaint in divorce or a complaint in divorce has been filed. Probation officers may perform the function of marriage counselling in order to attempt to effect reconciliations, and statements of a confidential nature made to them by a party during the performance of such function shall be privileged and inadmissible as evidence unless the party concerned waives such privilege at trial or at the time the statement is made.

Comment: This section is inserted as a cross reference to Section 4 of the *Civil Procedural Support Law,* which creates such domestic

relations division and provides for probation officers. Investigation and report is made mandatory where a case involves custody of children, the support of dependents, and divorce where there are children under fourteen. In other instances, the court may utilize such services. See also Section 602 of the proposed Marriage Code.

Provisions of the first sentence were added to the 1929 Act by the amendment of December 30, 1959, P. L. 2055.

The last sentence of Section 201 is included for the purpose of encouraging parties to submit to marriage counselling in those counties where skilled probation officers are able to perform such service. When the probation officer assumes the role of counsellor, the matter of privilege should be the same as in the case of a professional marriage counsellor, as provided by Section 804 of this code. However, the probation officer also has a duty to investigate and report to the court. In discharging this latter and primary duty, he will have complete freedom to investigate and report, except where he has also performed counselling services, in which event confidential statements made to him will be privileged unless the party concerned waives the privilege. As a matter of practice, the probation officer might ask the party who has made a confidential statement to him whether there are any matters which the latter has stated that are to be held in confidence. If the party desires to, a waiver of the privilege might occur at that time.

SECTION 202. *Time of Hearing; Domestic Relations Division Investigation and Report; Cooperation with Probation Officers; Guardian ad Litem.*—No hearing upon grounds for divorce shall be held in any action for divorce from the bonds of matrimony or from bed and board until at least thirty days after the filing of a complaint. During such period of thirty days or longer, or after filing of a notice of intention to file a divorce complaint, the court may require a conference of the parties, and if there are any children of the marriage who are under fourteen years of age, an investigation and report shall be made by probation officers attached to the domestic relations division of the court and such report shall include all relevant data regarding the marriage in question. If there are no children of the marriage who are under fourteen years of age, the court, at its discretion, may order such an investigation and report. It shall be the duty of the parties to the marriage to provide such information as is requested by probation officers and to meet with such probation officers or with a person or persons of

their own choosing, in order to determine whether or not a reconciliation is practicable. Where it is deemed advisable by the court, the court may appoint a guardian ad litem to represent the interest of any minor children of the marriage at any stage of the proceeding after the filing of a notice of intention to file a divorce complaint or a divorce complaint, and it shall be the duty of such guardian ad litem to protect the interests of such minor children and to present any facts pertaining to the marriage which may be of assistance to the court in its determination and disposition of the matter.

Comment: This section is new and is intended to utilize a time interval, which is now provided for by local rules of court in some counties, for the purpose of saving marriages where possible and to give greater protection to the interests of children. During such interval an opportunity may be afforded the parties to use the services of either personnel attached to the court or that provided by private or religious agencies so that an affirmative effort may be made at reconciliation. This thirty-day interval, when taken in conjunction with the preliminary thirty-day notice of intention to file a complaint required by Section 401, will provide a total "cooling off" period of sixty days or more.

It is contemplated that where there are children under fourteen years of age a complete investigation and report must be made so that the court will be aware of the relevant facts pertaining to the particular family, and that in addition a guardian ad litem may be appointed to safeguard the interests of the children. The parties would not be forced to submit to marriage counselling or treatment but there would be a duty to cooperate in furnishing information and meeting with either an officer attached to the court, or, where preferred, with a representative of some private or religious agency. It is assumed that by persuasion such officials may be able to induce submission to counselling where such has a possibility of success, but if there is no prospect of reconciliation no further duty will be imposed upon the parties. In other words, where there is no motivation to save the marriage, the investigating or exploratory role will be limited to fact finding and perhaps the giving of information about the consequences of divorce. Where there are no children involved, the court may at its discretion order an investigation and report, and that may depend upon the case load of personnel and whether or not there are any indications that such may be helpful.

Reference is made to the domestic relations division, provided for in Section 201. (Such division was provided for by the amendment of December 30, 1959, P. L. 2055, Section 2 (23 P. S. § 19) to the 1929 Act.) It is hoped that in time, skilled and experienced personnel will be acquired to assist the court and to perform the duties of the domestic relations division. It is also contemplated that the division will refer as many cases as possible to proper private or religious agencies who provide counselling and other social services, and that the division will serve as a repository for reports and data concerning particular families and also compile statistics so that there may be an appraisal of the effectiveness of the treatment of matrimonial matters.

The provisions of this section are a composite of several techniques which are being used in other jurisdictions in an attempt to preserve the stability of marriages. Perhaps the most important statute having such objective is that of the neighboring State of Ohio. As early as 1938, Ohio authorized its courts to appoint officers to investigate matrimonial causes. In 1951, Ohio passed a statute which provides that "On the filing of a petition for divorce or for alimony, the court of common pleas may, and in cases where there are children under fourteen years of age involved shall cause an investigation to be made as to the character, family relations, past conduct, earning ability, and financial worth of the parties to the action. The report of such investigations shall be made available to either party or his counsel of record upon written request not less than five days before trial." (See BALDWIN'S OHIO REV. CODE § 3105.08 (8003–9)). Thus, Ohio at the present time requires an investigation when children under fourteen are involved. In addition, every divorce petition is filed in duplicate and a copy is immediately delivered to the domestic relations branch in those courts of common pleas which have established such an agency. Both parties are invited to make use of free counselling services provided by those courts in Ohio which have adopted the "family court" approach to domestic relations problems. Referral for counselling is made to private and religious agencies which cooperate with the court and its domestic relations branch.

In Los Angeles County, California, advantage has been taken of a California statute which provides that upon the filing by one spouse of a request for aid in reconciliation, a divorce action shall be automatically delayed for thirty days, and that the court may call upon physicians, psychiatrists, social workers, and religious agencies to assist it in reconciliation efforts. It has been reported that in

Los Angeles County an average of over forty reconciliations per month are being effected, involving an average of over a hundred children in such families.

In Illinois, sixty days must elapse between a divorce petition and hearing, and the court is permitted to invite parties to confer informally to explore the possibility of reconciliation. In Indiana, the state constitution authorizes the establishment of courts of conciliation or the use of existing courts for such purpose, and a sixty-day period must elapse between the filing of a divorce complaint and hearing.

Wisconsin and Michigan are leaders among the states which have adapted the guardian ad litem ("King's Proctor") technique to divorce cases where children are involved. A friend of the court may be designated to safeguard the interests of any children who will be affected by a divorce.

New Jersey recently undertook an experiment in this area. An excellent and comprehensive survey of domestic relations law was made by the Special Committee on Divorce and Custody of the New Jersey State Bar Association in 1956. The report was submitted to the Supreme Court of New Jersey and in 1957 that court announced that in ten counties in New Jersey, after September 1, any couple seeking a divorce or separation, must cooperate in an attempt to effect a reconciliation if any children are involved. The plan was tested for three years and found to be unsuccessful due to its compulsory features and in 1960–61, a committee was appointed to devise a substitute plan based on voluntary counselling. The New Jersey experience indicates that it is desirable to have counselling on a voluntary rather than a compulsory basis.

In 1961, a report and a proposed act establishing a conciliation department was submitted to the Massachusetts legislature. This report is the most thorough and penetrating study of reconciliation efforts by courts which has been made and its recommendations concerning the creation of departments comparable to the domestic relations division contemplated by Section 202 merit close study. The value of such a service is demonstrated.

Minnesota during the recent past created a family court in Minneapolis and in 1961 bills were introduced in the Minnesota legislature extending the family court approach to other counties of that state. Wisconsin has a new Family Code which became effective in 1960 and one of its main objectives is to promote reconciliation. There are many other examples of various devices to promote reconciliation which are being adopted throughout the country.

All of the above devices have the common objective of trying to do something affirmative about saving marriages which can be saved and each device is concerned with the protection of children. A provision such as that which is proposed by Section 202, or which is similar to the techniques being used in other states, is urgently needed if Pennsylvania is to undertake the preservation of marriages and protection of children and to make intelligent use of available resources for dealing with family problems. This is not only a matter of the welfare of husband and wife, it is also a social problem of utmost importance. The lives and characters of children may depend upon whether society does something affirmatively to conserve the family as a basic social unit. The studies of leading experts in juvenile delinquency show that there is a higher correlation between juvenile delinquency and broken homes than between delinquency and any other one factor. Some authorities view it as a *sine qua non.*

The utilization of the insight and skills of experts and trained personnel in an attempt to save families is not idealistic nor impractical. The existing "do nothing" policy is the one which is impractical. Present practice deals with symptoms rather than cause, ignores actual problems, aggravates hostilities, impedes reconciliation, neglects the interests of children, and treats what is in essence a social or psychological problem as if only a narrow technical legal issue was at stake. An intensely human problem should not be forced into a narrow straight jacket of adversary procedure. For a survey of what is being done in many other jurisdictions, see MAXINE VIRTUE, FAMILY CASES IN COURT (1956, Duke University Press).

SECTION 203. *Annual Report of Domestic Relations Division.* —It shall be the duty of the domestic relations division to make an annual report to the court and to the Bureau of Vital Statistics of the Commonwealth which shall include the following information: The number and kinds of matrimonial causes which have been filed and their disposition, including petitions granted, decrees denied, and cases pending; the number of settlements or reconciliations which have been effected; the number of children involved in matrimonial causes and the number affected by various kinds of dispositions of such causes; the number of cases where support, child support, maintenance, or allowance, was ordered as compared with those where no such order was entered; the number

of such cases where the obligor was ordered to pay the sum ordered to the domestic relations division; compliance with court orders and the number and percentage of cases where the obligor has been in arrears or failed to pay sums ordered and the total amount therein involved; the number of cases where action has been taken to collect arrearages or to enforce orders and the kind of action taken; the total amount of support and allowance or maintenance ordered per family and the amount of support ordered per child within the following classes of amounts per month: $1-20, $21-40, $41-60, $61-80, $81-100, $101-120, $121-140, $141-160, $161-180, $181-200, $201-220, $221-240, $241-260, $261-280, over $280; all settlements approved by the court; together with the median amount of support ordered per family per month, the median amount of support per child per month, and such other statistical information as may be requested by the court or the Bureau of Vital Statistics of the Commonwealth, or which may be of value in the administration and adjudication of matrimonial causes.

Comment: One of the great difficulties in the area of domestic relations law is that there is a serious lack of statistics which disclose the actual operations of the law and its administration. Little, if anything, is known about how the law is operating and the value of certain legal processes in effectuating public policy. Mr. Fred H. Steininger, Director of the Lake County Welfare Board, Gary, Indiana, recently issued a Study of Divorce and Support Orders in Lake County for the period January 1, 1956, through June 30, 1957. Some extremely useful and shocking information is disclosed in this study. For example, of the 585 fathers who were ordered to pay support directly to the court during this period (as compared with the 200 who were ordered to pay support to the wife or other person) *89 percent were in arrears or had not paid at all. Some 47 percent had never paid anything* pursuant to the order. Presumably, noncompliance would be higher where the order was to pay the sum to the wife instead of to the court. This is perhaps the most shocking flouting of court orders that can be found in our society. If, as suspected, Pennsylvania court orders are being similarly violated, it should be known what procedures and remedies are most efficacious in coping with the problem. It is important to know something about the amount of support ordered per family and per child, the number of cases where no order is entered, the number of children involved in matrimonial actions and how the cases were

disposed of. From the Department of Public Welfare additional data may be obtained so that it may be known the extent to which the public is supporting through public assistance the wives or children of nonsupporters who for one reason or another flout or disregard support orders and thereby shift an economic burden to the taxpayers and jeopardize respect for law and order.

