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By Samuel Van Pelt*

No Fault Divorce: A Re-examination of Nebraska Law

I. INTRODUCTION

Nebraska lawyers and judges have now had approximately two and a half years' experience under the no fault divorce law.¹ During that period, the law has been the subject of scholarly comment,² legislative modification,³ and judicial interpretation, not to mention day-to-day scrutiny and testing by divorce lawyers and trial judges.

Although domestic relations law will always be changing to reflect current social and economic conditions, it is fair to say that the no fault law has undergone its initial testing. It may be anticipated that the law will remain basically in its present form in the years ahead. With few exceptions, the law has been favorably received by bench, bar and litigants, and there is no serious movement within the state to return to the fault concept of divorce. Thus, it is appropriate to comment on the daily operation of the present law and analyze legislative amendments and Nebraska Supreme Court interpretations.

II. PRE-TRIAL PROCEEDINGS

A. Application for Temporary Support and Fees

After filing the petition for dissolution, the first court proceeding is usually a hearing on the application for temporary allowances. The Nebraska statutes provide that the court may order either party to pay temporary support for the other party and their

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1. L.B. 820, 82d Neb. Leg., 2d Sess. (1972) became effective July 6, 1972, and now appears at Neb. Rev. Stat. §§ 42-347 to -79 (Reissue 1974).
2. Henderson, *Practice and Problems Under Nebraska's New Divorce Laws*, 52 NEB. L. REV. 1 (1972); Note, 7 CREIGHTON L. REV. 369 (1974); Note, *Alimony Awards Under No Fault Divorce Statutes*, 53 NEB. L. REV. 126 (1974).
3. L.B. 961, 83d Neb. Leg., 2d Sess. (1974); L.B. 1015, 83d Neb. Leg., 2d Sess. (1974).

minor children.⁴ It is further provided that the application shall be accompanied by a statement of the applicant's financial condition and, to the best of the applicant's knowledge, a statement of the other party's financial condition.⁵ The temporary support order may not be entered before three days notice of the hearing and after service has been accomplished, unless notice is waived. Section 42-357 originally provided that the order could not be entered until three clear days after notice of hearing. L.B. 1015 amended section 42-357 to provide that orders could not be entered "before three days."⁶ The intention of this amendment is not entirely clear, and section 42-357 should be further clarified by substituting "seventy-two hours" for "three days."

A statutory provision often overlooked by counsel in connection with temporary support applications is section 28-446.03, which specifies a support obligation of a stepfather for his stepchildren.⁷ Although the history of such provisions indicates they were designed to aid county attorneys in criminal support actions, the statute by its terms imposes civil liability as well. Thus, it would be proper for the court to allow temporary child support for a stepchild, even though the final decree cannot continue the support, since the stepparent relationship (and consequent support obligation) terminates when the decree becomes effective.⁸

Although section 42-359, which provides for submission of financial statements, does not specifically preclude personal testimony, trial courts are well-advised to determine temporary support applications by affidavit only. At this early stage of the divorce proceeding, the parties are usually hostile and a temporary support hearing is often their first confrontation after filing. Unless these facts are presented by affidavit, hostility may hamper an effective determination and disposition of the temporary support question.

There is an increasing tendency throughout the country to use schedules in determining the amount of temporary support payments. Although some courts closely follow these schedules,⁹ judges in Nebraska's Third Judicial District use a schedule as a guide, but will deviate from its provisions upon a showing of special

4. NEB. REV. STAT. § 42-357 (Reissue 1974).

5. *Id.* § 42-359.

6. See L.B. 1015 § 2, 83d Neb. Leg., 2d Sess. (1974), *amending*, NEB. REV. STAT. § 42-357 (Reissue 1974).

7. NEB. REV. STAT. § 28-446.03 (Cum. Supp. 1974).

8. See H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 6.2 at 189 (1968).

9. In Milwaukee County, Wisconsin, for example, the schedule is adhered to strictly. Attorneys simply present affidavits to a bailiff or other court clerk who makes the necessary computations and enters a support order for the court's signature.

circumstances. Any schedule should be reviewed at least annually, and adjusted based upon a sufficient change in the All Items Consumer Price Index.¹⁰ As domestic relations dockets become more congested, attorneys may expect greater use of such schedules and more abbreviated proceedings generally.

Nothing in the new law would appear to change the common law rule that a wife may legally obligate her husband for the necessities of life, in the absence of an award for temporary alimony. Where a temporary allowance has been decreed, however, a husband may not be held liable for debts for necessities of life incurred by the spouse.¹¹

B. Temporary Custody

The court may enter an ex parte order determining the temporary custody of any minor children of the marriage.¹² This is one of the court's broadest powers and although it is a necessary procedure in isolated instances, it should be used sparingly and with caution. Where time does not permit a full hearing, the trial court should set the application for temporary custody for hearing on affidavits, instead of proceeding ex parte. Only in cases of child abuse or gross neglect, or other instances where time simply does not permit delay, should the court change custody ex parte. The affidavits submitted by the parties should state, *inter alia*, who presently has custody of the minor, and who has had custody for most of the preceding six months. Unless a strong showing is made to the contrary, it is ordinarily in the minor's best interests to remain with the custodial parent during the proceedings to avoid uprooting him until a final determination is made. Many parties and attorneys wish to litigate the issue of temporary custody as fully as they would litigate permanent custody. However, since most contested divorce cases are heard from 60 to 120 days after filing, few custody questions are so critical that their resolution cannot be delayed until the final hearing.

