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# Practice and Problems under Nebraska's New Divorce Laws

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# PRACTICE AND PROBLEMS UNDER NEBRASKA'S NEW DIVORCE LAWS

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Change inevitably leaves in its wake a certain amount of disruption and uncertainty, and this certainly is no less true where entire statutory schemes are replaced with new codifications. Thus it is that lawyers and judges concerned with dissolution of marriages in Nebraska will experience some discomfort at being uprooted from the old and familiar in dealing with this area of family relations. Once the initial reaction has passed, however, it will be seen that the new law,[1] effective July 6, 1972, for the most part changes only the law in the books and leaves the law in practice relatively unmolested. The purpose of L.B. 820, the new divorce act, is to make the law more nearly conform to that in practice and to simplify and remove the antiquated provisions dealing with annulments, separations and divorce, many of which were initially passed before the turn of this century. While time will judge whether this objective has been achieved, the practicing lawyer and judge must prepare now to implement the new law as it exists. It is hoped that this article will facilitate and aid in that task as it attempts to outline the practice and point out some of the problems ahead.

## I. JURISDICTION

The power of the state to dissolve marriages has never really been challenged in this country since *Maynard v. Hill*[2] was decided by the United States Supreme Court in 1888. The federal courts having eschewed any responsibility for jurisdiction over divorces,[3]

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1. L.B. 820, 2d Sess., 82d Neb. Leg. (1972) (codified as NEB. REV. STAT. §§ 42-347 to 379 (Cum. Supp. 1972) ). This bill was introduced by Senators Waldron and Carpenter. In adopting one of the so called no-fault tests as grounds for divorce (irretrievable breakdown, irreconcilable differences, or insupportability), Nebraska joins Alabama, California, Colorado, Florida, Iowa, Michigan, New Hampshire, North Dakota, Oregon, and Texas. *See* Freed, *Grounds for Divorce in the American Jurisdictions*, 6 FAMILY L.Q. 179 (1972).
2. 125 U.S. 190 (1888).
3. "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony,

the question arises as to when a particular state can exercise this power. The law has long recognized the importance of the family unit in our society and it is obvious that the power of a state to dissolve marriages greatly affects the stability of that unit, which in turn affects our society. There are two basic problems in the area of state jurisdiction over divorces. The first problem concerns the minimum contacts or interests that a state must have, as a matter of federal constitutional law, in relation to a party or parties to a marriage when a dissolution of that marriage is sought. The second problem concerns the maximum restrictions which a state can impose upon a party or parties seeking a divorce in its forums. In the celebrated case of *Williams v. North Carolina*,[4] it was decided that domicile of one of the parties to the marriage would suffice to give the domiciliary state jurisdiction to grant a divorce, but the Supreme Court of the United States has never decided what absolute minimum contacts or interests must exist between a state and a party or parties to a marriage before that state has the power to dissolve the marriage relationship.[5]

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either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board." Barber v. Barber, 62 U.S. 582, 584 (1859). Although this statement has been criticized as dicta, the Supreme Court has been steadfast in refusing to recognize jurisdiction over domestic relations. *See* Ohio *ex rel.* Popovici v. Alger, 280 U.S. 379 (1930).

4. 317 U.S. 287 (1942). "For it seems clear that the provision of the Nevada statute that a plaintiff in this type of case must 'reside' in the State for the required period requires him to have a domicil, as distinguished from a mere residence, in the state. *Latterner v. Latterner*, 51 Nev. 285, 274 P. 194; *Lamb v. Lamb*, 57 Nev. 421, 65 P.2d 872. Hence the decrees in this case, like other divorce decrees, are more than *in personam* judgments. They involve the marital status of the parties. Domicil creates a relationship to the state which is adequate for numerous exercises of state power. See *Lawrence v. State Tax Commission*, 286 U.S. 276, 279; *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313; *Milliken v. Meyer*, 311 U.S. 457, 463-464; *Skiriotes v. Florida*, 313 U.S. 69. Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent." 317 U.S. at 298-99.

5. In *Alton v. Alton*, 207 F.2d 667 (3rd Cir. 1953), the issue involved the jurisdictional power of the Virgin Islands to grant divorces. Judge Goodrich, speaking for the majority, held that the power is based on domicile and that the statute which authorized divorces on

Nebraska now provides for two separate bases of jurisdiction.[6] The first requires domicile in Nebraska of one of the parties for one year prior to the filing of a petition for divorce. The second requires that the marriage be solemnized in Nebraska and that one of the parties reside in Nebraska from the time of the marriage to the filing of the petition. If the family unit is of paramount importance in our society, it follows that the state that has the greatest interest in the stability of that unit be vested with the power to alter or dissolve it. Under *Williams* it is clear that domicile is a constitutionally sound basis, as this requirement is apt to vest the power in the state or states most affected. Nebraska's first basis which requires domicile adheres to this proposition insofar as the minimum test is concerned. Nebraska's second basis, however, deviates from the domicile requirement in that it requires something less, namely celebration and continued residence in Nebraska. The fact that the marriage is celebrated in Nebraska does not in itself enhance the state's interest in the family unit, but where one or both of the parties to the marriage remain in Nebraska after the celebration, an exception to the domicile requirement might be warranted in some cases. Nebraska could well be the state with the most substantial interest in this family unit even though the party or parties have not established domicile in Nebraska. A serious drawback to the second basis, however, is the fact that it will also include persons in whom Nebraska has no interest. For example, two people from Iowa could come to Nebraska, marry in a relatively short time, and have grounds for divorce arise immediately before the couple leaves the state. Thus, it would seem that this second basis should be tightened up so that only those persons in whom Nebraska has a substantial interest will qualify for divorce in this state.[7] This could be done by adding a third element to the second

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the basis of personal service within the jurisdiction or upon a general appearance of the parties was unconstitutional. Writ of certiorari was granted, but the case became moot before the Supreme Court decided the issue when the husband obtained a divorce in his home state of Connecticut. The issue was again raised in 1955, but the Supreme Court disposed of the case on another ground. Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955).

6. NEB. REV. STAT. § 42-349 (Cum. Supp. 1972). Special provision is also made in this section for persons serving in the armed forces of the United States.

   For a discussion of *Stuckey v. Stuckey*, 186 Neb. 636, 185 N.W.2d 656 (1971), where three of the seven justices on the Nebraska Supreme Court held that *in personam* jurisdiction over a nonresident defendant in a divorce case is authorized on a minimum contacts theory under Nebraska's long-arm statute, *see* 51 NEB. L. REV. 159 (1971).