SECTION 204. *Registration of Facts by Prothonotary with Bureau of Vital Statistics of the Commonwealth.*—Upon the entry of any decree of divorce from the bonds of matrimony or divorce from bed and board or annulment of a marriage, it shall be the duty of the prothonotary to file with the Bureau of Vital Statistics of the Commonwealth a registration of the relevant facts in substantially the following form:

COMMONWEALTH OF PENNSYLVANIA
County of .....

COURT OF .....
TERM NO. .....

Registration of Facts Relevant to
Divorce or Annulment of Marriage

Type of action:
Plaintiff (husband or wife):
Date of filing of complaint ....
month day year

HUSBAND	WIFE
Full name	Full name .....
Usual residence	Usual residence .....
street address or R.F.D. No.	street address or R.F.D. No.
....	....
city or town state or country	city or town state or country
Race or color	Race or color .....
Date of birth ..... Age	Date of birth ..... Age .....
month day year last birthday	month day year last birthday
Place of birth	Place of birth .....
Usual occupation	Usual occupation at separation .....
Industry or business	Industry or business .....
Religious denomination	Religious denomination .....
Any prior marriages? If so, state	Any prior marriages? If so, state
....	....
how dissolved date place grounds	how dissolved date place grounds
....	....
....	....

Place of this marriage .....
Place of this separation .....
Number of children born alive to this marriage .....

Number of children of this marriage now living under 18 years of age .....
Names and dates of birth of all children to this marriage

....
....
....

Other children affected, names and dates of birth

....
....

How was defendant served? .....
Was case contested? .....
Decree granted to .....
What property settlements, custody agreements, and the like were made? .....
Cause (legal grounds) for decree .....
Date of decree ....

(Signature) .....
Prothonotary or Clerk
Date: .....

Comment: It is highly desirable to make the completion of the registration of facts form a requirement in all actions for dissolution of marriage. Responsibility for the making of the record should be specified as that of the prothonotary.

The statewide utilization of the *same form* would greatly facilitate the compilation and reporting of statistical items.

Several states have the items believed essential in divorce registration spelled out in the law.

ITEMS	(See proposed Marriage Code, Section 203, and Comment thereto.)
Usual residence.	Beside the value of street address in locating parties at later dates, the designation of street addresses enables ecological (spatial) studies of divorce phenomena in urban areas.
Race or color.	There is a considerable interest in the prevalence of divorce in the Negro group, with some claims that their standards equal or excel the whites in this regard. The records could be studied from this point of view. Race or color is also a good identifying item in record searching.
Religious denomination.	(See proposed Marriage Code, Section 203, and Comment.) There is a considerable interest in whether mixed religion marriages are more prone to divorce. If both marriage and divorce records are collected for a period of years with this item thereon, an analysis could be

attempted for Pennsylvania. One state, Iowa, has such records now.

Where children are involved in a mixed religion divorce action, this item takes on added relevance.

Marital history of couple. The dissolution of the present marriage must needs take into account the statistical-legal history of the couple. This item should be obtained in the same degree of specificity as in the case of marriage license applications. If such information can be obtained, the prevalence of remarriage in its different forms and the likelihood of failure again of the different kinds of mixed marriages can be studied.

Place and date of marriage. This is basic.

Place and date of separation. The date of separation, especially, is particularly important in studying the duration of marriages ending in divorce. This is a much more valid measure than the duration to date of decree. One study made in Connecticut actually obtained the date of the alleged cause of divorce, but to request such information as a regular thing might be considered too demanding.

Children. As a matter of good recording, more than anything else, the listing of all children of the marriage (or children affected by the decree) would seem useful to persons consulting the records. A Rule of Court, No. 207, in Dauphin County specifies this kind of registration. The standard statistical questions are much simpler, and are those given first. Itemizing the children by date of birth—in connection with other dates given—does permit a more specific analysis of the relationship of children in divorce than can now be obtained from records.

Items on outcome. These are rather standard questions, asked in some states.

ARTICLE III

GROUNDS FOR DIVORCE; ANNULMENT AND ABOLITION OF DEFENSES

SECTION 301. *Grounds for Divorce from the Bonds of Matrimony.—*

(1) Whenever it shall clearly appear that the disruption of a marriage is irreparable and that attempts at reconciliation would be impracticable or futile and not to the best interests of the family, it shall be lawful for the court to grant a divorce from the bonds of matrimony upon any of the following grounds:

(a) Marital misconduct which destroys or seriously impairs the marriage relationship. Such marital misconduct shall be limited to:
  (i) Wilful and malicious desertion for the period of two or more years;
  (ii) Adultery;
  (iii) Cruel and barbarous treatment which endangers the life or health of the other party;
  (iv) Knowingly entering into a bigamous marriage while a former marriage still is subsisting;
  (v) Sentence and commitment to imprisonment for a term of two or more years upon conviction of having committed a felony or attempted felony or upon a plea of guilty or nolo contendere thereto;
  (vi) Such indignities to the person of the other party as to render his or her condition intolerable and life burdensome.

(b) Insanity or serious mental disorder which has resulted in confinement in a mental institution for at least five years immediately before the filing of the complaint, where there is no reasonably foreseeable prospect of the defendant spouse's being discharged from such institution. A presumption that no such prospect of discharge exists shall be established by a certificate of the superintendent of such institution to that effect.

(c) Living apart for a continuous period of two years because of estrangement due to marital difficulties.

(2) In any action of divorce from the bonds of matrimony or from bed and board, where grounds for divorce have been established, if the court finds that attempts at reconciliation are practicable and to the best interests of the family, it may of its own motion or at the request of either party:

(a) If there are any children in the family under fourteen years of age, stay the proceedings for a period not to

exceed six months; and in reaching such decision, the court may take into account the report and recommendations of any guardian ad litem who has been appointed to represent the interests of the children;

(b) Whether or not there are any children in the family under fourteen years of age, issue a temporary decree of divorce from bed and board for a period of six months;

(c) If there are no children in the family under fourteen years of age, stay the proceedings for a period not to exceed sixty days.

If at the end of the aforesaid periods of sixty days or six months, no reconciliation has been achieved, the disruption of the marriage shall be deemed irreparable and the court shall grant a final decree of divorce from the bonds of matrimony unless the bed and board decree is made final, as provided in Section 302 of this act.

Comment: This is based on Section 10 of the 1929 Act (23 P. S. § 10). The section, as redrafted, is intended to make a fresh start on the troublesome problem of grounds for divorce and to embody legal experience and social insight in a modern statute which is both realistic and legally and socially sound. The law traditionally has done little to help and much to harm marriage stability. This is because in the past the emphasis has been upon fault and the existing statute postulates an "innocent and injured spouse." In reality, the postulate is a myth, for there are few if any "innocent and injured" spouses in the sense that *all* of the "fault" is attributable to one party. Typically, there is some blame and some virtue on each side. What is far worse, however, is the historical role of the divorce court, which under existing statutes serves merely as the liquidator of the marriage, perpetuates or intensifies bitterness, and does nothing constructive unless interment of the marriage has social utility.

There seems to be no useful purpose to be served by the retention of the "innocent and injured spouse" requirement. It already has been dispensed with in both bed and board and annulment cases. Moreover, the courts themselves have abrogated this requirement to a large extent by holding that the term "innocent and injured" does not contemplate a plaintiff wholly free from fault but rather one who is least at fault. This is an application of the doctrine of "comparative rectitude" by which the courts weigh

the respective guilt of each party and then proceed to award a decree of divorce to the party who is least at fault. The practical consideration as to whether there are, in fact, any innocent parties, and the fact that most actions for divorce are *ex parte* where only the plaintiff is present, making it almost impossible for the court to determine who is the "innocent and injured" spouse, lead to the conclusion that the term "innocent and injured" as it is now construed is a misnomer and mere surplusage. Therefore, it has been discarded.

In lieu of a negative and destructive approach to divorce, it is recommended that statutes enable the courts to acquire facilities and to employ procedures which are calculated to salvage some marriages and avert some broken homes. The legal profession and the courts have the responsibility of doing more than merely burying marriages long dead and in a state of decomposition. The best interests of the family and of society should be regarded by the court, and care should be exercised lest the divorce judge bury a live corpse. See Judge Alexander's stimulating article on *The Family Court—An Obstacle Race?,* 19 U. Pitt. L. Rev. 602 (1958). In order to save some marriages and to help some married persons, the law must abandon a "vested rights" approach to divorce and give recognition to society's interest in marriage. Merely because misconduct of one spouse constitutes a "ground" for divorce should not *ipso facto* result in a decree if there is a reasonable basis for encouraging reconciliation and the interests of the family, including children, cry out for an attempt to save the marriage. In this sense, this section, by recognizing that society, too, has an interest in marriage and divorce, makes it more difficult to secure a divorce than is the case under existing law.

In essence, the above draft seeks to accomplish two major and several lesser objectives. First, it de-emphasizes and limits the "fault" or "innocent and injured" spouse approach to divorce law. In providing for the deletion of the "innocent and injured" terminology, the code follows the precedent which was established when that phrase was omitted from the annulment provision of Section 12 in the amendment of July 15, 1935, P. L. 1013, No. 328. (As to bed and board divorce, see *Wick v. Wick,* 352 Pa. 25 (1945)). Secondly, the proposal sets forth what sometimes has been called an "honest" ground, namely, a ground which is not based upon "fault" but which looks to objective proof that the marriage relationship is over and done with. This is done by making living apart for a

period of two years, because of estrangement due to marital difficulties, a separate and distinct ground for divorce.

The proposed ground—living apart for two years—(1) (c) is new but is based on similar statutes in many jurisdictions of the United States. In Denmark there are only two grounds for divorce: adultery and separation for a period of two years. The fact that, since adultery is losing its social stigma, Danes are seeking divorces on the ground of adultery because it is quicker than the omnibus separation grounds, indicates the inadvisability of having such omnibus grounds without adequate additional grounds. The proposed code, however, contains adequate additional grounds. By adding a "separation" ground, the adversary nature of the divorce proceedings, the defense of recrimination, and the "innocent and injured" spouse requirement are, to some extent, dispensed with, without sweeping new legislation, and without establishing complex new divorce machinery. Furthermore, a "separation" provision should not offend those who are opposed to so-called "easy divorce."

COMPARISON: Separation without cohabitation, noncohabitation, or "living apart," is a ground for divorce from the bonds of matrimony, if for the period indicated in the following: Arizona (5 years), Arkansas (3 years), District of Columbia (5 years), Idaho (5 years), Kentucky (5 years), Louisiana (2 years), Maryland (5 years), Nevada (3 years), North Dakota (4 years), Rhode Island (10 years), Texas (7 years), Utah (3 years), Vermont (3 years), Washington (5 years), and Wisconsin (5 years). The North Dakota statute is interesting and provides in effect that where there has been a decree of separation in effect for more than four years and reconciliation is improbable, absolute divorce may be granted. See also the Maryland and Utah statutes. The former also refers to "separation beyond reconciliation" and the latter to "where parties have lived separate under decree of separate maintenance of any state for 3 consecutive years without cohabitation." In Alabama, the wife only may procure a divorce where parties have lived apart without cohabitation for 2 years. In New Hampshire, a divorce or legal separation may be obtained where there has been no cohabitation for 3 years, and in Maine there may be a legal separation where no cohabitation for 1 year. North Carolina (2 years) and Wyoming (2 years) also grant absolute divorces where there has been a living apart without cohabitation. *Total of American Jurisdictions:* 20. This is not to be confused with mere "incompatability" which is a ground for divorce only in New Mexico and Oklahoma.

The case for a "living apart" statute has been most strongly and convincingly argued by Professor William E. McCurdy of the Harvard Law School in his article, *Divorce—A Suggested Approach,* 9 Vand. L. Rev. 685 (1956). There are at least three good reasons why adoption of such a ground is desirable. First, factual proof is relatively simple and obviates any temptation to perjury, exaggeration, or distortion of truth. Second, it eliminates the need for "washing dirty linen" publicly, thus sparing the parties, their children, and the court the distressing need for a painful intrusion into the sordid details of a broken marriage. Third, it is objective proof, in and of itself, that there has been a permanent marital disruption, whereas many present statutory grounds for divorce are merely symptoms of marital disharmony rather than proof of definite failure. Moreover, added assurance of permanent disruption is given by Subsection (2) which permits a bed and board divorce in lieu of an absolute divorce in cases where attempts at reconciliation are practicable and in the interests of the family.