C. Exclusion from the Premises

One of the most desirable modifications contained in the no fault law is the last sentence of section 42-357, which provides that

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10. The schedule used in the Third Judicial District was prepared from data received from the University of Nebraska Home Economics Department, actual cases, and United States military allotment schedules.
 11. See, e.g., *Acton v. Schoenauer*, 121 Neb. 62, 236 N.W. 140 (1931); *Wise Memorial Hosp. Ass'n v. Peyton*, 99 Neb. 48, 154 N.W. 838 (1915). For a more comprehensive discussion of this rule in other jurisdictions, see *Holiday Hosp. Ass'n v. Schwarz*, 166 So. 2d 493 (Fla. Dist. Ct. of App. 1964).
 12. NEB. REV. STAT. § 42-357(3) (Reissue 1974).

after motion, notice to the other party's attorney, and hearing, either party may be excluded from the family dwelling upon a showing that physical or emotional harm would otherwise result. This added the requirements of notice and hearing to the exclusion procedure. Further, it has eliminated the inequitable situation under the old law which caused a party, usually the husband, to come home from work and find that not only had he been sued for divorce but that he was prohibited by law to enter his own home, to visit his wife and children, or to collect his personal belongings.¹³ The new provision has worked well, and the notice requirement has had the practical effect of substantially decreasing the number of exclusion orders sought.

An order may be entered *ex parte* restraining either party from molesting or disturbing the peace of the other party.¹⁴ Because notice and a hearing are now required before a party may be excluded from the premises, this provision protects a party from harm pending the hearing. The temporary restraining order should be carefully restricted to the statutory language, and attorneys should not be allowed to broaden the scope of the statute by including unnecessary or excessive language.

Section 42-357 also protects property interests pending the hearing. Either party may be ordered *ex parte* to refrain from transferring or disposing of assets, except in the usual course of business or for necessities of life. Although an order may be entered *ex parte*, it remains in force for no more than ten days or until a hearing is held, whichever occurs first.

III. DISSOLUTION TRIAL

A. Uncontested Cases

In uncontested cases, the issues are relatively simple. The following jurisdictional prerequisites should be established before the hearing.

1. One of the parties must be a resident of the county in which the suit is brought.¹⁵
2. One of the parties must have actually resided in the state with the bona fide intention of making the state his permanent home for at least one year, unless the parties were married in the state and one party has resided in the state continuously from the time of the marriage.¹⁶

13. NEB. REV. STAT. § 42-309, repealed by L.B. 820 § 35, Neb. Laws (1972).

14. NEB. REV. STAT. § 42-357(2) (Reissue 1974).

15. *Id.* § 42-348.

16. *Id.* § 42-349. The constitutionality of this provision was upheld by the Nebraska Supreme Court in *Ashley v. Ashley*, 191 Neb. 824, 217 N.W.2d

3. The petition must contain certain allegations prescribed by statute.¹⁷
4. Service of process must have been accomplished either by personal service if within the state; or personal notice if out of the state; by publication subsequent to an order if the respondent's whereabouts are unknown; or by a voluntary appearance by the respondent.¹⁸
5. Sixty days must have elapsed since the date of service, the filing of the voluntary appearance, or the last date of publication.¹⁹

In a default or uncontested divorce it must be determined at the hearing that (1) the marriage is irretrievably broken, (2) every reasonable effort has been made to effect a reconciliation, and (3) the property settlement is not unconscionable.

If both parties state under oath that the marriage is irretrievably broken, or one party so states and the allegation is not denied by the other party, this is probably conclusive.²⁰ If either of the parties denies that the marriage is irretrievably broken, the matter

926 (1974). Further, the United States Supreme Court has recently sustained the validity of Iowa's one year residency requirement. *Sosna v. Iowa*, 95 S. Ct. 553 (1975). This should remove doubts concerning the validity of state residency requirements in this area. The Court reasoned that Iowa's durational residency requirement violated neither the equal protection nor due process clauses of the United States Constitution because the one year requirement did not involve an irrevocable loss of the right to obtain a divorce. Further, the Court found that Iowa had a public policy interest in matters concerning the custody and support of children and in avoiding the possibility of becoming a "divorce mill." Finally, the Court found a state interest in ensuring that divorce decrees would not be subject to collateral attack in other states on the basis that there was no bona fide domicile in Iowa at the time the divorce was granted.