7. To the extent Nebraska affords divorce jurisdiction to dissolve mar-

basis in the form of a requirement of an intent that Nebraska be the permanent place of residence. In this way, the example of the two people from another state mentioned above would be eliminated unless one of the parties intended to make Nebraska his or her permanent place of residence. It would seem that Nebraska has little interest in providing a forum for divorce for persons who marry in this state and merely remain in the state until such time as a cause of action for divorce arises and the petition is filed without any intention of permanent residence.

Recent United States Supreme Court cases dealing with durational residence requirements in regard to qualifications for welfare benefits and voting foretell problems with some state laws in regard to the maximum restrictions a state may impose upon parties seeking divorce. In *Shapiro v. Thompson*[8] the United States Supreme Court held that a state may not penalize the exercise of the fundamental right of a person to travel interstate unless it is shown to be necessary to promote a compelling governmental interest. A one year waiting period to qualify for welfare benefits was struck down because the state could not justify this barrier to interstate travel. This reasoning was followed in *Dunn v. Blumstein*[9] which invalidated certain durational residence requirements in regard to voter qualifications. From these cases the message is clear that long durational residence requirements which impinge upon fundamental rights are constitutionally suspect, and that the involved state will have a heavy burden to shoulder in justifying periods beyond a few months.

As more and more states adopt the "no fault" grounds for divorce, the problem of people traveling from one state to another for the purpose of obtaining a divorce will diminish.[10] In the era of migratory divorces, states with relatively liberal grounds for divorce were legitimately concerned with preventing their forums

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riages in which it has little or no interest, it will almost inevitably undercut a state having such interest. One exception is the case where the parties have no present intent to make any state their permanent place of abode. The number of such cases outside the military are probably relatively small and it probably can be safely assumed that this domicile-less status is not long in duration in most of these cases.

8. 394 U.S. 618 (1969).
9. 405 U.S. 330 (1972).
10. The so-called migratory divorce problem resulted from the disparity in grounds for divorce existing among various states. The classic case involved residents of New York, where the only effective ground for divorce was adultery, traveling to another state such as Nevada, where cruelty was recognized as a grounds and where one could establish residence in a relatively short time.

from becoming divorce havens for persons who actually resided elsewhere. Many states enacted durational residence requirements. That is, in addition to becoming a bona fide resident or domiciliary, a person had to maintain this status in the state for a certain period, sometimes up to two years. Nebraska now requires that a person be a bona fide resident of the state for one year prior to the filing of the petition.[11] Although this requirement of one year is not as suspect as those states which have longer requirements, it is worth considering the effect of the *Shapiro* and *Dunn* cases on this type of residence requirement.

There are many people in the United States, within and without the military, who move or are subject to being moved by their employers or for other reasons on a regular or frequent basis. Most states provide exceptions for the military in their divorce jurisdiction statutes to take into account the problem that a person can be stationed in a state for a long period of time and yet never acquire domicile there. These provisions typically allow a person in the armed forces to qualify under the divorce laws if he or she has been continuously stationed at any military base or installation in the state for whatever residence period is otherwise required. This has been a partial solution for some, but it leaves untouched the other problem which concerns people who voluntarily move or who are forced to move from one jurisdiction to another. Undoubtedly many of these people are not able to qualify for expeditious relief in the area of divorce because of the durational part of the residence requirements of state laws where those laws require a substantial period of residence. As states become more uniform in their divorce grounds, the people who are caught by long durational residence requirements are increasingly going to be people who are traveling from state to state for reasons other than divorce. To the extent that this happens, the requirement will become increasingly hard to justify. The right to obtain a divorce can in some cases be as fundamental as the right to travel or to vote. Health, safety or financial circumstances may dictate that temporary relief under divorce or dissolution of the marriage laws be had as soon as possible. In addition, if a marriage is no longer viable, one should be allowed to discontinue that relationship, seek out another, and thereby establish a stable family unit, which has long been recognized as a fundamental right[12] and of paramount importance to our society.[13]

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11. NEB. REV. STAT. § 42-349 (Cum. Supp. 1972).
12. Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. State of Nebraska, 262 U.S. 390 (1923).
13. Maynard v. Hill, 125 U.S. 190 (1888).

The relevance of the reasoning in *Shapiro* and *Dunn* should be clear here. Even if the right to obtain a divorce is not thought to be as fundamental as the right to vote in general, the inability to obtain temporary relief or a divorce in the forum of a newly acquired residence within a reasonable period of time certainly impinges on and penalizes the exercise of the right to travel. Unless a state can show that its durational residence requirement is necessary to promote a compelling governmental interest, and that will be harder to accomplish as uniformity of grounds for divorce among the states increases, one should expect the Supreme Court of the United States to eventually hold that long durational residence requirements, such as one year or more, do not pass constitutional muster.[14]

Nebraska continues to recognize legal separations or divorces from bed and board under its new law.[15] When the new divorce act was introduced in the legislature, section 4 of the bill (section 42-350 as codified) contained the jurisdictional basis pertaining to legal separation, but during the legislative process the provision was deleted.[16] Legal separation is defined in such a way that it is clearly excluded from being considered as an action for dissolution, and it is unlikely that a court could, with any degree of logic, say that the jurisdictional requirements for dissolution also pertain to an action for legal separation. In any event, the new law is silent on the subject of jurisdictional bases for actions for legal separation and it would behoove the legislature to reinsert the original provision with one minor change,[17] so as to make it conform to the

14. In *Whitehead v. Whitehead*, 492 P.2d 939 (Hawaii 1972), the Supreme Court of Hawaii held that its one year residency requirement as a prerequisite to obtaining an absolute divorce in the state is valid, reversing the lower court which held that the requirement violated the "equal protection clause" of the fourteenth amendment of the United States Constitution.
15. NEB. REV. STAT. § 42-347(2) (Cum. Supp. 1972).
16. Prior to the amendment deleting the jurisdictional basis shown in italics the section, in its entirety, read:

    Sec. 4. *An action for legal separation may be brought by any person who has actual residence in the county in which the petition is filed.* If a petition for legal separation is filed before residence requirements for dissolution of marriage have been complied with, either party, upon complying with such requirements, may amend his pleadings to request a dissolution of marriage, and notice of such amendment shall be given in the same manner as for an original action under this act.