A special recognition of the interests of children of a divorcing couple is provided for in Subsection (2), which is an adaptation of the procedure presently employed in Ohio and which is being tested in some counties in New Jersey. It hardly admits of argument that under present statutes and procedure, Pennsylvania tragically neglects the welfare of its children who are being seriously damaged by the present policy of easy divorce in uncontested cases.

Section 301, Subsection 1(b), (insanity), is new and is based in part on Sections 92 and 108 of the Civil Code of California. It is submitted that this subsection is necessary, since none of the other subsections adequately deal with the problem of insanity, and the annulment provision (Section 12), of course, does not cover insanity occurring *after* the marriage, although it would adequately cover insanity existing at the time of the marriage. Therefore, this subsection does not provide for a divorce on the ground of insanity existing at the time of the marriage, but does provide for a divorce on the ground of insanity arising subsequently. It is submitted that there is no practical difference between insanity and the situation resulting from imprisonment. Since the latter is a ground for divorce, even under existing Pennsylvania law, the former should also be a ground for divorce. Furthermore, the husband or wife of an insane spouse should be free to remarry to provide a parent for children, if any, of the marriage.

COMPARISON: Some 29 American jurisdictions recognize postnuptial insanity as a ground for divorce from the bonds of matrimony. A

five-year period is the most common time specified. The following lists such jurisdictions with time period: Alabama (5 years), Alaska (3 years), Arkansas (3 years), California (3 years), Colorado (5 years), Connecticut (5 years of "legal confinement because of incurable mental illness"), Delaware (5 years), Georgia (3 years), Hawaii (3 years), Idaho (3 years), Indiana (5 years), Kansas (5 years), Kentucky (5 years), Maryland (3 years), Minnesota (5 years), Mississippi (3 years), Montana (5 years), Nebraska (5 years), Nevada (2 years), New Mexico (5 years), North Carolina (5 years), North Dakota (5 years), Oklahoma (5 years), Oregon (3 years), Texas (5 years), Utah (no time specified if "incurable"), Vermont (5 years), Washington (2 years), and Wyoming (2 years). Mental incapacity at the time of marriage is a statutory ground for annulment in some 40 states.

In summary, the philosophy behind this code is that an affirmative and constructive approach must be made to the problem of divorce if society is to take measures to save family stability. Existing statutes and procedures are almost wholly destructive. Marriages which might be saved are summarily terminated in uncontested cases. The "innocent and injured" spouse myth is a false criterion because too often both are at "fault" or neither is really to blame. A "black and white" approach is unrealistic and fictional. What matters, socially speaking, is whether a particular marriage is actually dead, still alive, or capable of resuscitation. To safeguard the interests of society, and especially those of children, a fresh approach to divorce law not only is desirable, it is imperative. It is as unsound to force a social problem into a straight jacket of adversary procedure for the resolution of a fictitious issue as it is medically unsound to attempt a cure of all maladies by bloodletting. For, actually, there is no contest in most divorce cases, so the reason for adversary procedure is gone; and its purpose, to determine whether the defendant was at fault, is frustrated because the real facts of the marriage failure may never emerge in the usual *ex parte* proceeding. The law should make an effort to be constructive and face up to the realities of marriage and divorce.

SECTION 302. *Grounds for Divorce from Bed and Board; Attempts at Reconciliation; Decree.*—The same grounds for divorce from the bonds of matrimony which are set forth in Section 301 of this act shall also constitute grounds for divorce from bed and board. If in any action for divorce from the bonds of matrimony or from bed and board it is established to the satisfaction of the

court that it is practicable to attempt to effect a reconciliation between the parties to a marriage and that the interests of the Commonwealth and the family best would be served by denying a complaint for divorce even though grounds for the same may exist, the court upon its own motion or at the request of either party may decree a divorce from bed and board for six months from the date of the decree if the safety or welfare of the family make such decree advisable or if grounds exist for divorce from the bonds of matrimony. Such decree of divorce from bed and board may be cancelled or modified at any time if it appears that further attempts to effect a reconciliation are futile or impracticable or that a party receiving alimony refuses to cooperate in affecting a reconciliation, and upon such showing the court in its discretion may terminate the decree for divorce from bed and board and proceed in the manner provided by law to hear and grant a divorce from the bonds of matrimony. In such proceeding to cancel or modify a decree of divorce from bed and board, the court shall consider the expressed wishes of the parties concerned regarding the continuance or cancellation or modification of such decree, and the court may grant a final decree of divorce from bed and board.

Comment: This is based on Section 11 of the 1929 Act (23 P. S. § 11) and, as revised and reconstructed, is intended to make use of a bed and board divorce as a device to encourage reconciliation, a period during which the parties live apart but cooperate with marriage counsellors in an attempt to solve or overcome their marital difficulty. Broad discretion is committed to the court to adopt such a technique. In a sense, an *a mensa et thoro* decree becomes an interlocutory decree but it also is a period during which reconciliation is encouraged and during which the parties may receive help either from personnel attached to the court or from private agencies, or both. In addition, where the religious faith of the parties is such that they do not want a divorce from the bonds of matrimony but merely a legal separation, and the court is informed of their desire, bed and board divorce will be available.

The same grounds set forth in Section 301 for absolute divorce are also grounds for bed and board divorce. No longer is the latter available only to the wife. The "innocent and injured" spouse requirement is dispensed with here as in the case of divorce from the bonds of matrimony.

If it is found that any attempt at effecting a reconciliation is

dangerous or impracticable, and the parties have expressed no desire for an *a mensa et thoro* decree, the court, at its discretion may award an absolute divorce if grounds for such otherwise exist.

The intent of the new provision is to provide for another period during which an attempt may be made to save viable marriages and the premise is that the court should, where practicable, act affirmatively to preserve marriages. It is also intended that if such efforts turn out to be futile, either an absolute divorce or a permanent decree of *a mensa et thoro* may be awarded depending upon the wishes of the parties. It is also provided that the decree may be modified or cancelled when circumstances warrant.

There are at least two jurisdictions which have statutory authority for the conversion of an *a mensa et thoro* decree or legal separation into an absolute divorce. In the District of Columbia (DIST. COL. CODE Section 16–403) "where a final decree of divorce from bed and board heretofore has been granted or hereafter may be granted and the separation of the parties has continued for two years since the date of such decree, the same may be enlarged into a decree of absolute divorce from the bond of marriage upon the application of the innocent spouse." The same grounds are set out for both an absolute and a bed and board divorce. In North Dakota (2 N. DAK. REV. CODE 1943, Section 14–0605) "If it shall be made to appear . . . that the original decree has been in existence and force for more than four years and that reconciliation between the parties to the marriage is improbable, the judge may revoke the separate maintenance decree and, in lieu thereof, may render a decree absolutely divorcing the parties, and at the same time make such final divisions of the property, or may direct the payment of such alimony, and make such orders with reference to minor children, if any, as justice and merits of the case and the circumstances of the parties shall warrant." In North Dakota, as in the District of Columbia, the same grounds exist for both an absolute divorce and separate maintenance.

The proposed code is intended to convert the questionable and anomalous bed and board decree into something which has value in matrimonial affairs. As the decree is now used and as it has been utilized historically, it creates a situation where the husband has all of the duties without corresponding advantages as a result of his "fault" judicially declared, which may or may not be in accord with the actual facts. The husband is further embittered, his hostility is increased, and the chance of reconciliation is all but eliminated. If legal separation is used as a period of time when both

parties cooperate in trying to work out their differences, however, an *a mensa et thoro* decree serves a useful and affirmative purpose.

As previously stated, where the parties for religious or other reasons want an *a mensa et thoro* decree, the court will have discretion to order it, but where there is no such expressed desire, the court may or may not transform it into a decree for absolute divorce depending upon the facts and circumstances of the individual case.

SECTION 303. *Annulment of Void and Voidable Marriages.*—In all cases where a supposed or alleged marriage shall have been contracted which is and was void or voidable under Sections 303 and 304 of the Marriage Code or under other applicable law, either party to such supposed or alleged marriage, or a parent or guardian where authorized, may petition to have it declared null and void in accordance with the procedure provided for under this act and the Pennsylvania Rules of Civil Procedure, unless there has been confirmation of such marriage by cohabitation after removal of the impediment thereto as provided in Section 221 of the Marriage Code.

Comment: This section replaces Section 12 of the 1929 Act (23 P. S. § 12) and makes a cross reference to the proposed Marriage Code. Section 12 of the 1929 Act is limited to annulment of void marriages, and so-called voidable marriages are grounds for divorce under Section 10 thereof. Since such former grounds for divorce under this proposed code are returned to their original position as grounds for annulment (*e.g.* fraud, force and coercion) it is necessary to provide specifically for annulment of voidable marriages as well as void ones. The present policy of eliminating "fault," *i.e.*, the abandonment of any requirement of "innocent and injured spouse" for annulment, is continued.

The specification of grounds which make a marriage void or voidable is more properly placed in a marriage code than in a divorce code, although if it is desirable, the grounds could be set forth in both codes. Logically, such matters are more closely allied to requirements for marriage than with grounds for divorce. Under Section 303 of the proposed Marriage Code, marriages may be held void where there was an existing spouse, consanguinity existed, and where one party was insane at the time of the ceremony and incapable of assenting and there was no subsequent confirmation or ratification of the marriage. Under Section 304 of the proposed Marriage Code, marriages are voidable where a minor was involved,

either party was under the influence of intoxicating liquor or drugs, impotency existed at time of marriage, there was fraud, duress, force, or coercion, and where the purpose of the marriage has been frustrated by law or physical condition, and there was no subsequent confirmation or ratification of the marriage.

The proposed Marriage Code provides in Section 105 ("Definitions") that a "void" marriage is one whose validity may be questioned in either an annulment action or in a collateral proceeding, that a "voidable" marriage is subject to attack only in an annulment action and may not be attacked after the death of either party. The proposed Marriage Code, Section 305, also provides that whenever the validity of any marriage shall be denied or doubted, either party may file a petition in the nature of a declaratory judgment action to have the validity of such marriage determined.

The proposed Marriage Code in Section 304 also provides that a parent or guardian of a minor who married without parental consent may petition for annulment if such marriage was not subsequently ratified and if the action is commenced within sixty days of the ceremony.

The general effect of the proposed provisions will be to return Pennsylvania to the traditional distinctions between divorce and annulment grounds. Only Georgia, Pennsylvania and Washington, for example, regard fraud as a ground for divorce rather than annulment, and 42 states treat it as the latter. Consanguinity is a ground for divorce and/or annulment in only seven states, only a ground for divorce in Georgia, Mississippi and Pennsylvania. In the remaining states it is a ground for annulment only.

Since the legitimacy of all children born of an ostensible or purported marriage, whether such marriage be void or voidable, will be sustained from date of birth as provided in Section 801 of the proposed Marriage Code, there is no problem in restoring artificial grounds for divorce to their logical status as grounds for annulment. These provisions are now contained in the Act of December 17, 1959, P. L. 1916, No. 695. It is the desire not to make children illegitimate which led to the original shift and since such fear will no longer have any basis due to the provisions of the proposed Marriage Code and the recent amendment, those matters which are more properly regarded as grounds for annulment rather than grounds for divorce, should be returned to their proper place.

SECTION 304. *Abolition of Defenses; Defense to Adultery.*—Except as otherwise provided in this act, the defenses of recrimina-

tion, condonation, connivance and collusion are hereby abolished: Provided, however, That where adultery is charged, if it be established that the party alleging such offense either conspired to procure its commission or willingly forgave the offense, the court may refuse to grant a divorce on that ground but may consider such offense in determining whether other grounds exist for termination of the marriage.