17. NEB. REV. STAT. § 42-353 (Reissue 1974) requires that the petition include the following:
 - (1) The name and address of petitioner and his attorney;
 - (2) The name and address, if known, of respondent;
 - (3) The date and place of marriage;
 - (4) The name and date of birth of each child whose custody or welfare may be affected by the proceedings;
 - (5) If the petitioner is a party to any other pending action for divorce, separation, or dissolution of marriage, a statement as to where such action is pending;
 - (6) A statement of the relief sought by petitioner, including adjustment of custody, property, and support rights; and
 - (7) An allegation that the marriage is irretrievably broken.
18. *Id.* § 42-348.
19. L.B. 1015 § 3, 83d Neb. Leg., 2d Sess. (1974), amending NEB. REV. STAT. § 42-363 (Reissue 1974).
20. NEB. REV. STAT. § 42-361(1) (Reissue 1974).

should not proceed as a default, and should be set for hearing as a contest. Although at an uncontested hearing some statement of the specific problems burdening the marriage is helpful to the court, particularly in determining whether efforts to effect a reconciliation have been made,²¹ such a statement is probably not necessary in determining whether the marriage is irretrievably broken, as long as one of the parties so states under oath.

Although the court must find that all reasonable efforts to effect a reconciliation have been made before a decree of dissolution may be entered, this finding is no longer necessary to waive the six months waiting period.²²

Despite the statutory language, the Nebraska Supreme Court has made at least one exception. In *Condreay v. Condreay*²³ the court stated that no effort to reconcile need be made where one of the parties is incarcerated for a period of time and it would be unreasonable to attempt reconciliation under the circumstances. How far beyond its facts *Condreay* may be extended remains to be seen, as each case should be determined upon its own facts. The court should consider, among other things, the length of the marriage, how long problems have existed, how much time has passed since the filing of the action and since the most recent separation of the parties, whether minor children are involved, whether the parties have been previously separated, and any specific attempts at reconciliation such as marriage counseling, discussion among parties, family and friends, trial separations, and trial reunions.

After excepting terms providing for the support and custody of minor children, section 42-366(3) states that the property settlement agreement "shall be binding upon the court unless it finds, after considering the economic circumstances of the parties, and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the agreement is unconscionable."²⁴ In spite of the broad authority conferred on the trial court by this statute, the court should not substitute its judgment for that of the parties or their counsel. A settlement is not unconscionable merely because it results in a "bad deal" for one party.

There are at least two instances, however, where the settlement should be scrutinized. First, where one party is not represented by counsel the court should examine the merits of the settlement to determine whether one party has overreached the other. Sec-

21. *Id.* § 42-360.

22. *Id.*

23. *Condreay v. Condreay*, 190 Neb. 513, 209 N.W.2d 357 (1973).

24. NEB. REV. STAT. § 42-366(2) (Reissue 1974).

ond, where the parties agree to provide little or no child support, there is often an unwritten understanding that the wife will apply for public assistance in the norm of Aid to Families with Dependent Children ("AFDC"). Such a practice is unconscionable as to taxpayers and violates public policy. Therefore, it is a legitimate concern of the court. It can be prevented if the court, in every case where the agreed-upon child support falls below minimum levels, asks the wife, under oath, whether she is receiving or intends to apply for AFDC benefits. If she admits that she intends to seek welfare benefits, and the husband's earning capacity warrants the contribution of a larger sum, the agreement should be disapproved. If she denies that she intends to apply for these benefits, the local welfare office should be alerted to notify the court if application is made. Where the husband's earning capacity does not appear to warrant a larger payment, or if the evidence discloses that the wife is capable of supporting the child by independent means, then the agreement should be approved.

B. Contested Cases

In contested cases, just as in uncontested cases, the court must find that the marriage is irretrievably broken and that every reasonable effort to effect a reconciliation has been made. If a dispute exists, a determination must be made regarding alimony, division of property, and custody and support of minor children.

The statute sets forth conditions for determining upon the statements of the parties whether there has been an irretrievable breakdown of the marriage. Section 42-361 provides:

(1) If both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken, or one of the parties has so stated and the other has not denied it, the court, after hearing, shall make a finding whether the marriage is irretrievably broken.

(2) If one of the parties has denied under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the petition, and the prospect of reconciliation, and shall make a finding whether the marriage is irretrievably broken.²⁵

The distinction between subparagraph one and subparagraph two would appear to be one without a rational difference. Subparagraph one should either provide that the court must or shall find the marriage to be irretrievably broken under the articulated conditions, or the entire section should be repealed and replaced with the following:

25. *Id.* § 42-361.

The court, after hearing, shall consider all relevant factors, including the circumstances that gave rise to the filing of the petition and the prospect of reconciliation, and shall make a finding whether the marriage is irretrievably broken.