    As enacted, the section makes little sense because no jurisdictional basis exists in the act for filing an action for legal separation.
17. The reinserted sentence should read: "An action for legal separation may be brought by any person *who is a bona fide resident of*

jurisdictional basis language in section 42-349 dealing with actions for dissolution.[18]

Finally, the new divorce act provides that actions for annulments "shall be subject to all applicable provisions of sections 42-347 to 42-379 pertaining to dissolutions of marriage, except that the only residence requirement shall be that petitioner be an actual resident of the county in which the petition is filed."[19] Since annulments are for the purpose of declaring that a valid marriage never existed, there is no reason to have a durational requirement as in the case of divorce. Annulments can only be granted under rather strict statutory grounds which usually evidence the policy of the state to prohibit or discourage certain unions.[20] If one or more of these grounds are met, mere domicile should suffice as authority for the state to declare the marriage invalid. It would be incongruous for the state to provide that a void or voidable marriage could not be the subject of an annulment action until a certain period of time had elapsed. The possibility of fraud upon Nebraska courts and the undercutting of the interests of other states is rather remote in actions for annulments.[21] Thus, there is no reason why prompt relief should not be available to citizens of Nebraska in this area.

## II. SERVICE OF PROCESS

Service of process has not been altered significantly from that

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*this state* ~~who has actual residence in the county in which the petition is filed.~~" Without the italicized language an ambiguity exists in § 42-350 when compared with § 42-349 because the language "actual residence" could be construed to mean something less than the domicile language used in § 42-350. The stricken language is surplusage since § 42-348 covers venue in all proceedings under the new divorce act.

18. Out of an abundance of caution, it should be pointed out that there should be no durational residence requirement for actions for legal separations. Prompt official recognition of the separation should be available so that the parties can seek protective orders in regard to their marital rights and obligations during what often times is the most trying period of marital discord.
19. NEB. REV. STAT. § 42-373 (Cum. Supp. 1972). This language is also susceptible to the same ambiguity discussed previously, note 17 *supra*, and should be changed to read: ". . . except that the only residence requirement shall be that petitioner be *a bona fide resident of this state* ~~an actual resident of the county in which the petition is filed.~~"
20. The annulment grounds in Nebraska are set out in NEB. REV. STAT. § 42-374 (Cum. Supp. 1972).
21. The general rule is that the validity of a marriage is judged by the law of the jurisdiction where it is celebrated and this is recognized by statute in Nebraska. NEB. REV. STAT. § 42-117 (Reissue 1968). Contrast this with the choice of law rule in dissolution of marriages.

under former sections 42-305 and 42-305.01.[22] Section 42-355, dealing with service, merely combines and simplifies the two former sections dealing with service. The only substantive change wrought was in the provision of notice by publication. Heretofore, one was required to make "reasonable and due inquiry and search" as to the whereabouts of the defendant for three months after filing the petition before the court could authorize notice by publication when the defendant's whereabouts was unknown. This period is now reduced to thirty days.

At this point it might be worthwhile to review some basic law pertaining to service of process and the effect of obtaining different types of jurisdiction through that service. Since 1948 the Supreme Court of the United States has recognized what are commonly called "divisible divorces." In *Estin v. Estin*[23] and *Vanderbilt v. Vanderbilt*[24] it was held that *in rem* jurisdiction will suffice to authorize a state to dissolve the marriage relationship. *In rem jurisdiction*, however, will not suffice to terminate a spouse's or children's rights to support, or otherwise affect property rights.[25] Section 42-355 provides four methods of service of process. Subsection 1 provides for personal service within Nebraska; subsection 2 provides for personal service outside of Nebraska; and subsection 4 authorizes dissolution of a marriage, or a legal separation, where the respondent personally appears in the case. Service perfected under subsection 1, personal appearance under subsection 4, and service upon a resident of Nebraska under subsection 2 will suffice to give *in personam* jurisdiction over the defendant so that rights and obligations in regard to support and property may be affected[26] in addition to the dissolution of the marriage. In other words, the court having jurisdiction by virtue of any one of these types of service is empowered to enter an order requiring the defendant to pay alimony or child support, and this decree will not only be enforceable in the decreeing state, but will also be enforceable in every state of the United States.[27] Out-of-state personal

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The law of the forum where the dissolution is sought governs regardless of when and where the underlying conduct took place.

22. These sections were repealed by L.B. 820 § 35, 2d Sess., 82d Neb. Leg. (1972).
23. 334 U.S. 541 (1948).
24. 354 U.S. 416 (1957).
25. If the court has perfected *in rem* jurisdiction over property of the spouses located within the state, it has power to affect it. *See* Pennoyer v. Neff, 95 U.S. 715 (1877).
26. *See* CLARK, LAW OF DOMESTIC RELATIONS § 11.4 (1968).
27. This would be true under the "full faith and credit clause" found in Article IV, Section 1 of the United States Constitution, and in addition could be achieved in most states under the Uniform Reciprocal Enforcement of Support Act.

service upon a nonresident of Nebraska and citation by publication, however, suffice only to give *in rem* jurisdiction, and a court does not have the power to enter an order for support which other states are compelled to enforce under this type of service,[28] except to the extent that the court has *in rem* jurisdiction over the property of a party.[29] As previously stated though, *in rem* jurisdiction does suffice to dissolve the marriage.

## III. WAITING PERIOD

Concern over hasty divorces has caused most states to provide for a "cooling off period" either prior or subsequent to the divorce hearing. Some states have provided for both, as did Nebraska under former section 42-305.02, where a suit for divorce could not be heard or tried until sixty days after the filing of the plaintiff's petition, and under former section 42-340 where a decree of divorce did not become final or operative until six months after trial, except for the purpose of appeal. Under the new act Nebraska kept the latter provision,[30] but increased the sixty-day waiting period prior to hearing or trial to six months.[31] This period may be waived, however, where the court determines that conciliation efforts have failed. Nebraska is unique in having such a long waiting period prior to the divorce hearing, and particularly so when it is coupled with a six-month interlocutory period after the hearing before the divorce becomes final.[32]

At first glance one is tempted to argue that the legislature should eliminate the six-month waiting period prior to the hearing, and return to the sixty-day waiting period under the old law. One should, however, not be so quick to return to the familiar. It is suggested that a better solution would be to eliminate the six-month interlocutory period following the hearing or trial because this type of provision has caused serious problems. Two main