Comment: This is based on Section 52 of the 1929 Act (23 P. S. § 52), modified so that the defenses of collusion and connivance are narrowly defined in terms of conspiracy to procure the commission of the adultery. Condonation is narrowly defined as covering the situation where the offense was "willingly" forgiven. Discretion is given to the court either to award a divorce decree or deny it, depending upon the circumstances of the case, and it is also provided that the court may consider the adultery in connection with other grounds, such as "indignities" or "cruel and barbarous treatment." Recrimination, as a defense, is abolished. However, such circumstances might affect the discretion of the court in determining whether to grant a divorce or not. It is felt that it is best to leave such matters to the court's discretion rather than to legislate a hard-and-fast rule. It is hoped that the proposed code provision will eliminate the difficulty which occurs in making a distinction between the case where the husband affords an opportunity or procures the adultery of his wife or, on the other hand, was merely seeking to get evidence of her unfaithfulness. Under this section, he must have conspired to procure the commission of the offense. Condonation is also made less rigid. It is necessary under the proposed section that it be "willingly" and "voluntary." If there is physical compulsion, or economic necessity, the court may find that despite cohabitation there was no condonation. See 21 Minn. L. Rev. 408 (1937), 6 A.L.R. 1157 (1920), 47 A.L.R. 576 (1927). Rejection of recrimination is deliberate because it is felt that there is no justification for a doctrine which in effect says that if a given marriage is utterly impossible and both parties are offenders, it must be perpetuated. Such a concept is an insult to the institution of marriage, and where it is accepted has occasioned serious injustices and has led to a disrespect for law and the judicial process.

ARTICLE IV

COMPLAINT; JURISDICTION; JURY TRIAL; HEARING BY COURT; APPOINTMENT OF MASTER; POWERS

SECTION 401. *Notice of Intention to File Divorce Complaint.*—Notice of intention to file a complaint in divorce shall be filed in the office of the prothonotary and copies of such notice shall be served upon the prospective defendant and upon the domestic relations division at least thirty days prior to the filing of any complaint in divorce. Such notice of intention shall state the names and ages of all minor children of the marriage but shall not state the contemplated grounds for divorce. If a reconciliation between the parties has not been achieved within thirty days after service of such notice of intention, then the plaintiff shall have the right to file a complaint in divorce.

Comment: This section is intended to provide a "cooling off" period before commencement of the divorce action and at a stage when reconciliation efforts may have a maximum chance for success. The "notice of intention" would not include specific allegations nor accusatory material which tends to intensify hostility. This is similar to the device being tried in New Jersey, referred to in the Comment to Section 203, and that which is in effect in Illinois, and is somewhat like the procedure followed in Los Angeles. For a discussion of this approach, see MAXINE VIRTUE, FAMILY CASES IN COURT (1956, Duke University Press).

SECTION 402. *Jurisdiction.*—

(1) Original Jurisdiction of Courts of Common Pleas.—The several courts of common pleas of this Commonwealth, except in Allegheny and Philadelphia Counties, shall have original jurisdiction over cases of divorce from the bonds of matrimony, from bed and board, and for the annulment of void or voidable marriages and, where they have jurisdiction, shall determine in one action the following matters and issue an appropriate decree or orders with reference thereto and may retain continuing jurisdiction thereover:

(a) The determination and disposition of property rights and interests between spouses, including any rights cre-

ated by any antenuptial or postnuptial agreement, and including the partition of property held as tenants by the entireties or otherwise and any accounting between them, and the order of any alimony, maintenance, counsel fees, costs or other allowance authorized by law;

(b) The future care, custody and visitation rights as to children of such marriage or purported marriage;

(c) Any support, maintenance or assistance which shall be paid for the benefit of any children of such marriage or purported marriage;

(d) The approval of any proper settlement, involving any of the matters set forth in clauses (a), (b) and (c) of this subsection as submitted by the parties; and

(e) Any other matters pertaining to such marriage and divorce or annulment authorized by law and which fairly and expeditiously may be determined and disposed of in such action.

(2) Original Jurisdiction of the Court of Common Pleas and the County Court of Allegheny County.—The Court of Common Pleas of Allegheny County shall have original jurisdiction over cases of divorce from the bonds of matrimony, from bed and board and for the annulment of marriages under the provisions of this act. Whenever practicable, the court of common pleas shall consolidate and determine in one action the following matters and issue an appropriate decree or orders with reference thereto and may retain continuing jurisdiction thereover:

(a) The determination and disposition of property rights and interests between spouses, including any rights created by any antenuptial or postnuptial agreement, and including the partition of property held as tenants by the entireties or otherwise and any accounting between them, and the order of any alimony, maintenance, counsel fees, costs, or other allowance authorized by law;

(b) The future care, custody and visitation rights as to children of such marriage or purported marriage;

(c) The approval of any proper settlement, involving any of the matters set forth in clauses (a) and (b) of this subsection, as submitted by the parties; and

(d) Any other matters pertaining to such marriage and divorce or annulment authorized by law and which fairly and expeditiously may be determined and disposed of in such action.

The County Court of Allegheny County shall have the same jurisdiction provided by the Act of May 5, 1911, P. L. 198, as amended, or as otherwise provided by law, but shall whenever practicable combine any award of custody or visitation rights as to which it has jurisdiction with its order for child support.

(3) Original Jurisdiction of the Courts of Common Pleas and the Municipal Court of Philadelphia.—The Courts of Common Pleas of Philadelphia County shall have original jurisdiction over cases of divorce from the bonds of matrimony, from bed and board and for the annulment of marriages under the provisions of this act. Whenever practicable, the Courts of Common Pleas of Philadelphia County shall consolidate and determine in one action the following matters and issue an appropriate decree or orders with reference thereto and may retain continuing jurisdiction thereover:

(a) The determination and disposition of property rights and interests between spouses, including any rights created by any antenuptial or postnuptial agreement, and including the partition of property held as tenants by the entireties or otherwise and any accounting between them, and the order of any alimony, maintenance, counsel fees, costs, or other allowance authorized by law;

(b) The approval of any proper settlement, involving any of the matters set forth in clause (a) of this subsection, as submitted by the parties; and

(c) Any other matters pertaining to such marriage and divorce or annulment authorized by law and which fairly and expeditiously may be determined and disposed of in such action.

The Municipal Court of Philadelphia shall have the jurisdiction provided by the Act of July 12, 1913, P. L. 711 as amended, or as otherwise provided by law, but shall whenever practicable combine any award of custody or visitation rights as to which it has jurisdiction with its order for child support.

(4) Domicile.—The said courts having power to grant divorces shall have authority to do so notwithstanding the fact that

the marriage of the parties and the cause for divorce occurred outside of this Commonwealth, and that both parties were at the time of such occurrence domiciled without this Commonwealth, and that the defendant has been served with the complaint only by publication as provided by the Pennsylvania Rules of Civil Procedure for such cases. Said courts shall also have power to annul void or voidable marriages notwithstanding the fact that such were celebrated without this Commonwealth at a time when neither party was domiciled within this Commonwealth, if either party at the time of the annulment action is a resident of this Commonwealth, and notwithstanding that the defendant has been served with the complaint only by publication as provided by the Pennsylvania Rules of Civil Procedure for such cases.

Comment: Subsection (1) of this section is an important fundamental change proposed by this code. Section 601 is intended to tie in with this section. The intent and purpose behind the above provision is to effect a consolidation of all matters which are involved in a dissolution of a marriage rather than, as at present, to have fragmentation between several courts and actions. So far as is known, Pennsylvania is the only state which now has such an unfortunate fragmentation, and it appears to be the consensus of the bench and bar of this Commonwealth that this situation calls for immediate remedy. It is with regret that Allegheny and Philadelphia Counties are excepted, and it is hoped that in time such counties will be able to consolidate all such matters into one court's jurisdiction. Judge Walter W. Braham in his article in 26 Pa. B.A.Q. 274 (1955), and Judge Vincent A. Carroll in his article in 27 Pa. B.A.Q. 15 (1955) have fully and ably discussed the matter.

The General Assembly, by the Act of December 30, 1959, P. L. 2055, enacted a permissive consolidation statute as an amendment to the 1929 Act. This code proposes to make the consolidation mandatory rather than permissive, except in Allegheny and Philadelphia Counties.

The provisions of Section 15 of the 1929 Act pertaining to venue of divorce and annulment actions, having been suspended by the Pennsylvania Rules of Civil Procedure, have been eliminated in the drafting of this code. The prior provision of Section 15 as to domicile has been retained substantially in the same form, except that annulment is added and reference is made to the Pennsylvania Rules of Civil Procedure.

SECTION 403. *Residence of Plaintiff; Conclusive Presumption of Domicile.*—No spouse shall be entitled to commence proceedings for divorce by virtue of this act who shall not have been a bona fide resident in this Commonwealth at least one whole year immediately previous to filing of his or her complaint: Provided, That, if the proceedings for divorce are commenced in the county where the defendant has been a bona fide resident at least one whole year immediately previous to the filing of such proceedings, in such case, residence of the plaintiff within the county or state for any period shall not be required. The plaintiff shall be a competent witness to prove his or her residence, *and proof of actual residence within the Commonwealth for one year shall create a conclusive presumption that plaintiff is domiciled within the Commonwealth.*

Comment: This is based on Section 16 of the 1929 Act (23 P. S. § 16), and is substantially the same except for the italicized portion. A one-year residence before filing is the period most commonly provided for and some 24 states normally require such a length of residence although in states such as Colorado, Illinois, and South Dakota, a shorter period suffices if the offense was committed within such states. The shortest period is six weeks in Nevada and Idaho. The period in Florida is 90 days, in Wyoming 60 days, in Arkansas two months, in Utah three months, and in Maine, North Carolina and Vermont, six months. A two-year period is required in Delaware, Louisiana, New Jersey, Rhode Island, Tennessee and Wisconsin. No time is specified in Maryland or New Hampshire if the plaintiff is a bona fide resident or there domiciled. There are varying periods, depending upon grounds and circumstances, in Connecticut, Massachusetts and New York.

The italicized portion is added in order to avert, if possible, some of the metaphysical hairsplitting which arises due to the technical distinction between residence and domicile. Except for the policy which finds expression in the one-year requirement, it would be recommended that the only requirement should be domicile, as in Maryland and New Hampshire, so that jurisdiction in the conflicts of laws sense and jurisdiction under the statute would be based upon the same factor and would coincide, thus eliminating a troublesome legal problem.

SECTION 404. *Time When Complaint in Desertion Cases May be Exhibited.*—In cases of wilful and malicious desertion it shall be lawful for the deserted spouse to exhibit his or her complaint

to the court at any time not less than six months after such cause for divorce shall have taken place, but the case shall not proceed to a hearing until after the expiration of two years from the time at which such desertion took place.

Comment: This is based on Section 17 of the 1929 Act (23 P. S. § 17). The same time element is retained. Provisions inconsistent with this code are eliminated.

SECTION 405. *Jurisdiction Where Defendant Is Insane or Suffering from Serious Mental Disorder.*—In cases where a spouse is insane or suffering from serious mental disorder, the court shall have jurisdiction to receive a complaint for divorce in which such person is made the defendant upon grounds set forth in Section 301 of this act, and such proceedings, except as otherwise expressly provided in this act, shall, in such cases, be the same as in other proceedings for divorce.

Comment: This is based on Section 18 of the 1929 Act (23 P. S. § 18) and is substantially the same except for the substitution of more acceptable terminology for the outmoded term "lunatic."

SECTION 406. *General Appearance Not Deemed Collusion; Collusion Defined.*—The entry of a general appearance by, or in behalf of, a defendant shall not be deemed collusion. Collusion shall be found to exist only where the parties conspired to fabricate grounds for divorce or annulment, agreed to and did commit perjury, or perpetrated fraud on the court. Negotiation and discussion of terms of property settlement and other matters arising by reason of contemplated divorce shall not be deemed to constitute collusion.