The Nebraska Supreme Court has not stated precisely what constitutes an irretrievable breakdown and such a statement may not soon be forthcoming, because this issue is very seldom contested and appealed. However, as a practical matter, if one party insists that the marriage is irretrievably broken, even if the other attempts to contradict this assertion, most courts would find the marriage to be irretrievably broken, particularly after a contested trial.²⁶

As in uncontested cases, before a dissolution decree may be entered, the court must find that every reasonable effort to effect a reconciliation has been made and has failed. The same considerations discussed above apply to contested cases.²⁷

1. *Division of Property and Alimony*

Section 42-351 gives the court jurisdiction to render judgments concerning the division of property. Until the passage of L.B. 1015,²⁸ little was said in the statute regarding marital property, except that settlement agreements had to be approved by the court.²⁹

L.B. 1015 inserts the words "division of property" into section 42-365, which previously related only to alimony. This amendment is significant because it places the division of property on an identical basis with the awarding of alimony, and makes the criteria for awarding alimony applicable to the division of property as well. The Nebraska Supreme Court recently held in *Sullivan v. Sullivan* that "[t]he division of property and alimony may be considered together."³⁰ Both the statute and *Sullivan* indicate that attorneys and trial courts may treat alimony and division of property as part of the same question, rather than separately, as has been the practice in the past.

The division of property in contested trials in the Third Judicial District is expedited by entering a pretrial order which requires the parties to set forth relevant information regarding all items of real and personal property, as well as the income of each of the

26. For a general discussion of cases from other jurisdictions setting forth criteria for determining "irretrievable breakdown," see ANNOT., 55 A.L.R.3d 581 (1974).

27. See text accompanying notes 22 and 23 *supra*.

28. See note 6 *supra*.

29. NEB. REV. STAT. § 42-366(4) (Reissue 1974).

30. 192 Neb. 841, 843-44, 224 N.W.2d 542, 543 (1975).

parties for the preceding three years. Responses to the pretrial order are marked as exhibits and offered at the trial, and opposing counsel may cross-examine the parties regarding the information contained in the exhibit. Evidence adduced in this manner, rather than orally by question and answer, saves considerable trial time and is likely to be more accurate.

Section 42-365 explicitly sets forth the criteria to be considered in awarding alimony.³¹ These criteria are largely a codification of the common law.³² One criterion recently added by the legislature, that of "interruption of personal careers or educational opportunities" reflects the sentiment expressed in *Magruder v. Magruder*.³³ This standard would appear to be directed toward domestic situations where the parties marry at an early age without completing their educations or professional careers. The wife works to support the family, while the husband completes his education and advances professionally. Ultimately, the husband feels that he has outgrown his wife and wishes to dissolve the marriage.

Although *Magruder* has been criticized for interjecting the fault concept into the no fault law,³⁴ the majority opinion reflects the concern now embodied in the statute that educational and professional sacrifices made by the wife should be compensated. This criterion does not necessarily punish the husband for his fault in desiring to dissolve the marriage. In such a case it is logical to allow alimony for a specific period of time to enable the wife to reestablish herself and complete the education that was interrupted by the marriage.

A similar concept was recently stated in *Krejci v. Krejci*,³⁵ which involved a marriage late in life and of relative short duration. The court allowed the wife a lump sum, not expressly referred to as alimony, to "reestablish herself."³⁶ This holding, which compensates the wife for the interruption of the professional ca-

31. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment without interfering with the interest of any minor children in the custody of such party.

Id. § 42-365.

32. See *Mandelberg v. Mandelberg*, 187 Neb. 844, 195 N.W.2d 148 (1972); *Fry v. Fry*, 186 Neb. 521, 184 N.W.2d 636 (1971).

33. 190 Neb. 573, 209 N.W.2d 585 (1973).

34. See Note, 53 NEB. L. REV. 126 *supra* note 2; see also *Magruder v. Magruder*, 190 Neb. 573, 578, 209 N.W.2d 585, 588 (1973) (White, C.J., dissenting).

35. 191 Neb. 698, 217 N.W.2d 470 (1974).

36. *Id.* at 702, 217 N.W.2d at 472.

reer and life that existed before her marriage, is consistent with both the new statutory language and with *Magruder*.

Since *Magruder*, several alimony cases have been decided which should allay the fears of *Magruder*'s staunchest critics.³⁷ In *Barnes v. Barnes*³⁸ the court rejected the wife's claim for increased alimony based upon decisions existing prior to the enactment of the no fault law, stating that the court is "not necessarily bound" by cases decided under the prior law. This decision appears to strengthen the criteria for awarding alimony specifically enunciated in the statute.

The alimony question is related to the women's liberation movement, and particularly to its primary objective of achieving social and economic equality between the sexes. Until recently, marriage laws reflected a traditional or "unliberated" view of women by allowing them to benefit from several presumptions. The laws assumed that mothers were usually more fit than fathers to have custody of children; that wives had no money to maintain a divorce action or pay their attorney's fee; and that women were incapable of economic independence and therefore entitled to a life-time annuity called alimony.

When women achieve economic equality with men, the logic for these preferences will diminish or disappear. The presumption regarding custody of minors has already fallen by the wayside.³⁹ In the current transitional period, unliberated wives who stay at home with children, taking care of the house, and who have developed neither a profession nor earning capacity, receive more substantial alimony awards, while wives with careers and earning capacity receive little or no alimony. Further, liberated wives may well be ordered to pay alimony to their husbands when circumstances warrant it.