28. *See* CLARK, LAW OF DOMESTIC RELATIONS § 11.2 (1968).
29. Note 25, *supra.*
30. NEB. REV. STAT. § 42-372 (Cum. Supp. 1972).
31. NEB. REV. STAT. § 42-363 (Cum. Supp. 1972). The section also requires the six months to run from service, appearance, or completion of conciliation proceedings instead of from filing as under the old law.
32. Vermont appears to be the only other state requiring a six-month waiting period, this running from the date of service, but it is limited to cases involving child custody. VER. R.C.P. 80(h) (1971). Other states rely on their general rules or codes of civil procedure pertaining to the period of time allowed for initial responsive pleading or require a special waiting period, either from filing or from service, ranging up to 90 days.

problems occur when a state has such an interlocutory period. First, many people do not understand that they are not finally divorced, and proceed to remarry or take other action which is inconsistent with their existing marital relation.[33] This results in a void second marriage which compounds their problems. Secondly, upon the death of one of the spouses during this period, the surviving spouse will inherit or take a statutory forced share,[34] which is the last thing that the deceased spouse usually would want. In addition, there is little chance of reconciliation after the dirty linen has been aired in public. Therefore, it would seem preferable to delete the interlocutory period following the hearing, and have the divorce become final, subject to appeal, as do other civil judgments or decrees. This would place Nebraska in line with the majority of jurisdictions in this country.[35]

If the suggested action is taken, then the six-month waiting period preceding the hearing would provide a more opportune period for conciliation and would help assure that only those marriages which are in fact irretrievably broken are dissolved. If the parties can show to the court that conciliation efforts have failed, then the court should have the power to waive the six-month period, but only upon an additional finding that such waiver is for the best interest of the parties, including any minor children. In this connection, it should also be provided that in no event shall the suit be heard until sixty days after service of process has been perfected or an appearance entered.[36] This approach would provide a minimum "cooling off period" of sixty days which could not be waived by the court. The six-month period would be the period normally invoked for purposes of allowing a reasonable time for conciliation to be effected, but if the parties could show to the satisfaction of the court that conciliation efforts had failed, that there was no reasonable expectation that they would succeed, and that it was for the best interests of all concerned, the court could then waive the six-month period. The case would not be ripe for hearing, however, unless and until the sixty-day period had elapsed.

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33. *See, e.g.*, Loringer v. Kaplan, 179 Neb. 215, 137 N.W.2d 716 (1965).
34. *See, e.g.*, In re Waller's Estate, 116 Neb. 352, 217 N.W. 588 (1928).
35. *See* CLARK, LAW OF DOMESTIC RELATIONS § 13.8 (1968).
36. The proposed section would take the place of § 42-363 and read: "An action for dissolution of marriage may not be heard before six months shall have elapsed after filing of the petition for dissolution, but the court may waive this waiting period if it shall determine that conciliation is highly improbable and that the best interests of the parties, including any minor children, requires such a waiver. In no event shall an action for dissolution of a marriage be heard or tried until sixty days after service of process is perfected or an appearance is entered."

## IV. TEMPORARY RELIEF PENDING FINAL HEARING

Two types of temporary relief are provided for under the new act.[37] After a petition for dissolution of marriage or legal separation is filed, and anytime during the pendency of the action, the court, where immediate relief is necessary, may enter certain temporary orders without notice to the other party.[38] The court may enter orders to protect the assets of the parties, both real and personal, from being fraudulently conveyed or otherwise dissipated upon application by either party. The court also may enter orders protecting the parties from harassment and dealing with the temporary custody of any minor children of the marriage. These types of *ex parte* orders expire at the end of ten days or at the time of a hearing thereon, whichever is earlier.[39] The *ex parte* orders may be extended into temporary injunctions after notice and hearing, and can be made permanent upon final hearing.[40]

The second type of temporary relief authorizes the court to enter orders requiring either party to pay for the temporary support and maintenance of the other party and minor children, and to enable such party to prosecute or defend the action.[41] The court may, where claim is made for temporary allowances, enter an order granting the allowances after the service of process or after an appearance is entered, but such orders can only be entered after three days have elapsed from the time that notice of hearing has been served or waived. Under a literal reading of this provision, the court is allowed to enter the order after notice of hearing, but prior to the hearing itself. The statute does not specify any time limit within which the hearing has to be held. Justice would seem to require that, unless there is dire financial need, a court not require payment prior to the hearing. At the hearing the court should take evidence on the necessity of payments, and if any is necessary, the reasonableness of the amount. In the event payment is required before the hearing is held, the court should entertain

37. NEB. REV. STAT. § 42-357 (Cum. Supp. 1972).
38. Although § 42-357 specially authorizes the granting of temporary restraining orders, the Nebraska Code of Procedure provides further conditions which must be met. § 25-1063 details the circumstances upon which a temporary order should issue, and § 25-1064(2) requires both an affidavit in support of the motion for a temporary order and notice to the party against whom the order is issued.
39. The point from which the 10 days begins to run is not identified in § 42-357, but when the latter is considered in conjunction with § 25-1070 it would appear that the 10 days should run from time of notice to the enjoined party. Basic due process would seem to require that the order will be effective only from the time of notice.
40. NEB. REV. STAT. § 42-351 (Cum. Supp. 1972).
41. NEB. REV. STAT. § 42-357 (Cum. Supp. 1972).

promptly a motion to either move up the hearing date or suspend the order until the hearing is held.

The new act contains a new provision giving the court the power to appoint an attorney to protect the interests of any minor children of the parties.[42] Presumably this may be done upon the court's own motion in any action for dissolution of marriage or legal separation, but the provision will probably be exercised only where custody is at issue. This commendable provision is sorely needed in many cases involving child custody.[43] Appointed counsel has the power under the statute to make an independent investigation, to subpoena witnesses to appear and testify on matters pertinent to the welfare of the children, and to receive a fee, which can include expenses to be fixed by the court. The amount is to be taxed as costs and paid by the parties as ordered by the court. If the party responsible for paying is indigent, the fee is to be paid by the county if the court so orders.