Comment: Section 31 of the 1929 Act (23 P. S. § 31) has been suspended in part by Pennsylvania Rules of Civil Procedure 1121–1136, but the sentence as to entry of a general appearance not being collusion remains in effect, and is retained in this section. In addition, collusion is defined in somewhat narrow terms, so as to reflect the realities of this problem in terms of practice. It is intended to eliminate some uncertainty which may exist as to what constitutes collusion. Parties should be able to discuss and plan for the settlement of economic problems without any fear of being charged with collusion.

SECTION 407. *Jury Trial.*—After service on the defendant, in the manner provided by the Pennsylvania Rules of Civil Procedure,

or entry of a general appearance for the defendant, if either of the parties shall desire any matter of fact that is affirmed by one and denied by the other to be tried by a jury, he or she may take a rule upon the opposite party, to be allowed by a judge of the court, to show cause why the issues of fact set forth in such rule shall not be tried by a jury, which rule shall be served upon the opposite party or his or her counsel.

Upon the return of such rule, after hearing, the court may discharge it, or make it absolute, or frame issues itself, and only the issues so ordered by the court shall be tried accordingly, but such rule shall not be made absolute when, in the opinion of the court, a trial by jury cannot be had without prejudice to public morals.

Comment: This is based on Section 35 of the 1929 Act (23 P. S. § 35) and is substantially the same except for the reference to the Pennsylvania Rules of Civil Procedure.

SECTION 408. *Hearing by Court; Appointment of Master; Powers.*—A master may be appointed by the court to hear testimony on all or some issues, except issues of custody, paternity and support, and return the record and a transcript of the testimony as provided by the Pennsylvania Rules of Civil Procedure, or a judge of the court at chambers may appoint a master to take testimony and return the same to the court.

Comment: This is Section 36 of the 1929 Act (23 P. S. § 36) as amended by the Act of December 30, 1959, P. L. 2055, Section 3. The exception of issues of custody, paternity and support was inserted because it was intended that the court alone, not a master, should hear and decide these issues.

ARTICLE V

ALIMONY; ALLOWANCE AND SUPPORT

SECTION 501. *Permanent Allowance Where Defendant Is Insane or Suffering from Serious Mental Disorder.*—In case of the application of a spouse for divorce from a spouse who is insane or suffering from serious mental disorder, the court, or a judge thereof to whom the application is made, shall have the power to decree an allowance for the support of the defendant spouse, during the term

of his or her natural life, by requiring the plaintiff to file a bond, with surety or sureties if necessary, in such sum as it may direct, conditioned as aforesaid, before granting the divorce, if the defendant spouse has not sufficient income or estate for self-support.

Comment: This is based on Section 45 of the 1929 Act (23 P. S. § 45) and is rephrased to include "serious mental disorder" as used in this code and to equalize the positions of husband and wife, applying the same economic considerations to each of them. The term "allowance" is substituted for "alimony" (See Section 105 for the definition of "Allowance").

SECTION 502. *Alimony Pendente Lite, Counsel Fees and Expenses.*—In case of divorce from the bonds of matrimony or bed and board or the annulment of marriage, the court may, upon petition, in proper cases, allow a wife or husband reasonable alimony pendente lite and reasonable counsel fees and expenses.

Comment: This is based on Section 46 of the 1929 Act (23 P. S. § 46) and is substantially the same except that it expressly provides that alimony pendente lite may be awarded in an annulment action, which is the construction which has been given to Section 46 of the 1929 Act by the Pennsylvania courts. See *Baker v. Baker,* 84 Pa. Superior Ct. 544 (1925). It is also provided that alimony pendente lite *may* be awarded to the husband as well as the wife in a proper case because there appears to be no good reason why there should not be equality of right here if the normal economic circumstances are reversed.

SECTION 503. *Alimony in Divorce From Bed and Board.*—In cases of divorce from bed and board, the court or the judge thereof to whom application is made, or the court upon its own motion, may order the payment of periodic alimony where it is established that there is actual need therefor and the other party against whom the order is entered has sufficient property, income, or earning capacity to pay such alimony. The marital fault of either party shall not preclude nor affect the granting of such alimony where both actual need and ability to pay are established. In no event shall such alimony exceed more than one-third of the net annual income or profits from the estate of the party ordered to pay. Such alimony shall be subject to modification due to changed circumstances regardless of whether or not the decree reserves such power

and either party may petition the court for modification and wherever practicable the same judge who heard the original action shall pass upon the request for such modification. Death of either party shall terminate alimony and the court may upon petition or on its own motion terminate it if the court finds that the party receiving the same has refused to cooperate in good faith in attempting to effect a reconciliation or that further attempts at reconciliation are futile. The court in its discretion may require the party ordered to pay alimony to provide such security for its payment as shall be determined and approved by the court and any and all remedies available in nonsupport actions shall be available and applicable to cases where alimony is not paid as ordered by the court. No alimony shall be awarded to a party who shall have been found by the court to have ample resources to maintain an accustomed standard of living.

Comment: This is a complete redraft of Section 47 of the 1929 Act (23 P. S. § 47). It provides that the court may order alimony where: (1) actual need therefor is established, and (2) the other party has sufficient financial ability to pay it. Such may be awarded to either the wife or the husband. "Fault" shall not be considered if there is (1) economic need, and (2) ability to pay. Thus, payment is predicated upon an economic basis. It is felt that this is justifiable because otherwise the recipient may become a public charge, go on public assistance, and become a burden to the taxpayer. "Fault" is also dispensed with because it is difficult if not impossible to ascertain the true facts and because as a practical matter usually there is "fault" on each side. The present one-third limit is retained on the amount of such an alimony award. The sum ordered is subject to modification due to changed circumstances, for example, increased need on the one hand, or increased income on the other. It is provided that the same judge, where practicable, shall hear any motion for such change. Death terminates the obligation as does a refusal to cooperate in good faith in effecting a reconciliation. The latter is intended to serve as some leverage or inducement to reestablish the marriage as a going concern. The same remedies are provided for as in nonsupport actions under pertinent provisions of the proposed Marriage Code.

This section is a substantial departure from existing law in Pennsylvania. It is based upon the economic facts of life, will simplify the problem by eliminating the elusive element of "fault,"

and will be consistent with the new purpose of bed and board divorce which is commented upon in connection with Section 302.

SECTION 504. *Allowance Upon Divorce From the Bonds of Matrimony or Annulment.*—In cases of annulment or divorce from the bonds of matrimony, the court or the judge thereof to whom application is made may order the payment of a periodic allowance, whether or not the same is sought by the complaint, where it is established that the petitioning party has actual need therefor and the other party has sufficient property, income, or earning capacity to pay such an allowance. The marital fault of either party as it appears in the annulment or divorce proceeding shall not preclude nor affect the granting of such an allowance where both need and ability to pay are established. In no event shall such allowance exceed more than one-third of the net annual income or profits from the estate of the party ordered to pay such allowance. Such allowance shall be subject to modification due to changed circumstances regardless of whether or not the decree reserves such power and either party may petition the court for modification and wherever practicable the same judge who heard the original petition for an allowance shall pass upon the request for modification. Death of either party shall terminate the allowance, as shall the remarriage or purported remarriage of the party receiving such allowance. Such allowance may be awarded in conjunction with and shall take into account any property settlement approved by the court and the property and earning capacity of the petitioner shall be considered in determining whether there is need for such allowance. The court in its discretion may require the party ordered to pay such allowance to provide such security for its payment as shall be determined and approved by the court and any and all remedies available in nonsupport actions shall be available and applicable to cases where such allowance is not paid as ordered by the court. No allowance shall be awarded to a party who shall have been found by the court to have ample resources to maintain an accustomed standard of living.

Comment: This is entirely new and contemplates an award of an allowance, in some cases, upon divorce or annulment. Pennsylvania is the only state which refuses to award alimony or to require a property settlement in lieu thereof. In 44 states alimony is awarded.

In Delaware, the court may make a reasonable property settlement (13 DEL. CODE § 1531), and the same type of statute exists in Texas (13 TEX. CODE § 4638). In North Carolina, a wife must petition a court for alimony prior to a decree of absolute divorce. The other states have discarded the notion that a duty to support must be based upon a marital status.

Existing law in Pennsylvania in several instances occasions injustice and hardship. The typical case which the proposed provision would help is where a husband has a high income but little property. The wife of such a husband often cannot afford a divorce, even though grounds therefor exist, and hence she is forced to petition for a divorce from bed and board or abandon him as a source of income. It is unfair and unreasonable that such a situation should exist. In such a case the husband should not have all the psychological and economic advantage in arriving at a property settlement.

On the other hand, the recommended provision is carefully limited to cases where there is (1) actual need, and (2) ability to pay. It is not intended that the system of alimony which exists in most states should be adopted in Pennsylvania, because grave abuses have occurred under such a system. See 6 LAW AND CONTEMPORARY PROBLEMS 183 *et seq.* (Spring, 1939) which has a symposium on alimony. Moreover, as in the case of alimony in a bed and board divorce, a limit of one-third is placed upon the amount which may be ordered, and in case of death or remarriage (or even a purported remarriage) the allowance terminates. Such sum is subject to modification upon change in circumstances and the same judge, where practicable, shall hear the application.

It is also provided that the court shall take into account any property settlement arrived at by the parties. Wherever possible encouragement should be given to the private determination of the economic problems which arise upon dissolution of a marriage. It is far better that the parties themselves, where possible, arrive at terms, rather than to have them imposed by a court. Because of this there is much to be said for present Pennsylvania policy in not recognizing alimony and, but for the hardship and injustice which occurs in some instances under present law, no change would be recommended. It is intended by this section to retain the worthwhile emphasis upon private settlement of property rights and yet at the same time provide for an allowance where needed.

Annulment is included because, in some cases at least, even a party to an invalid marriage should get some support or property

settlement. For example, it might be found that after 25 years of marriage one party had an existing spouse from whom he or she thought there had been a divorce or annulment. In such a case, the de facto wife should be entitled to some of the fruits of her labor. She should be entitled to a partition of property acquired by joint funds or joint efforts, and in addition, if needed, an allowance.

This section permits the allowance to be paid to an ex-husband as well as an ex-wife, if there is actual need and the other party has an ability to pay.

The proposed statute would promote economic justice and would eliminate the unfortunate disparity between Pennsylvania law and that of practically all the other states, while at the same time preserving the worthwhile emphasis upon private settlement of property matters.

SECTION 505. *Payment of Support, Allowance, Alimony, or Alimony Pendente Lite to Domestic Relations Division; Disbursement; Duty of Obligee to Report; Reduction or Cancellation of Arrearages.*—When so ordered by the court, all payments of child support, allowance, alimony, or alimony pendente lite, shall be made to the domestic relations division of the court which issued the order or such division of the court at the residence of the party entitled to receive such an award. The domestic relations division shall keep an accurate record of all such payments and shall notify the court immediately whenever any person subject to a payment order is thirty days in arrears in such payment so that appropriate action may be taken to enforce the order of the court. It shall be the duty of the domestic relations division to distribute such payments to the person entitled thereto as soon as possible after receipt.

When payments are made directly to the obligee instead of to the domestic relations division, the obligee shall have the duty of reporting to the domestic relations division any nonpayment of an order for child support, allowance, alimony, or alimony pendente lite, and the division shall immediately notify the obligor of such claim. The court may reduce or cancel any such order where the obligee without reasonable excuse failed to report nonpayment of the order within six months after the same became past due and

enforcement of the order and collection of arrearages would occasion unreasonable hardship to the obligor.

Comment: This new section is intended to insure, in so far as possible, that awards will be complied with, to permit the court to enforce its awards without instigation from the person entitled thereto, and to make it possible for the court to know from day to day whether there are any arrearages or nonpayments so that appropriate action may be taken. The proposal is similar to the Friend of the Court device employed in Michigan, which has gone a long way to eliminate the problem of arrearages. For a detailed description of the Michigan plan, see Michigan Judicial Council, FIFTH ANN. REP. (Aug. 1935) 61 *ff.* For a short description, see 6 LAW AND CONTEMPORARY PROBLEMS 274, at 275 footnote 3 (1939).