2. Custody and Support of Minors

The new no fault law⁴⁰ did not substantially change prior statutory or common law relating to custody and support of minors. As amended by L.B. 1015, however, section 42-364 now sets forth crite-

37. See, e.g., *Young v. Young*, 192 Neb. 735, 224 N.W.2d 361 (1974); *Barnes v. Barnes*, 192 Neb. 295, 220 N.W.2d 22 (1974); *Reisig v. Reisig*, 191 Neb. 612, 216 N.W.2d 731 (1974); *Seybold v. Seybold*, 191 Neb. 480, 216 N.W.2d 179 (1974); *Casselmann v. Casselman*, 191 Neb. 138, 214 N.W.2d 278 (1974).

38. 192 Neb. 295, 220 N.W.2d 22 (1974).

39. L.B. 1015 § 4(c) (2), 82d Neb. Leg., 2d Sess. (1974), amending NEB. REV. STAT. § 42-364 (Reissue 1974).

ria which had not previously been codified, but which had generally been followed as part of the common law.⁴⁰ In addition, the Nebraska Supreme Court, with Chief Justice White writing for the majority, recently enunciated the following additional criteria:

Many factors may be considered in light of the particular circumstances of each individual case. The general considerations of the moral fitness of the parents, or respective environments offered by each parent, the emotional relationship between the children and their parents, their age, sex, and health, the effect on the children of continuing or disrupting an existing relationship, the attitude and the stability of character of each parent, and the capacity to furnish the physical care and education and needs of the children are some of many factors for the court to consider.⁴¹

All of these criteria should guide attorneys in preparing relevant evidence in custody cases, and will assist courts in determining custody issues.

In addition to adhering to the guidelines established by the statute and cases, additional information should be ascertained by the trial court pursuant to its own investigatory powers,⁴² if not submitted in evidence by the attorneys:

1. An evaluation of the physical and mental health of the minor and the proposed custodial parents.
2. A complete profile of the proposed custodians' social background including military service, employment, residence, earning capacity, social and recreational activities, and criminal conduct.
3. A detailed proposal for the minor's care by the proposed custodian and its relationship to the occupational and recreational activities of the proposed custodian, particularly respecting the amount and quality of personal supervision that will be devoted to the minor.

40. NEB. REV. STAT. § 42-364 (Reissue 1974) now provides:

(1) In determining with which of the parents the children, or any of them, shall remain, the court shall consider the best interests of the children, which shall include, but not be limited to:

(a) The relationship of the children to each parent prior to the commencement of the action or any subsequent hearing;
 (b) The desires and wishes of the children if of an age of comprehension regardless of their chronological age, when such desires and wishes are based on sound reasoning; and
 (c) The general health, welfare, and social behavior of the children.

41. *Christensen v. Christensen*, 191 Neb. 355, 358, 215 N.W.2d 111, 114 (1974).

42. NEB. REV. STAT. § 42-351 (Reissue 1974).

4. The history of the relationship between the proposed custodians and the minor.
5. The minor's preferences regarding custody.
6. The underlying motivations for custody on the part of each proposed custodial parent.

One of the most desirable provisions of the new law authorizes the appointment of an attorney to represent minor children, and gives him the power to investigate and call witnesses at the trial.⁴³ Although the trial court probably has always had an inherent power to appoint a guardian *ad litem* when this would be in the best interests of the minor, the new statute has resulted in greater use of this practice.

Where trained social workers are available, the appointed attorney should use their services for the investigatory work. Investigations can be conducted less expensively and usually more efficiently by a trained social worker, and the ethical problems which arise when an attorney is required to testify as a witness regarding his own investigation are avoided.⁴⁴

The investigation report, whether from a court-appointed attorney, a social worker, or both, is one of the court's most useful tools in determining the question of child custody. There are, however, evidentiary problems concerning the use of this report at trial, which have not been fully resolved by statute or court decision. Section 42-358 states that the attorney may make an independent investigation, but it does not expressly allow the investigation to be received into evidence over objections such as hearsay. When a report contains information damaging to one of the proposed custodians, counsel for such party is likely to make one of these objections.

The Nebraska Supreme Court has repeatedly stated that if the trial court does not expressly find or state that it considered an investigation report, there is a presumption that it was not considered if it is, in fact, incompetent evidence.⁴⁵ A more direct answer to the problem is found in *Schuller v. Schuller*.⁴⁶

The statute clearly authorizes the trial court, since the children are wards of the court, to make an independent investigation of the living conditions and the environment and care of minor children.

43. *Id.* § 42-358.

44. A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 5-102, E.C. 5-9, E.C. 5-10 (1969).

45. *See, e.g., Christensen v. Christensen*, 191 Neb. 355, 359, 215 N.W.2d 111, 114-15 (1974).

46. 191 Neb. 266, 268-69, 214 N.W.2d 617, 619-20 (citation omitted).