*Ex parte* orders, as necessary as they are, can be the subject of abuse by the parties. One of the areas of abuse has been in regard to excluding a reluctant party from the family dwelling. It is not infrequent that a marriage has reached the point that it is no longer viable, but neither of the parties will move out of the family dwelling. In the past one of the techniques for removing a party was for an action of divorce to be filed with supporting affidavits requesting a temporary restraining order prohibiting the other spouse "from going about or upon the premises, or in the home of the petitioner or the person of the petitioner, and from accosting, molesting, communicating or causing any harm to petitioner and from interfering with petitioner in her custody, control, and management of any children," or similar language. Sometimes the alleged facts supporting the request for the temporary restraining order were more apparent than real, but nevertheless, the court would rather be safe than sorry. The restraining order was then served upon the other spouse, usually the husband, while he was away from the home and he was effectively evicted. In some instances he had to get a deputy sheriff to accompany him home just to get his personal belongings. In any event, this practice will be curtailed under section 42-357 because a special provision has been inserted dealing with this problem. The court may order either party excluded from the family dwelling of the other only upon a showing that physical or emotional harm would otherwise result, and this is after motion, notice

42. NEB. REV. STAT. § 42-358 (Cum. Supp. 1972).
43. *See* Nemecek v. Nemecek, 188 Neb. 799, 199 N.W.2d 409 (1972), and in particular the dissenting opinion of Smith, J.

and hearing. *Ex parte* relief excluding a spouse is unavailable. This is a commendable provision because it helps to solve a thorny problem where the parties will not voluntarily decide who shall remain in the family dwelling until the property is disposed of upon final hearing. Sometimes the animosity which develops as a result of being initially excluded from the family dwelling without opportunity to tell the other side of the story is acute, and in some cases has even resulted in violence. Since a prompt hearing upon this type of matter should be available, it would appear that little or no inconvenience will result. Even where there is some inconvenience, it is far better to have the court decide who should remain in the family dwelling, a very emotional issue in some cases, rather than the parties initially deciding it through *ex parte* proceedings.

## V. HEARING ON THE GROUND FOR DISSOLUTION OR SEPARATION

The new divorce act requires that the court hold a public hearing wherein it is incumbent for the party or parties to present evidence as to whether the marriage should be dissolved or whether a separation should be authorized.[44] The requirement for corroboration under the old law has been eliminated.[45] Thus, if necessary, it is possible for the court to make its determination solely on the basis of the testimony of the petitioning party.[46] The statute also provides that, in the discretion of the court, a closed hearing may be obtained and that the court can restrict the availability of the evidence or bill of exceptions. Since public hearings are crucial to our system of government and jurisprudence, it should be expected that a court will exercise this discretion guardedly. Lastly, it should be noted that a divorce or legal separation is not granted *to* anyone. The marriage is simply dissolved or the separation decreed.

Upon a petition for dissolution of marriage the statute expressly requires that the court make a finding of whether the marriage is

44. NEB. REV. STAT. § 42-356 (Cum. Supp. 1972).
45. NEB. REV. STAT. § 42-335 (Reissue 1968), repealed by L.B. 820 § 35, 2nd Sess., 82nd Neb. Leg. (1972).
46. Since Nebraska's new divorce law is patterned after California's, of interest should be the recent California Supreme Court decision holding that in a proceeding for dissolution of marriage the trial court must require the petitioner to appear personally and testify at the hearing unless, in exceptional circumstances where an explanation of the petitioner's absence is shown to the satisfaction of the court, the court in its sound discretion permits the requisite proof to be made by affidavit. McKim v. McKim, 6 Cal. 3d 673, 493 P.2d 868, 100 Cal. Rptr. 140 (1972).

irretrievably broken,[47] and implicit in this is the requirement that the finding be based upon sufficient evidence. Although the statute does not expressly provide the grounds for a legal separation, it is implicit that the same finding required for dissolution be made in this type of case. The new divorce act also requires that no decree shall be entered unless the court finds that every reasonable effort to effect reconciliation has been made.[48] This is set out as an independent finding from that of irretrievable breakdown. The finding in regard to irretrievable breakdown subsumes the fact that reconciliation is not possible, but the statute requires a separate finding that the parties *made* every reasonable effort to effect reconciliation.

Now that Nebraska has only one ground upon which a court may determine that a marriage should be dissolved or that a legal separation should ensue, it becomes very important to consider how a court should proceed in determining the existence of that ground so that the law is applied evenly from court to court and from case to case. Other jurisdictions have had some experience with a similar standard involving incompatibility of temperament.[49] While cases construing "incompatibility of temperament" are instructive,[50] perhaps one should start afresh with the term "irretrievably broken." The term, by its nature, calls upon the court to formulate a standard which can neither be completely objective nor subjective. A completely objective standard is unworkable because here we are dealing with a standard which will vary from individual to individual, while a completely subjective standard would leave the court to the mercy of the party or parties and, except for the issue of credibility, would result in a rubber stamp operation. Perhaps the closest analogy one can call up is that of the standard of negligence for an adolescent child. There we take into consideration as part of the facts and circumstances of our mythical ordinary prudent person the individual characteristics of the child. We determine whether the child in question exercised the type of prudence that would be expected of an ordinary

47. NEB. REV. STAT. §§ 42-347(1) and 42-361 (Cum. Supp. 1972).
48. NEB. REV. STAT. § 42-360 (Cum. Supp. 1972). Although the statute clearly covers all decrees, the wisdom of making this requirement apply to a decree for legal separation is questionable.
49. The following jurisdictions have adopted incompatibility of temperament as a grounds for divorce: Alabama, Alaska, Delaware, Kansas, Nevada, New Mexico, Oklahoma, and the Virgin Islands. Freed, *supra* note 1.
50. *See, e.g.*, Shearer v. Shearer, 356 F.2d 391 (3rd Cir. 1965). For further cases on what amounts to incompatibility or inability to live together, see Annot., 58 A.L.R.2d 1218 (1958).

child of the same age and experience under the same circumstances. A similar approach would seem to be appropriate for the court in determining whether or not the marriage is "irretrievably broken." The court would take into consideration the personal characteristics of the party or parties seeking dissolution or separation, and formulate a standard on that basis. The court would then substitute this "ordinary" person in the place of the party in question and ask whether or not the conduct or circumstances involving the actual parties would result in an irretrievably broken marriage between the mythical parties. In many cases the answer will be quite clear, for the conduct will entail such things as adultery, cruelty or abuse, desertion, neglect, mental illness,[51] or other conduct which will leave little or no doubt that the marriage is in fact irretrievably broken. The cases on the fringe will be troublesome, but the court in applying the standard it has formulated should not be any more burdened than it is in many other cases where the ultimate facts are difficult to determine. It should be remembered in this regard that the burden of proof is still on the party seeking the dissolution or separation, and unless that burden is met the court is justified in refusing the requested relief, just as in any other case. One can conjure up many cases, such as one where a party testifies that the marriage is no longer viable because they do not love each other any longer, or because they have nothing in common, or because the respondent smokes cigars in bed while reading into the wee hours of the morning. Certainly in some cases, any of these could well be a basis upon which a court could accurately find that the marriage is irretrievably broken. So much will depend upon the individual parties that one cannot lay down a standard for all cases, and this is the reason for formulating a standard on the basis of the individual characteristics of the parties and then applying it to the facts at hand. This is the reason for treating children differently under negligence law. When one thinks of the test of extreme cruelty applied under the prior divorce law, is the new test any more difficult to apply? In time a body of case law will develop, and until then the task is probably no more difficult than a "close" cruelty case.