There may be occasional, though perhaps rare instances where considerable hardship, if not injustice, occurs when an obligee to whom payments were being made directly (usually the wife) allows arrearages to accumulate and then belatedly seeks to collect the whole amount from the obligor. The policy behind the above provision is that the obligee should have the responsibility or burden of bringing arrearages to the attention of the domestic relations division, which may take appropriate steps toward enforcement of the order. The obligee should not be permitted to sleep on her rights, in effect to waive payment, and then to take tardy action to collect. The inference may be that the obligee did not actually need the money. Discretion is given to the court to decide on the basis of equity and fairness whether arrearages should be cancelled or modified, and the domestic relations division is given the duty of notifying the obligor when he is in arrears. It is assumed that the above provision will not preclude such orders from being deemed to be final judgments within the meaning of the full faith and credit clause of the Constitution and that where the obligor is found in another state such sister state may lend its process for collection but allow mitigation to the same extent as Pennsylvania would under this proposed provision.

SECTION 506. *Allowance Where a Foreign Ex Parte Divorce.* —Whenever a person who was a resident of this Commonwealth at the time such party was a defendant or respondent in a foreign ex parte action for annulment or divorce petitions a court of this Commonwealth for an allowance and establishes the need therefor,

such court having jurisdiction over the person or property of the other party may order that such allowance be paid in the same manner and under the same conditions and limitations which pertain when an allowance is sought as an incident to an annulment or divorce in this Commonwealth. In the event that the other party from whom such allowance is sought cannot be located within this Commonwealth, the court may attach the tangible or intangible property of such party as is within the jurisdiction of the court in the manner provided by the Pennsylvania Rules of Civil Procedure, except that no exemption shall apply, and subject it to the payment of such allowance in the same manner as provided by law in actions for nonsupport.

Comment: This section is new and is intended to supplement Section 504 and to take care of the situation where a foreign ex parte divorce is obtained by one spouse and there is no litigation of an alimony issue. The "stay-at-home" spouse, usually the wife, would be able to bring suit for an allowance by either obtaining personal service upon her ex-husband or attaching his Pennsylvania property. She would not have to contest the validity of the foreign divorce. The suggested provision is similar in purpose to the New York statute which was sustained by the United States Supreme Court in the recent case of *Vanderbilt v. Vanderbilt,* 354 U. S. 416 (1957), and is designed to take care of the problem of divisible incidents of divorce which is posed by *Estin v. Estin,* 334 U. S. 541 (1948). It is intended to permit such an action after divorce because the nonappearing spouse may desire to let the divorce stand rather than overturn it in order to get support, and where the plaintiff has remarried and has a new family, hardship may be imposed by a declaration of invalidity. See *Commonwealth v. McVay,* 383 Pa. 70 (1955), commented upon in 18 U. Pitt. L. Rev. 382, 390–394 (1957), where it is noted that existing law in Pennsylvania encourages a finding that foreign divorce decrees are invalid.

SECTION 507. *Registration, Adoption and Enforcement of Foreign Alimony, Temporary Alimony, Alimony Pendente Lite, or Allowance Decrees.*—Whenever a person subject to a valid decree of a sister state or territory for the payment of alimony, temporary alimony, alimony pendente lite, or allowance, or his property, is found within this Commonwealth, the obligee of such decree may petition the court of common pleas where the obligor or his prop-

erty is found to register, adopt as its own, and to enforce a duly issued and authenticated decree of a sister state or territory. Upon registration and adoption such relief and process for enforcement as is provided for at law, in equity, or by statute, in similar cases originally commenced in this Commonwealth, shall be available, and a copy of the decree and order shall be forwarded to the court of the state or territory which issued the original decree. The obligor in such actions to register, adopt, and enforce, shall have such defenses and relief as are available to him in the state or territory which issued the original decree and may question the jurisdiction of that court if not otherwise barred. Interest may be awarded on unpaid installments and security may be required to insure future payments as in such cases originally commenced in this Commonwealth. Where property of the obligor, but not his person, is found within this Commonwealth, there shall be jurisdiction quasi in rem and upon registration and adoption of the decree of the sister state or territory, such relief and enforcement of the decree shall be available as in other proceedings which are quasi in rem.

Comment: Since Pennsylvania has not adopted the *Uniform Enforcement of Foreign Judgments Act,* this section is included to cope with the problem of the migratory or fugitive obligor who by the simple expedient of crossing a state line evades and escapes alimony, allowance or maintenance payments. This section is intended to achieve the purpose of the uniform act in the limited area of alimony, allowance and maintenance and to avoid the necessity of regarding the foreign decree as a debt and requiring a new action in Pennsylvania on the foreign decree or judgment. Proof and authentication of the foreign decree is all that would be necessary unless the defendant successfully interposes a valid defense which would have been available to him in the state of rendition or shows that such court was without jurisdiction, assuming that he is not estopped or barred from doing so. The proposal assumes that in such cases the same process should be available as where a similar action was originally commenced in this Commonwealth. The policy factor is the principle that obligors should not escape alimony, allowance or maintenance obligations by fleeing the jurisdiction any more than they should so escape support orders and that if the person or property of the obligor is found within the Commonwealth, jurisdiction should be exercised here to compel compliance and reciprocity can be hoped for where the situation is reversed.

The legal question dealt with is a familiar one and has been considered by the United States Supreme Court in a series of cases. See *Barber v. Barber,* 21 How. 582 (1858); *Lynde v. Lynde,* 181 U. S. 183 (1901); *Sistare v. Sistare,* 218 U. S. 1 (1909); and *Griffin v. Griffin,* 327 U. S. 220 (1946). For helpful discussions, see Jacobs, *The Enforcement of Foreign Decrees for Alimony,* 6 LAW AND CONTEMPORARY PROBLEMS 250 (1939), and FREEDMAN, LAW OF MARRIAGE AND DIVORCE IN PENNSYLVANIA (1st ed. vol. 2, 1944) § 798. Briefly, the above cases involve a consideration of the obligations imposed by the full faith and credit clause of the Constitution for the enforcement of a sister state's alimony decrees. The rule seems to be that a state *must* enforce the *final* judgments of a sister state which had jurisdiction. There has been some uncertainty, however, as to what comprises a *final* judgment. Accrued alimony payments which have been unpaid must be enforced. Future installments need not be enforced under full faith and credit compulsion but, if the decree is registered and adopted by the second state, may be enforced the same as any other decree of the court.

California, Washington, Oregon, Minnesota, Mississippi, Connecticut, and in some instances New York, all have procedure for adopting the foreign judgment as the court's own and issuing process thereon. To the above should be added those states having the *Uniform Enforcement of Foreign Judgments Act,* namely, Arkansas, Illinois, Missouri, Nebraska, Oregon (included above also), Washington (included above also), Wisconsin, and Wyoming. Thus, there is substantial authority for the proposal for registering and adopting foreign decrees.

Identical reasons of policy which justify the Uniform Reciprocal Enforcement of Support Act of May 10, 1951, P. L. 279, as amended, (62 P. S. § 2043.1 *et seq.*) also apply here as well. As a matter of fact, it may be reasonably argued that the definition of "support" in that act is so broad as to include alimony, allowance and maintenance decrees. However, the matter is of sufficient importance to require specific legislation. There does not appear to be any valid constitutional objection to this provision, as there appears to be no denial of due process in doing more than the full faith and credit clause requires, at least if the device is to make the foreign decree one's own as has been done in the states listed above.

ARTICLE VI

DECREE OF COURT; PROPERTY RIGHTS AND COSTS

SECTION 601. *Decree of Court.*—

(1) In all matrimonial causes, the court having jurisdiction may either dismiss the complaint or enter a decree of divorce from the bonds of matrimony, from bed and board, or annulment of the marriage. Where the court has jurisdiction over both parties, as provided in Section 402 of this act, it shall include in its decree an order determining and disposing of property rights and interests between the parties, custody and visitation rights, child support, and any related matters.

(2) In all matrimonial causes, the court shall have full equity power and jurisdiction and may issue injunctions or other orders which are necessary to protect the interests of the parties or to effectuate the purposes of this act, and may grant such other relief or remedy as equity and justice require against either party or against any third person over whom the court has jurisdiction and who is involved in or concerned with the disposition of the cause.

(3) Whenever a decree or judgment is granted which nullifies or absolutely terminates the bonds of matrimony, any and all property rights arising from an antenuptial agreement or which are dependent upon such marital relation are terminated, unless the court otherwise expressly provides in its decree. All duties, rights, and claims accruing to either of said parties, at any time heretofore, in pursuance of the said marriage, shall cease and determine and the parties shall severally be at liberty to marry again in like manner as if they had never been married, except where otherwise provided by law.

(4) In all matrimonial causes when a decree of annulment or divorce from the bonds of matrimony or from bed and board is to be entered, as provided in Section 402 of this act, the court shall determine and resolve any property rights to real or personal property which are in dispute and may award such property to the party lawfully entitled thereto, or apportion such property or order its partition, as equity and justice may require. The separate property of each party shall remain such. But where real or personal property purports to be subject to their joint ownership, whether as

tenants by entireties, as tenants in common, as joint tenants, or otherwise, and was conveyed to them jointly or was acquired by their joint efforts and expenditures, in any and all such cases, the court may order the equitable distribution of such property and where necessary proceed with the partition of such real or personal property in the same manner as is provided for in the event of divorce by the Act of May 10, 1927, P. L. 884, Sections 1-4, as amended by the Act of May 17, 1949, P. L. 1394.

Comment: 1. The first paragraph is intended as a substitute for Section 55 of the 1929 Act, as amended by the Act of December 30, 1959, P. L. 2055, Section 4, (23 P. S. § 55). The purpose is to determine finally in one action, so far as possible, all matters relating to dissolution of a marriage. The reasons which support the change in Section 402 apply here too. This section is also intended to tie together Section 402 and Sections 502-507, dealing with alimony, alimony pendente lite, and allowance. The reason for the last sentence of Subsection (1) is that the Act of May 17, 1949, P. L. 1394, (68 P. S. § 501 *et seq.*) does not expressly provide for the partition of personalty, although it has been construed by court decision to permit partition of personal property held by entireties. This change provides statutory sanction for the present practice.

2. Subsection (2) is intended to give emphasis to the equity power and jurisdiction of the court and to make sure that it has effective power to deal with any problem which arises during the course of litigation, even if a third person is involved. For example, an injunction might issue against a corespondent restraining conduct which was interfering with attempts at reconciliation.

3. Subsection (3) deals with the effect of the decree upon rights, duties, and claims dependent upon a continuing marital relation. At present there is no statute which specifically states in precise language that property rights are terminated upon divorce or annulment, although such may be inferred from Section 55 of the 1929 Act (23 P. S. §55). A specific provision to that effect is contained in this section.

4. There is some uncertainty as to the effect of divorce upon antenuptial and postnuptial agreements. FREEDMAN, MARRIAGE AND DIVORCE IN PENNSYLVANIA (1st ed. vol. 2, 1944), § 713, takes the position that divorce has no effect upon antenuptial agreements which remain in effect despite the decree. A note on *Antenuptial Agreements in Pennsylvania,* in 55 Dick. L. Rev. 382

(1955), reports that there are at least three views upon this subject. One view is that divorce does not extinguish an antenuptial agreement, in the absence of any provision to that effect, unless the agreement is otherwise void. *Muhr's Estate,* 59 Pa. Superior Ct. 393 (1915), seems to support this view. The opposite position is that a party's rights depend not upon the agreement but upon the marriage which was contemplated, and hence if the marriage is dissolved, the agreement is terminated. This "failure of consideration" approach is adopted by *Seuss v. Schukat,* 358 Ill. 27, 192 N.E. 668, (1934) 95 A.L.R. 1461. See also 47 A.L.R. 473. The language of this section and of Section 55 of the 1929 Act, that upon divorce "all and every of the duties, rights, and claims accruing to either of the said parties, at any time heretofore, in pursuance of the said marriage shall cease and determine . . . " might be construed to mean that divorce terminated antenuptial agreements. The third or intermediate position is that a party who was at fault in providing grounds for divorce may not enforce an antenuptial agreement. See *Southern Ohio Savings Bank & Trust Co. v. Burkhart,* 148 Ohio St. 149, 74 N.E. 2d 67 (1947), and *York v. Ferner,* 59 Iowa 487, 13 N.W. 630 (1882), which refused to permit a wrongdoer to enforce an antenuptial contract.