It contemplates that in a proper case such a report may be taken into consideration and given weight by the trial judge. It follows that the trial court, in such a case, should submit its report to counsel for examination and further hearing where it forms a basis for the conclusions and judgment entered as to the disposition of the children. In this case the District Court found that he [sic] did not rely upon the objectionable parts of the report, and it is the settled law of this state that there is a presumption that the court, trying a case without a jury, in arriving at a decision, will consider such evidence only as is competent and relevant, and the Supreme Court will not reverse a case so tried because other evidence was admitted, when there is material, competent, and relevant evidence admitted sufficient to sustain a judgment of the trial court.

In view of the statute and the supreme court interpretations to date, the best procedure is for the trial court to submit copies of all reports to counsel, and then state for the record whether the report will or will not be considered in the custody decision. If the court expressly states that the report will not be considered, nothing further need be done. But, if the court states that the report will be considered, each party should have an opportunity to submit rebuttal evidence, in accordance with *Schuller*. Then, the report should be marked as an exhibit by the minor's attorney, either before or after the opportunity to submit rebuttal evidence has been given, and offered as evidence.

If objection is then made to the report, counsel should be instructed to make specific objections to specific portions. If such portions contain incompetent evidence, the court should rule only on those portions rather than refuse to receive the entire report. From a practical standpoint, when counsel are given full opportunity to read the report and offer rebuttal evidence, they are less inclined to make objections. If no objections are made, the court may consider the report, regardless of its evidentiary competence. Above all, the trial court should be careful never to consider secret reports or investigations which have not been subjected to a procedure similar to that just described.

It is extremely beneficial in custody cases for the trial court to visit with the minors involved, preferably in chambers on a relaxed, informal basis. This should not be done, however, in the absence of a stipulation by counsel for all parties. Although the parties may not be willing to stipulate to a conference solely between the court and the minors, they might approve a conference in chambers, on or off the record, or even in the presence of counsel, but not in the presence of the parties. Any procedure which avoids the minors testifying in the courtroom in the presence of all parties and spectators is highly desirable; minors are open and candid in

direct proportion to the informality and confidentiality of the surroundings.

In troublesome custody cases, after the decree has been entered, it is often advisable to continue the involvement of the minor's attorney or the social worker, or both, on a supervisory basis.⁴⁷ A trial court has continuing jurisdiction, as well as a moral obligation, to see that minors are protected after the decree.⁴⁸

IV. POST-DECRETAL PROCEEDINGS

A. Petitions to Modify

A decree of dissolution may be modified or vacated by the district court within six months of its entry,^{48a} but that power does not survive an intervening order of the Supreme Court involuntarily dismissing an earlier appeal of the decree.^{48b} Before the no fault law, a modification of a decree could be initiated either by motion to modify or by formal petition.⁴⁹ The new law does not expressly provide for one procedure or the other, or specifically state that service of process is a prerequisite to such an action. However, section 42-365, discussing modification of orders for alimony, states "prior to the date of service of process on a petition to modify," implying that a modification should be initiated by a petition after service of process, rather than upon motion and notice as has previously been the case. If this was the intent of the legislature it should be clarified.

Because the court has continuing jurisdiction over the best interests of minors, and there is express statutory authority for modification of maintenance and custody orders, the most common petition to modify involves the custody and support of minor children.⁵⁰ The new law does not alter the preexisting common law in that a material change of circumstance since the decree was entered must be shown.⁵¹ However, the discovery of material facts which existed but were unknown to the trial court and the opposing party and could not have been ascertained with reasonable diligence, constitute a change of circumstance which the court may consider.^{51a} A material change in circumstance regarding the

47. See *Lewis v. Lewis*, 192 Neb. 266, 219 N.W.2d 910 (1974) (approving this procedure).

48. *Roach v. Roach*, 192 Neb. 268, 220 N.W.2d 27 (1974).

48a. NEB. REV. STAT. § 42-372 (Reissue 1974).

48b. *Dewey v. Dewey*, 192 Neb. 676, 223 N.W.2d 826 (1974).

49. NEB. REV. STAT. § 42-340 (Reissue 1960); *Hammond v. Hammond*, 103 Neb. 860, 174 N.W. 865 (1919).

50. NEB. REV. STAT. § 42-364 (Reissue 1974).

51. *Gray v. Gray*, 192 Neb. 392, 220 N.W.2d 542 (1974).

51a. *Bartlett v. Bartlett*, 193 Neb. 76, — N.W.2d — (1975).

amount of support to be paid is easier to prove than the change of circumstances necessary to provide the basis for changing custody. With the considerable inflation of recent years, most wives seeking increased child support have little difficulty in proving increased expenses in raising children, as well as increased earning power of the ex-husband.