If the legislature were to adopt the suggested revision in regard to the waivable six-month period with an absolute minimum sixty-day waiting period prior to hearing,[52] courts would probably feel much more secure in finding that a marriage is irretrievably

51. Special provision is made where a spouse is mentally ill at the time of dissolution of marriage. NEB. REV. STAT. § 42-362 (Cum. Supp. 1972).

52. *See* note 36, *supra,* and accompanying text.

broken, particularly where the parties have to show that during this period they exhausted all reasonable efforts at reconciliation.[53] In fact, this six-month requirement would make Nebraska's divorce ground closely akin to the ground many states have had for some years where they recognize that living separately and apart for a prescribed period of time is a sufficient basis for divorce.[54] If the parties have exhausted every reasonable effort at reconciliation, and one of the parties still insists on a divorce at the end of a six-month period, there is less chance that a divorce will be granted where it is not truly justified. The problem has always been, and will continue to be, that by refusing to grant the divorce one does not reconcile the parties, but relegates them to lives that none of us would wish to have imposed on ourselves. The old saying, "you can lead a horse to water, but you can't make him drink" was never more true than in this area. If the evidence shows that the disharmony of the spouses in their common life is so deep and intense as to be irremediable, then it serves no purpose, except possibly punishment, for the state to refuse to dissolve that union. You do not establish a stable family unit by refusing the divorce.

Finally, it should be pointed out that the defenses of condonation, connivance and recrimination have no relevance under a test of "irretrievably broken." The question at this point is one of whether the marriage *is* irretrievably broken, and not one of *why* it is irretrievably broken. Where, however, the parties collude or fabricate the evidence, certainly the court should refuse to grant the relief requested, as in any other case where the parties attempt to work a fraud upon the court.

## VI. CHILD CUSTODY AND SUPPORT

The law in regard to custody and support of minor children remains substantially the same. During the pendency of an action for dissolution or legal separation, the court has power to award custody and compel the payment of child support.[55] The same power exists in regard to the final hearing where a dissolution or legal separation is decreed.[56] The court's power to determine custody is to be exercised on the basis of the best interests of the minor children, including placing the minor children in court custody if their welfare so requires.[57] In the past, some courts have

53. NEB. REV. STAT. § 42-360 (Cum. Supp. 1972).
54. This ground for divorce is now recognized in about half of the states. CLARK, LAW OF DOMESTIC RELATIONS § 12.6 (1968).
55. NEB. REV. STAT. §§ 42-351 and 42-357 (Cum. Supp. 1972).
56. NEB. REV. STAT. §§ 42-351 and 42-364 (Cum. Supp. 1972).
57. By strictly following the "best interest" test where the custody issue

also used, regardless of the test expressed in the statute, the test of whether a parent is fit to have custody of a child or children.[58] It has not always been easy to tell in a particular jurisdiction whether a court deemed the "best interest" and the "fitness" tests to be synonymous.[59] It appears that some courts have treated the two as synonymous, or resorted to one or the other on an indiscriminate basis. Perhaps it is worthwhile to undertake a discussion of the two tests here because they are not interchangeable and can lead to different results.

The "best interest" test is much broader and really subsumes the "fitness" test, but this does not mean that the "best interest" test is the appropriate test to be used in all custody matters. As between two parents, it would appear that the "best interest" test would always be appropriate and result in a correct solution to the issue. Where a parent is unfit to have custody of a child, it follows that it would not be in the best interest of the child to be placed in the custody of that parent. To this extent, the two tests coincide and in this situation resort to the "fitness" test need never occur. In fact, the "fitness" test is of limited usefulness anyway where the dispute is between two parents, because both parents are often fit to have custody of the children. Since the "best interest" test is all inclusive where the issue is between two parents, it should be the exclusive test in that situation.

Where the custody issue is between a parent and a third party,

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is between two parents, the opportunity is presented to put to rest the totally unjustifiable rule that an adulterous wife is unfit as a matter of law to have custody of her minor children as against the husband, Wolpa v. Wolpa, 182 Neb. 178, 153 N.W.2d 746 (1967). In 1970 the Nebraska Supreme Court appeared to be on the verge of abandoning this rule in favor of an appropriate test based primarily on the best interest of the children, *see* Fisher v. Fisher, 185 Neb. 469, 179 N.W.2d 667 (1970), but the rule still stands. That the *Wolpa* rule serves only to punish and is totally foreign to the merits of the issue is born out by such cases as Beck v. Beck, 175 Neb. 198, 120 N.W.2d 585 (1963); Houghton v. Houghton, 179 Neb. 275, 137 N.W.2d 861 (1965); Hanson v. Hanson, 187 Neb. 108, 187 N.W.2d 647 (1971); and Nemecek v. Nemecek, 188 Neb. 799, 199 N.W.2d 409 (1972), where, under various circumstances, an adulterous wife or permissive ex-wife is given, or allowed to keep, physical custody of her minor children while legal custody or supervisory power is given to the appropriate juvenile probation officer.

58. *See, e.g.,* Gorsuch v. Gorsuch, 143 Neb. 578, 578-79, 11 N.W.2d 456, 456 (1943): "The proper rule in a divorce case, where the custody of minor children is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents."