This provision is included so that there may be certainty as to the effect of divorce or annulment upon antenuptial agreements. Since the parties at the time of entering into the agreement contemplated a continuing marriage and in essence the marriage was the consideration for the agreement, the preferable view is that divorce terminates the agreement. This does not mean that the court may not, in proper cases, award an allowance or alimony. Moreover, terms of such an agreement may be relevant in determining property rights as between the parties.

Where one party, usually the wife, waives her right to support and maintenance, such waiver should be a factor for the court to consider. A difficult problem is presented where a man agrees to marry a woman in order to give their baby a name if the wife agrees to waive her right to support or alimony. Perhaps most states have regarded such agreements void as against public policy, although other jurisdictions, notably Ohio, have sustained them. A strong argument for upholding such waivers is made by Judges Nochem S. Winnet and Wendell B. Gibson in their brochure on FAMILY LAW (1952), published by the American Law Institute in its series on "Continuing Legal Education." The social interest in encouraging the legitimation of children, wherever possible, would seem

more important than the theoretical sanctity of the duty of a husband to support a wife, at least where the wife waives such right. Pennsylvania courts have had difficulty with the problem created by such marriages of "convenience." See *Commonwealth ex rel. Contino v. Contino,* 72 D. & C. 550 (1955), and compare *Osgood v. Moore,* 38 D. & C. 263 (1941). It is recognized that there are reasonable arguments each way as to whether waiver of support should be valid in such cases, but it appears that the balance favors encouraging legitimation.

Subsection (4) provides for the resolution of property disputes upon annulment or divorce. Reference is made to Section 402 of the code, which gives common pleas jurisdiction over consolidated actions. Reference is also made to the existing provision regarding partition of property held by entireties in the event of divorce. (Act of May 10, 1927, P. L. 884, §§ 1–4, as amended by the Act of May 17, 1949, P. L. 1394, 68 P. S. §§ 501–504). The procedure for partition provided for in the latter act is extended to cases where the decree is for annulment or divorce from bed and board. It is appreciated that tenancy by entireties is strictly limited to lawful spouses and that where there is an annulment by hypothesis there could be no such tenancy. It is also appreciated that Pennsylvania has held that where there was what purported to be a conveyance to tenants by entireties to unmarried grantees the estate actually conveyed was a joint tenancy with right of survivorship: *Maxwell v. Saylor,* 359 Pa. 94, (1948), criticized in 22 Temple L.Q. 228 (1948). This provision does not change the existing rule that a lawful marriage is a condition precedent to tenancy by entireties. Nor does this section purport to change the decision in *Maxwell v. Saylor.* This section is intended to be authorization for the court to resolve property disputes. The separate property of each party remains such. But where real or personal property is in some form of joint ownership, because it was conveyed to the parties in some such form, or was acquired by their joint efforts or expenditures, then the court may award such property, or apportion it, or order its partition, as equity and justice may require. Where partition is necessary, the existing statutory procedure provided for by the above mentioned Act of 1927 will be utilized. Where the property is held by entireties, there will be no change. By analogy, such procedure will be extended to joint ownerships which are not tenancy by entireties, *e.g.,* in an annulment decree where the parties may hold as joint tenants. It should also be noted that subsection (4) expressly incorporates and states the decisional law to the effect

that partition is available for personal as well as real property. Finally, property acquired by joint effort or expenditures is expressly made subject to partition so that equity and justice may be done where a wife or putative wife (in an annulment action) should be entitled to a share of the property.

SECTION 602. *Disposition of Realty and Personalty After Termination of Marriage.*—Unless otherwise provided by the court, whenever a decree of annulment, or divorce from the bonds of matrimony or from bed and board is decreed by the court of competent jurisdiction, both parties whose marriage is so terminated or affected, shall have complete freedom of disposition as to their separate property and may mortgage, sell, grant, convey, or otherwise encumber or dispose of such realty or personalty, whether such separate property was acquired before, during, or after coverture, and neither need join in, consent to, or acknowledge any deed, mortgage, or instrument of the other, and after such annulment or divorce from the bonds of matrimony or from bed and board, neither shall be deemed to have any dower or curtesy interest or statutory share in the real estate of the other.

Comment: This section is new and amplifies the provisions of the Act of April 11, 1927, P. L. 181, Section 1, No. 151, (48 P. S. § 117a). It logically belongs in a divorce code, rather than in a marriage code. Section 117a above covers only divorce from bed and board and makes no reference to annulment or divorce from the bonds of matrimony. The change adds annulment or divorce from the bonds of matrimony so that in one section in the code the matter is clearly set forth, although the addition is merely declaratory of existing common law. The purpose is to facilitate freedom of disposition where the marriage has been terminated, regardless of the manner of termination, and to preclude the necessity of having the other party join in such disposition. It is also specified that any such termination of the marriage cuts off any dower, curtesy or statutory share interest of the other spouse. The Act of 1927, *supra,* has been construed as cutting off a husband's curtesy interest (or statutory share) and it should work both ways. See *Scaife v. McKee,* 298 Pa. 33, (1929). It is also recognized that where a court granting a decree may wish to order support, alimony, or an allowance, or where a property settlement agreement is involved, it may be necessary for the court to make an order regarding the separate property of a spouse, and this section is worded so that this may be done.

SECTION 603. *Injunction Against Disposition of Property Pending Suit and Decrees Rendering Fraudulent Transfers Null and Void.*—Where it appears to the court that a party is about to remove himself or his property from the jurisdiction of the court or is about to dispose of, alienate, or encumber property in order to defeat an alimony, alimony pendente lite, allowance, child support, or similar award, an injunction may issue to prevent such removal or disposition and such property may be attached as provided by the Pennsylvania Rules of Civil Procedure. The court may also issue a writ of ne exeat to preclude such removal and may require either or both parties to submit an inventory and appraisement of all property owned or possessed at the time action was commenced. Any encumbrance or disposition of property to third persons who had notice of the pendency of the matrimonial action or who paid wholly inadequate consideration for such property may be deemed fraudulent and declared null and void.

Comment: This section is new and is intended to take care of the situation where a recalcitrant husband (or wife) attempts to dispose of or encumber property and thereby defeat the allowance of alimony or other award. The section provides for an injunction to preclude such action (and a writ of *ne exeat* which is now available) and also allows such a disposition to be declared fraudulent and null and void where the third person had notice of the pending case or a wholly inadequate (or no) consideration was paid. The following jurisdictions have one or both of these provisions: Alaska, Arizona, District of Columbia, Florida, Georgia, Kansas, Kentucky, Louisiana, Massachusetts, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Abstracts of statutes from these states appear in Vernier and Hurlbut, *The Historical Background of Alimony Law and Its Present Structure,* 6 LAW AND CONTEMPORARY PROBLEMS 197, at 209–210 (1939). Since the above listing was compiled in 1939, other states may have enacted similar statutes and the provisions in the named states may have been modified or repealed.

SECTION 604. *Costs.*—The court may award costs to the party in whose favor the order or decree shall be entered, or may order that each party shall pay his or her own costs, as to it shall appear just and reasonable.

Comment: This section is based on Section 56 of the 1929 Act (23 P. S. § 56).

ARTICLE VII

ATTACKS UPON DECREES; APPEALS; PLAINTIFF AS A COMPETENT WITNESS; RULES OF COURT AND FOREIGN DIVORCES

SECTION 701. *Limitations on Attacks Upon Decrees; Laches.* —The validity of any decree of divorce or annulment issued by a court of common pleas of this Commonwealth shall not be questioned, except by appeal, in any court or place in this state after the death of either party to such proceeding and if it is shown that a party who subsequently attempts to question the validity of such a decree had full knowledge of the facts and circumstances later complained of, at the time of issuance of said decree, or failed to take any action, despite such knowledge, within two years after the date of such decree, said party shall be barred from questioning such decree and it shall be deemed valid in all courts and places within this Commonwealth.

Comment: This is new and is intended to place an appropriate limitation upon collateral attacks upon divorce decrees. Statutes of limitations are placed upon most causes of action in order to avert stale claims and to establish some certainty and finality in legal affairs. The same policy applies with greater force in the case of divorce and annulment. Certainty as to marital status is of the utmost importance. There have been several cases in Pennsylvania, and many elsewhere, where an attempt is made years later to overturn a divorce or annulment decree. Typically, the contest is between alleged wives over the property of the deceased husband. This section would bar a collateral attack by the first wife in such a case. It would also bar such collateral attack or an attempt to vacate the decree where the party slept on her rights and give a statutory basis for the familiar doctrine of laches. It is not intended that the section eliminate the "term rule" and where the grounds of attack must be raised at the same term of court the party would be bound by that rule as distinguished from the proposed statute.

SECTION 702. *Opening or Vacating Divorce Decrees; Same or Later Terms; Effect of Fraud.*—A motion to open a divorce decree

may be made only at the same term of court in which such decree was rendered and not thereafter. Such motion may lie where it is alleged that the decree was procured by intrinsic fraud or that there is new evidence relating to the cause of action which will sustain the attack upon its validity. A motion to vacate a decree or strike a judgment alleged to be void because of extrinsic fraud, lack of jurisdiction over the subject matter or because of a fatal defect apparent upon the face of the record, must be made within five years after entry of the final decree. Intrinsic fraud is such as relates to a matter adjudicated by the judgment, including perjury and false testimony, whereas extrinsic fraud relates to matters collateral to the judgment which have the consequence of precluding a fair hearing or presentation of one side of the case.

Comment: This section reflects present Pennsylvania cases as interpreted by FREEDMAN, MARRIAGE AND DIVORCE IN PENNSYLVANIA (1st ed. vol. 2, 1944) § 719.

SECTION 703. *Appeals.*—Either of the parties in any suit or action for divorce or annulment may appeal therefrom to the Superior Court, in the manner provided by law for such appeals, and the said appeal shall be prosecuted in the usual manner, and the Superior Court shall transmit the record, with the judgment thereon, with all the proceedings, as in other cases, to the court below to be carried into effect.

But where a defendant in any proceeding for divorce or annulment files with the prothonotary of the said court an affidavit that such appeal is not taken for the purpose of delay, but because the appellant believes he or she has suffered injustice by the decree from which he or she appeals, and that by reason of his or her poverty he or she is unable to furnish the required bail, such defendant shall be entitled to take such appeal the same as if the required bail had been given.

Comment: This is based on Section 60 of the 1929 Act (23 P. S. § 60) with the addition of "annulment actions."

SECTION 704. *Plaintiff a Competent Witness.*—In all proceedings for divorce, the plaintiff shall be fully competent to prove all the facts, though the defendant may not have been personally served with a complaint or rule to take depositions, and may not be

residing within this Commonwealth, but has been served only by publication as provided by the Pennsylvania Rules of Civil Procedure.

Comment: This is based on Section 50 of the 1929 Act (23 P. S. § 50) to which is added the reference to Pennsylvania Rules of Civil Procedure, intended as a cross reference.

SECTION 705. *Rules of Court.*—The several courts hearing matrimonial causes are hereby authorized to make and adopt such rules and practices as may be necessary to carry this act into effect which are not inconsistent with the Pennsylvania Rules of Civil Procedure, and to regulate proceedings before masters, and to fix their fees.