The party seeking a change in custody must show a material change in circumstance, not simply that the change would be in the best interests of the minor children. In *Gray v. Gray*⁵² the Nebraska Supreme Court recently stated that remarriage is not a material change in circumstances, because the parties could and should have contemplated remarriage at the time of divorce. The court probably meant that remarriage, standing alone, is not a sufficient change in circumstance to warrant reconsideration of custody, but counsel and trial courts should take care not to extend *Gray* beyond its particular facts. On the contrary, remarriage of either parent, and particularly the relationship of the second spouse to the minor, whether positive or negative, is a relevant factor which could not be predicted or considered at the time the original decree was entered.⁵³ Generally, the Nebraska Supreme Court has been extremely reluctant to change custody where the present custodian is fit.⁵⁴

The new statute is explicit concerning modification of alimony payments. Except as to amounts which have accrued before the date of service of a petition to modify, alimony orders may be modified or revoked for good cause where alimony was not allowed in original decree, however, the decree may not be modified to award alimony.⁵⁵ To ensure the availability of alimony in the future, counsel representing the wife is well-advised to provide for nominal alimony in the original decree. An unqualified allowance of alimony in gross entered before July 6, 1972, whether payable immediately in full or periodically in installments, and whether intended fully as property settlement or allowance for support, or both, is not subject to modification.⁵⁶

The new law expressly provides that the decree may preclude or limit modification of the property settlement agreements, except those provisions concerning the support and custody of minor chil-

52. 192 Neb. 392, 220 N.W.2d 542 (1974).

53. *Erks v. Erks*, 191 Neb. 603, 216 N.W.2d 742 (1974).

54. *Fenner v. Strickland*, 192 Neb. 114, 219 N.W.2d 229 (1974); *Boyles v. Boyles*, 191 Neb. 67, 213 N.W.2d 729 (1974). Compare *Erks v. Erks*, 191 Neb. 603, 216 N.W.2d 742 (1974) (custody changed to mother).

55. NEB. REV. STAT. § 42-365 (Reissue 1974).

56. *Bryant v. Bryant*, 191 Neb. 539, 216 N.W.2d 162 (1974).

dren.⁵⁷ By negative inference, this language would seem to state that modification is available unless precluded by the decree. If so, the decisions indicate that modification requires a showing of a material change in circumstance not contemplated or foreseen by the parties.⁵⁸

B. Contempt Proceedings

After the petition to modify, the most frequently encountered post-decretal proceeding is the contempt citation for failure to comply with the decree or orders of the court. These proceedings most often relate to child support and visitation, although a contempt citation can be used to enforce any aspect of the court's order.⁵⁹

If a party violates a prior order, the adverse party should move for an order to show cause setting forth the time and place at which the party allegedly in violation must appear and present his version of the controversy. Although the order states that the respondent must show cause why he should not be held in contempt, the moving party usually has the burden of coming forth with the evidence. If the cited party offers neither evidence nor a satisfactory explanation, the court may find him in contempt only after a finding of "willful failure" to comply with the prior decree.⁶⁰

Even in cases where willful and contumacious failure to comply is found, the trial court should give the respondent a specified period of time to purge himself of the contempt by complying with the prior decree or to meet additional conditions imposed by the court. If a father is delinquent in his child support, the court should take this opportunity to order him to pay an additional amount in order to reduce the unpaid balance. If the cited party fails to meet any of the court-imposed conditions, thus failing to purge himself of the previously found contempt, he may then be punished for contempt. This punishment may consist of imprisonment for a specified period or until the order is obeyed, or a fine, or both.⁶¹ Finding a party in contempt is an extreme remedy, and incarceration should be used only as a last resort.

Few pieces of domestic relations legislation have stimulated greater comment than L.B. 961,⁶² which requires the clerk to sub-

57. NEB. REV. STAT. § 42-366 (7) (Reissue 1974).

58. Gray v. Gray, 192 Neb. 392, 220 N.W.2d 542 (1974).

59. For a discussion of enforcement of decrees, see Henderson, *supra* note 2, at 22-23.

60. Cain v. Miller, 109 Neb. 441, 191 N.W. 704 (1922).

61. Nebraska Children's Home Soc. v. State, 57 Neb. 765, 78 N.W. 267 (1899).

62. L.B. 961 83d Neb. Leg., 2d Sess. (1974), amending NEB. REV. STAT. § 42-358 (Reissue 1974).

mit to the district court a list of all persons delinquent in the payment of child support. The law further requires the court to appoint an attorney to initiate contempt proceedings within ten days and to prosecute offenders diligently. The law has been interpreted to apply only to decrees entered after July 6, 1972.⁶³ Even so limited, over 600 of these cases have been certified in Lancaster County alone and several thousand in Douglas County. The new law reflects the Legislature's concern over the impact of thousands of dollars of unpaid child support on the state welfare system.