59. *Compare, e.g.,* Mandelstam v. Mandelstam, 458 S.W.2d 786 (Ky. 1970), *with* James v. James, 457 S.W.2d 261 (Ky. 1970).

such as a grandparent, other relative or public agency, it is submitted that "fitness" of the parent is the only appropriate test. In this situation the "best interest" test may lead to undesirable results if followed literally. It is possible for a parent to be minimally fit as far as custody is concerned, while the best interest of a child requires that custody be placed in a third party because of the advantages which might be bestowed upon a child by that person.[60] It is not uncommon to have a situation where, because of the economic and cultural conditions of the parent, over which the parent may have little or no control, the circumstances dictate that a child be placed with a third party under a "best interest" test. Parents are the natural guardians of their minor children and are given much discretion and leeway in the rearing of their children in our society. This is true even though other parents or agencies might tend to do better, and the child or children in question might fare better if they were removed from the custody of their natural parents. This, however, is a practice that we have yet to indulge in our society and probably never will as long as it raises the specter that has occurred in certain countries within the memory of many now living. As long as the natural parent passes the minimum test of fitness, the court should not be compelled to decide what the best interests of the child dictate when the issue is between a parent and a third party. That has already been given due consideration under the "fitness" test.

Lastly, as has always been the law, the court retains jurisdiction to modify child custody and support awards, after notice[61] and hearing, until such time as a child reaches majority.

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60. For a good example of the type of difficulty that a court could avoid by using the "fitness" test where the custody issue is between a parent and a third party or parties, *see* Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152 (1966), where the court, even though admitting the father was fit, decided that the "stable, dependable, conventional, middle class, middlewest background" of the maternal grandparents should win out over the more "Bohemian" approach to life of the father in resolving what is in the best interest of the child.

61. The new act does not, nor did former § 42-312 dealing with modification, specify the nature or kind of notice required on a motion to modify. In Miller v. Miller, 153 Neb. 890, 46 N.W.2d 618 (1951), personal service was perfected on a former husband, then domiciled in Texas, on a motion to modify child support, and the Supreme Court upheld the service under former § 42-312: "In a proceeding to modify a divorce decree under statutory provision authorizing subsequent changes in the divorce decree, 'due process of law' requires only that the method of service be reasonably calculated to give the person served knowledge of the proceedings and opportunity to be heard." *Id.* at 900, 46 N.W.2d at 624. Thus, one type of service

## VII. ALIMONY

Upon dissolution of a marriage the court may order payments of alimony by one party to the other.[62] Notably, the language does not restrict alimony to payments by the husband to a wife. The alimony must be reasonable, having regard for the circumstances of the parties, the duration of the marriage, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. As under the old law, reasonable security may be required by the court.[63] The new law makes no change in the distinction between lump sum, or alimony in gross, and periodic alimony payments. The former is treated as a debt and is not subsequently modifiable except by agreement of the parties.[64] Periodic alimony payments are modifiable upon a showing of change of circumstances, except for those installment payments which accrued prior to service of notice[65] of the modification hearing. Accrued installments are not modifiable.

The new act also expressly provides that unless the parties agree in writing, or the order of the court provides otherwise, the obligation to pay periodic alimony "shall" terminate upon the death of either party or upon the remarriage of the recipient.[66] The use of the word "shall" probably works a slight change in Nebraska law. In *Wolter v. Wolter*[67] the Supreme Court of Ne-

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which would have been insufficient for an original order for child support is sufficient to modify an original order obtained under *in personam* jurisdiction. Even though courts justify the above type of service on the idea that the original jurisdiction continues, it is very doubtful that citation by publication would be upheld where the modification of monetary payments is concerned.

62. NEB. REV. STAT. § 42-365 (Cum. Supp. 1972). Under § 42-359, a claim for alimony must be accompanied by a sworn statement in regard to the applicant's financial condition. The court may order the person against whom the claim is made to do likewise in response to the claim.
63. Section 42-371 covers liens securing judgments and orders for the payment of money under the new divorce act.
64. "'An unqualified allowance of alimony in gross, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment, and survives the death of the husband.' *Spencer v. Spencer,* 165 Neb. 675, 87 N.W.2d 212. Such an allowance is not subject to modification." Ball v. Ball, 183 Neb. 216, 219, 159 N.W.2d 297, 299 (1968).
65. For the type of notice required, *see* note 61, *supra.*
66. See the last sentence of § 42-365.
67. 183 Neb. 160, 158 N.W.2d 616 (1968).

braska held that the remarriage of the alimony recipient did not automatically, in and of itself, terminate the right to receive periodic alimony payments. It merely established a prima facie case which required the court to terminate it in the absence of proof of some extraordinary circumstances justifying its continuation.[68] Even though a motion to modify might still be required, it will be a technicality because the court has no choice under the new language but to terminate the obligation to pay periodic alimony upon remarriage of the recipient. Of course, remarriage of the person paying periodic alimony is not sufficient by itself for modification.[69]

A new provision is contained in the new act stating that "where alimony is not allowed in the original decree dissolving a marriage, such decree may not be modified to award alimony."[70] This provision appears innocuous on its face, but could be a trap for the unwary. Because of the situation where a court has the power to grant an *ex parte* divorce by virtue of its jurisdiction over the petitioning party,[71] a person who is entitled to alimony could lose a very valuable right without an opportunity to be heard if this provision is interpreted to apply to all cases where the decree does not contain an award of alimony.

Injustice would result, for example, where a suit for dissolution of a marriage is brought in Nebraska by a resident and the other spouse has already established a residence in another state. The Nebraska court, not having the power to perfect *in personam* jurisdiction where the respondent is a resident of another state, would be powerless to award alimony to the wife.[72] As a matter

68. One of the extraordinary circumstances concerning the court involves the situation where the validity of the second marriage is in issue. This is a part of a larger problem involving the effect of an invalid second marriage upon the right to receive and the obligation to pay alimony arising from a prior marriage. This problem still exists under the new language of § 42-365: "Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon . . . the remarriage of the recipient." Certainly where the issue is raised at the time of an attempt to terminate alimony payments, the court should only be bound to terminate where there is a valid "remarriage." For a discussion of the problems involved in the question of whether an annulment of a second marriage revives the obligation to pay alimony from a prior marriage, *see* CLARK, LAW OF DOMESTIC RELATIONS § 3.6 (1968).
69. McIlwain v. McIlwain, 135 Neb. 705, 283 N.W. 845 (1939).
70. NEB. REV. STAT. § 42-365 (Cum. Supp. 1972).
71. See discussion in text at note 4 *supra.*
72. See discussion in text at note 28 *supra. But see* Stuckey v. Stuckey, note 6 *supra.*

of justice the statute should not be so construed, and moreover, such an interpretation might cause the provision to be held unconstitutional.[73] A construction should be placed upon the statute so that it will not run afoul of the constitution and so that injustice will not take place under it. This can be done by limiting the provision to those situations where the court has *in personam* jurisdiction over both parties.