Comment: This is based on Section 66 of the 1929 Act (23 P. S. § 66) to which is added reference to the Pennsylvania Rules of Civil Procedure.

SECTION 706. *Res Adjudicata; Estoppel.*—The validity of any divorce or annulment decree granted by a court having jurisdiction over the subject matter may not be questioned by any party who was subject to the personal jurisdiction of such court except by such direct appeal as is provided by law. A party who sought and obtained such decree, financed or agreed to its procurement, or accepted a property settlement, alimony pendente lite, maintenance, or allowance pursuant to the terms of such decree, or who remarries after such decree, or is guilty of laches, is barred from making a collateral attack upon the validity of such decree unless by clear and convincing evidence it is established that fraud by the other party prevented him from making a timely appeal from such divorce or annulment decree.

Comment: This is new and spells out the rules regarding res adjudicata and estoppel. The prevailing view is that where a party had an opportunity to raise an issue—including one as to jurisdiction—and failed to do so, he is thereafter barred from collateral attack. Res adjudicata may apply to jurisdictional facts as well as other facts. *Sherrer v. Sherrer,* 334 U. S. 343 (1948), *Coe v. Coe,* 334 U. S. 378 (1948). When it is a decree of a sister state which is involved, full faith and credit compels such res adjudicata effect where jurisdiction could have been questioned. It would seem that a decree of our own courts should have comparable efficacy.

Estoppel is a matter which is somewhat uncertain and it is highly desirable to cover it by statute. *Richardson's Estate,* 132 Pa. 292, (1890), held that the party who procures a divorce decree is estopped from thereafter asserting its invalidity, especially where he thereafter remarries, or receives a financial benefit. So too where the defendant thereafter remarries. See *Holben's Estate,* 93 Pa. Superior Ct. 472 (1928). It seems that in Pennsylvania estoppel requires affirmative conduct and does not operate against the Commonwealth to bar criminal prosecutions. See FREEDMAN, MARRIAGE AND DIVORCE IN PENNSYLVANIA (1st ed. vol. 2, 1944) § 797. This section incorporates the case law upon the subject.

SECTION 707. *Recognition of Foreign Divorces; Presumptions.* —An ex parte divorce from the bonds of matrimony obtained in another jurisdiction shall be of no force and effect in this Commonwealth, if both parties to the marriage were domiciled in this Commonwealth at the time the proceeding for the divorce was commenced. Proof that a person obtaining an ex parte divorce from the bonds of matrimony in another jurisdiction was (a) domiciled in this Commonwealth within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this Commonwealth within eighteen months after the date of his departure therefrom, or (b) at all times after his departure from this Commonwealth and until his return maintained a place of residence within this Commonwealth, shall be prima facie evidence that the person was domiciled in this Commonwealth when the divorce proceeding was commenced. Otherwise, the burden for impeaching the validity of a foreign divorce decree shall rest upon the assailant and prima facie validity shall be accorded to divorce decrees of sister states.

Comment: This is new and is an adaptation of the *Uniform Divorce Recognition Act* which is in effect in California, Louisiana, Nebraska, New Hampshire, North Dakota, Rhode Island, South Carolina, Washington and Wisconsin. The Uniform Act, however, has been limited to *ex parte* foreign decrees, because its application to a case where there was personal jurisdiction over both parties would be of doubtful constitutionality. See *Coe v. Coe,* 334 U. S. 378 (1948) and *Sherrer v. Sherrer,* 334 U. S. 343 (1948). This section safeguards the legitimate interests of the state which once was the matrimonial domicile while at the same time stressing the

normal duty placed upon the party who attacks a decree of a sister state under the Full Faith and Credit Clause and as construed by such cases as *Esenwein v. Commonwealth,* 325 U. S. 279 (1945). This section reflects case law on the subject, yet specifies presumptions which may assist the courts in adjudicating the facts.

ARTICLE VIII

MISCELLANEOUS PROVISIONS

SECTION 801. *Records of Conviction of Adultery.*—When the defendant in any action of divorce shall have been convicted and sentenced for adultery, the records of the said conviction shall be received in evidence on any application for a divorce.

Comment: This is based on Section 51 of the 1929 Act (23 P. S. § 51) eliminating "by the injured libellant" because of the elimination of "innocent and injured" spouse requirement in this code.

SECTION 802. *Marriage Upon False Rumor of Spouse's Death.*—

(1) The remarriage of a spouse who has obtained a license to marry and a decree of presumed death of the former spouse as provided in Section 210 of the Marriage Code shall be valid for all intents and purposes as though the former marriage had been terminated by divorce from the bonds of matrimony, and any and all property of the presumed decedent shall be administered and disposed of as provided by the Fiduciaries Act of 1949, as amended.

(2) Where a remarriage has occurred upon false rumor of the death of a former spouse, in appearance well founded, but there has been no decree of presumed death, the remarriage shall be deemed void and subject to annulment by either party to such remarriage as provided by Section 303 of this act and the returning spouse shall have cause for divorce as provided in Section 301.

(3) Where the remarriage was entered into in good faith, neither party to such remarriage shall be subject to criminal prosecution therefor.

(4) The children of any such remarriage, regardless of whether or not a decree of presumed death of former spouse was obtained, shall be deemed the lawful and legitimate issue of the parties to the remarriage from the date of birth.

(5) If the former spouse dies or procures a divorce the parties to the remarriage shall be deemed to be lawfully married from the date of such death or decree, as provided in Section 221 of the Marriage Code, and any children born to such parties shall be held to be their legitimate issue from date of birth, whether born before or after removal of the impediment.

Comment: This section is intended to tie together the several provisions of the proposed Marriage Code and the proposed Divorce Code which deal with the problem of a second marriage where the first marriage has not been terminated by death or divorce. Subsection (1) is simply a statement of the provision which appears in Section 210 of the proposed Marriage Code (see 1953, August 22, P. L. 1344, § 8, 48 P. S. § 1–8) and which has been retained in the proposed Marriage Code, except that reference is made to administration and disposal of property of the presumed decedent in accordance with the *Fiduciaries Act* (1949, April 18, P. L. 512, §§ 1201–1205, 20 P. S. §§ 320.1201–320.1205). Subsection (2) provides that either party to the second marriage, where there was no decree of presumed death, may seek an annulment where the first spouse turns up alive, and that the latter may procure a divorce in such event. Subsection (3) retains, in different language, the present immunity to criminal prosecution where the second marriage was entered into in good faith, and Subsection (4) safeguards the legitimacy of children of the second marriage. Subsection (5) incorporates and restates Section 221 of the proposed Marriage Code, which deals with the effectuation of a lawful marriage after removal of impediment and is included so that there may be a cross reference thereto and to complete the integration of the several statutes.

The only matter of substance which has been affected by this section is that a returning spouse no longer has an option to reclaim the one who innocently remarried. Although the returning spouse should have grounds for divorce it is highly undesirable to extend a one-sided option regardless of the wishes of the other parties concerned. As provided in this code, if the parties to the first marriage wish to reunite, that may be done since the second marriage is void if there was no decree of presumed death, and moreover, either party to the remarriage may have it annulled. If the returning spouse does not want the former spouse back, a divorce is obtainable. This section rejects the alternative that the second marriage is only voidable, rather than void, and hence some added protection would be given to it in that its invalidity would have to be

declared in annulment proceedings. However, it is more logical to regard the second marriage as void so that the parties to the first marriage can more readily be reunited if that is what they wish to do.

Under this section, a spouse who remarries upon a false rumor does so at her peril if there is no decree of presumed death and the former spouse later turns up. This should encourage the procurement of such a decree and discourage remarriage without it. New York has adopted a similar legislative policy and it is in the public interest to induce a legal inquiry into the facts where a spouse is missing and unheard from. See Comment to Section 303 of proposed Marriage Code as to the qualified meaning of "void" and the interrelation between the pertinent provisions of the proposed Divorce Code and the proposed Marriage Code.

SECTION 803. *Divorced Woman May Resume Maiden Name; Notice of Intention; Evidence.*—It shall be lawful for any woman who has heretofore been or shall hereafter be divorced from the bonds of matrimony, or whose marriage is annulled, to retake and thereafter use her maiden name or her prior name. Every such woman who elects to resume her maiden name or her prior name shall file a written notice avowing such intention in the office of the prothonotary of the court in which such decree of divorce or annulment was entered, showing the caption and number and term of the proceeding in divorce or annulment, and duly acknowledged before a notary public. Where a woman has a decree of divorce or annulment granted to her or her husband in a foreign jurisdiction, a certified copy of such foreign divorce or annulment decree shall be filed with the prothonotary where the affiant resides, and thereafter such a woman desiring to resume either her maiden name or her prior name may file a written notice so to do by making full reference therein to the filing of the foreign divorce or annulment decree with the prothonotary of the county where the affiant resides. A copy of the written notice in either case, so filed, duly certified by the prothonotary, shall be competent evidence for all purposes of the right and duty of such woman to use such maiden name or her prior name thereafter.

Comment: This is based on the Act of May 25, 1939, P. L. 192, as amended by the Act of July 13, 1953, P. L. 449, (23 P. S. § 98), rephrased for clarification.

SECTION 804. *Privileged Communications Between Spouse and Marriage Counsellor, Psychiatrist, Clergyman or Other Such Confidant Inadmissible in Evidence.*—Communications of a confidential character made by a spouse to a marriage counsellor, psychiatrist, clergyman, or other such confidant, shall be privileged and inadmissible in evidence in any matrimonial cause unless the party concerned waives such immunity.

Comment: This provision is added in order to encourage persons who are involved in marital difficulties to seek help for the solution of their problems. Unless some such provision is enacted, there is no common law basis for privilege as to communications to marriage counsellors, although there may be an existing privilege insofar as clergymen are concerned and a limited privilege in the case of psychiatrists, who usually are doctors. Creation of a statutory privilege may dispel some hesitancy about resorting to counselling and better enable the members of this new professional group to do effective work. As pointed out in a Comment in 106 U. Pa. L. Rev. 266 (1957), there is an urgent need for some such provision, and the relationship between spouse and counsellor meets all of the traditional requirements for privileged communication as set out in 8 WIGMORE ON EVIDENCE 531. That is to say, (1) the communications originate in a confidence that they will not be disclosed, (2) the element of confidentiality is essential to a full and satisfactory maintenance of the relation between the parties, (3) the relation is one which in the opinion of the community ought to be sedulously fostered, and (4) the injury which would occur to the relation by the disclosure of communications is greater than the benefit to be gained by disclosure. The privilege is limited to matrimonial causes and is not extended to all cases. Further, under Section 201 of the proposed Divorce Code and Section 602 of the proposed Marriage Code, probation officers may serve the function of marriage counsellors. See those sections for the privilege which exists in cases where probation officers engage in counselling.

ARTICLE IX

REPEALS AND EFFECTIVE DATE

SECTION 901. *Repeals.*—

(1) Specific Repeals.—The following acts and parts of acts and all amendments thereof are repealed to the extent specified:

Sections VI and IX of the act approved the thirteenth day of March, one thousand eight hundred and fifteen (Pamphlet Laws 150) entitled, "An act concerning divorces," are repealed insofar as supplied by this act.

The act approved the 2nd day of May, A. D. 1929 (Pamphlet Laws 1237) entitled, "An act affecting marital relations; prescribing grounds and regulating proceedings for divorce and the annulment of bigamous marriages; and amending, revising and consolidating the law relating thereto," absolutely.

Section 1 of the act approved the 25th day of May, A. D. 1939 (Pamphlet Laws 192) entitled, "An act authorizing women who have been divorced from the bonds of matrimony to retake and use their maiden names; and making certified copies of their election evidence in all cases," absolutely.

(2) General Repeal.—All other acts and parts of acts, general, local, and special, are repealed insofar as they are inconsistent herewith.

SECTION 902. *Effective Date.*—This act shall take effect on the first day of January, ——.