C. Wage Earner Deductions, Support Accounting and Temporary Support

The legislature's concern over unpaid child support is also reflected in sections 6 through 17 of L.B. 1015⁶⁴ which set forth a procedure for withholding a portion of a parent's wages to apply toward child support. This may be done only after notice and hearing, and the court may withhold "such amount as shall reduce and satisfy the . . . arrearage."⁶⁵

The court may order an employer to refrain from firing the employee as a result of wage earner deductions.⁶⁶ This system is a desirable improvement over the use of garnishment or other collection proceedings, which in the past have often resulted in the supporting parent being fired from his job, and consequently losing his ability to support his children. Protective language should be included automatically in every order withholding wages. An application for withholding may be filed by any person having a direct interest in the welfare of the child.⁶⁷ Persons specifically named as having such an interest are a parent, legal guardian, court-appointed custodian, county attorney, his deputies or assist-

63. See OP. ATT'Y GEN., May 21, 1974. In response to the question of how far back in the records the Clerk of the District Court must go in fulfilling the requirements of a monthly report of all delinquent cases, the Attorney General answered:

We think the answer is supplied by section 42-379, R.S. Supp., 1972. It states in part that "Sections 42-347 to 42-379 shall apply to all proceedings commenced on or after July 6, 1972." It goes on to provide that those sections shall also apply to those actions pending on that date on which judgment had not yet been entered, as well as to judgments modified or on appeal after that date.

64. L.B. 1015 83d Neb. Leg., 2d Sess. (1974).

65. *Id.* § 2. The deduction is further limited to the weekly sum in excess of 30 times the currently existing minimum wage. The present sum is \$60 and will become \$69 in January 1976.

66. *Id.* § 6(5).

67. *Id.* § 7.

ants, and any welfare office employee.⁶⁸ The court itself is specifically prohibited from making such application.⁶⁹

Upon filing an application for a withholding order, a hearing must be held within three weeks.⁷⁰ The employer is served with a copy of the application, notice of the hearing and interrogatories which must be answered and filed three days before the hearing.⁷¹ If the court finds it has jurisdiction over the employer and the earnings in question, and further finds that the employee has not fully complied with the support order, it may enter the withholding order.⁷² This order may also provide for payment of the applicant's attorney fees.⁷³ The order may be revoked or modified when good cause is shown, and terminates automatically thirty days after the employee ends his employment.⁷⁴

An interesting aspect of L.B. 1015 is section 4(3)⁷⁵ which requires a custodial parent, after notice and hearing, to file a verified report stating the manner in which the support money has been expended. This provision is most desirable because it offers a vehicle for eliminating the use of support money by a custodial parent for personal items, children by prior or subsequent fathers, and other improper purposes, which through the years have caused considerable irritation and annoyance for the supporting parent. The availability of this remedy should also eliminate one excuse often advanced by fathers for nonpayment of child support.

Frequently, after a motion for new trial has been overruled, and before a notice of appeal and praecipe is filed, the wife will seek a continuation of temporary support pending appeal. Because the statute provides for the payment of temporary support during the "pendency of the action"⁷⁶ this has generally been interpreted to include final disposition on appeal, and the matter is largely within the trial court's discretion.⁷⁷

Regarding child support and alimony, which is payable until a certain date or until a person reaches a certain age, there is no harm in and every reason for allowing payment during the appeal. However, where alimony has been ordered in a lump sum or pay-

68. *Id.*

69. *Id.*

70. *Id.* § 8.

71. *Id.*

72. *Id.* § 11.

73. *Id.* § 12.

74. *Id.* § 15.

75. *Amending NEB. REV. STAT. § 42-364* (Reissue 1974).

76. *NEB. REV. STAT. § 42-367* (Reissue 1974).

77. *Magruder v. Magruder*, 190 Neb. 573, 209 N.W.2d 585 (1973); *Overton v. Overton*, 178 Neb. 267, 133 N.W.2d 7 (1965).

able for a fixed number of years, any payments made pending appeal should be deducted from the final award to avoid double payment.

V. CONCLUSION

As predicted by Professor Henderson,⁷⁸ the new law has in fact given the bench and bar more streamlined and efficient procedures for dissolving marital unions. The initial impact of the new law has been to increase the number of marriages dissolved.⁷⁹ Whether this is good or bad for our society remains to be seen. Even though the new law may have resulted in more dissolved marriages and broken homes, it has not resulted in the docket congestion that some anticipated. By eliminating fault evidence, the average length of a contested trial has been reduced substantially and more cases can be processed in less time. Also, more cases appear to be settled under the new law than the old law. This may be because the parties are prohibited from airing their dirty linen, and are more disposed to compromise their differences amicably. There is one exception to this, however; now the party primarily "at fault" feels free to contest matters of property or child custody, while under the old law he would have avoided the introduction of the damaging fault evidence and been more inclined to take whatever settlement his spouse would offer. Despite its imperfections, the no fault law is a good law, and with continued judicial interpretation and legislative refinement, it should become even better.

78. See Henderson, *supra* note 2, at 23.

79. Data regarding the number of divorce complaints filed in the Third Judicial District are collected in Table I.

Table I
Complaints Filed
Third Judicial District of Nebraska
January, 1972 through December, 1974

	Jan.- June, 1972	July- Dec., 1972	Jan.- June, 1973	July- Dec., 1973	Jan.- June, 1974	July- Dec., 1974
Complaints Filed	496	503	610	507	524	552