## VIII. PROPERTY SETTLEMENTS

The new law expressly provides for property settlements between parties to a marriage attendant upon their separation or the dissolution of the marriage.[74] Case law in Nebraska pertaining to property settlements under the law prior to the new act requires that the parties actually separate and that grounds for divorce exist at the time such an agreement is executed.[75] One should expect this rule to continue under the new act particularly in regard to the requirement of an actual separation, even though there is now only one ground for dissolution or legal separation and that being somewhat amorphous. The purpose of the requirement is to proscribe property settlements where such an agreement might lead or be conducive to a divorce or separation, while

73. Even though there would be no "full faith and credit" problem where the petitioning spouse is barred from seeking alimony from the respondent spouse in another jurisdiction because that jurisdiction would only be giving the same effect to the decree as Nebraska would, a serious argument could be waged that the right to alimony was denied without due process of law under the fourteenth amendment to the United States Constitution. *See* Estin v. Estin, 334 U.S. 541 (1948); Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957). One of the ways the petitioning spouse could attempt to avoid the problem of losing the right to alimony in some situations would be to envoke the Uniform Reciprocal Enforcement of Support Act, NEB. REV. STAT. § 42-762 to 7,104 (Cum. Supp. 1972) by having the court find and certify that the respondent spouse was obliged to pay alimony and include an amount in the decree, to be modified, if necessary, upon hearing in the responding state. For a discussion of the question whether a former spouse can obtain alimony subsequent to a divorce where the decree does not mention alimony, *see* CLARK, LAW OF DOMESTIC RELATIONS § 14.4 (1968).

74. NEB. REV. STAT. § 42-366 (Cum. Supp. 1972).

75. Chambers v. Chambers, 155 Neb. 160, 51 N.W.2d 310 (1952); In re Estate of Lauderback, 106 Neb. 461, 184 N.W. 128 (1921). NEB. REV. STAT. § 30-106 (Cum. Supp. 1972) provides an exception to this rule by authorizing ante-nuptial and certain post-nuptial property settlement agreements in regard to real property where the agreement is in writing, signed by both spouses, and "acknowledged in the manner required by law for the conveyance of real estate, or executed in conformity with the laws of the place where made."

providing a means of avoiding controversy and litigation where the marriage is actually at an end.[76]

The terms of a property settlement agreement, which may include provisions for "maintenance,"[77] are binding upon the court unless found to be unconscionable.[78] Thus, the power to prohibit subsequent modifications by the court could, broadly construed, preclude court modification of periodic, as well as lump sum, alimony payments to which the parties have agreed if the agreement is not unconscionable at the time of execution. The parties by agreement could thereby oust the court of its traditional continuing jurisdiction over periodic alimony. Whether such a construction will be given remains to be seen,[79] but that such a power should exist in the parties, under court supervision, would not be unprecedented.[80] It would, after all, be a two edge sword; the amount could neither be reduced nor increased.

In regard to the enforcement of the terms of a settlement agreement, a distinction appears to be made between an agreement, the terms of which are set forth in the decree of the court dissolving a marriage or granting a legal separation, and a settlement agreement which is merely identified in such a decree without setting forth any of the specific terms of the agreement. Section 42-366(5) provides that "terms of the agreement set forth in the decree" may be enforced by all remedies available for the enforcement of a judgment, including contempt. Thus, the mere identification and approval of a settlement agreement, and even adoption of the terms by reference in a divorce decree, would mean, under a literal interpretation of section 42-366(5), that one must consult general contract law for their remedy.[81] This would mean that the con-

76. *See* In re Estate of Lauderback, note 75 *supra.*
77. NEB. REV. STAT. § 42-366(1) (Cum. Supp. 1972).
78. NEB. REV. STAT. § 42-366(2) (Cum. Supp. 1972).
79. When subdivisions (1) and (2) of § 42-366 are read in conjunction with subdivision (6), the statute might also be construed to mean that the parties are bound to their agreement by contract law, with the remedies available thereunder, but that the court still has the power to award alimony where necessary. For instance, where the obligated spouse is judgment proof and satisfaction of the property settlement agreement is not possible under ordinary remedies, a court could "get blood out of a turnip" by awarding alimony and enforcing its order through the contempt power. *Cf.* McMains v. McMains, 15 N.Y.2d 283, 206 N.E.2d 185, 258 N.Y.S.2d 93 (1965). This assumes that the identification and approval of the agreement in the decree would suffice as an allowance of alimony so as not to be barred by NEB. REV. STAT. § 42-365 (Cum. Supp. 1972).
80. For example, see VA. CODE ANN. § 20-109 (Supp. 1972).
81. *See* CLARK, LAW OF DOMESTIC RELATIONS § 16.12 (1968).

tempt power would not be available in that situation to enforce the terms of the agreement.[82] Thus, to ensure the full array of remedies, one should set out the terms of the settlement agreement in the decree and have the court order their performance.

## IX. CONCLUSION

As far as the bench and bar are concerned, the new act should provide a more streamlined and efficient procedure for dissolving those marital unions in Nebraska which exist in name only. The adversary nature of the prior law was not indispensable and was probably really never appropriate for this type of proceeding. When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together and provide our society with the sort of stable socio-economic unit on which this country so depends, it is time to call a spade a spade and dissolve it without acrimony, moral judgments or benedictions. The Nebraska Legislature is to be commended for dealing forthrightly with an old and vexing problem.

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82. NEB. CONST. art. 1, § 20 provides: "No person shall be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud." Alimony, where awarded by the court, is not a debt under this provision, Jensen v. Jensen, 119 Neb. 469, 229 N.W. 770 (1930), but the obligation underlying a mere agreement between the parties to pay alimony could be so construed. For cases holding that where there is no incorporation the contempt power does not lie, *see* Bradley v. Superior Court, 48 Cal. 2d 509, 310 P.2d 634 (1957); Young v. Superior Court, 105 Cal. App. 2d 65, 233 P.2d 39 (1951); Shogren v. Superior Court, 93 Cal. App. 2d 356, 209 P.2d 108 (1949); Campbell v. Goodbar, 110 Colo. 403, 134 P.2d 1060 (1943).