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Marriage and Divorce for the Devils Lake Indian Reservation

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NOTES

MARRIAGE AND DIVORCE FOR THE DEVILS LAKE INDIAN RESERVATION

I. OBJECTIVES OF DOMESTIC LAW

If a law is made in answer to the call for protection, in the case of domestic law it is necessary to determine how laws concerning the creation and destruction of the marital relationship can best offer protection to the family. Before an attempt can be made to offer such protection, it must be shown that the family merits or is in need of this special attention. That is, does the family serve a legitimate function in our society?

The family has been given many functional definitions, each regarding it to be of different value. The sociologist feels that "[I]t is almost axiomatic that the family is a universally necessary social institution. . . ."[1] The family, in the eyes of the law "is essential to the evolution and growth of a viable society. . . . Family, like law itself, is one of the basic processes for the control of human behavior. .. . Thus perceived, the law shapes and is shaped by the family."[2] Mr. Justice Traynor, in *DeBurgh v. DeBurgh*,[3] stated:

> The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve marriage.[4]

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1. B. MOORE, JR., POLITICAL POWER AND SOCIAL THEORY, 160 (1960), Harvard University Press.
2. J. GOLDSTEIN AND J. KATZ, THE FAMILY AND THE LAW, 1 (1965).
3. DeBurgh v. DeBurgh, 39 Cal.2d 858, 250 P.2d 598 (1952).
4. *Id.* at 863-64, 250 P.2d 598, 601 (1952).

The effects of marriage failure are felt by all. The social and economic cost is apparent in that it spawns juvenile delinquency, disturbs mental and physical health and affects school, industry and business. As an example, the cost of desertion by the husband and father is $1.5 billion yearly in Aid to Dependent Children.[5]

Indeed, if the family is so basic to our social, economic, political systems, the state has a valid interest in protecting this institution as a matter of self-preservation. By fostering family stability the state nurtures one of the basic elements from which it derives its strength and effectiveness. It is the state's interest in family stability which allows the law to create, maintain, or destroy the biological, social, economic and ethical relationships that are the family.

The interest of the state in marriage stability as it is effectuated by the law must not, however, become too commanding. "[A]ll legislation regarding private and personal arrangements must follow a policy of minimum state intervention consistent with the state's overall goals. It must respect the privacy and integrity of the marriage relationship and of all the individuals involved."[6]

If the family is desirable and the state has a legitimate interest therein, the goal of domestic legislation should be to promote greater family stability. However, in order to create laws that are effective in decreasing the instability of marriage, it is essential that something be known about the causes of this instability. Unfortunately, very little is actually known about the reasons for marriage breakdown and opinions based only on inadequate data are available.[7]

Modern developments have brought about a great change in the nature of the modern marriage. Whereas in earlier times the role of the family was largely economic, this income-producing task is today performed primarily outside the home. Such developments tend to create new roles for the modern family. The satisfying of personal needs through the relationship of the family has become much more important.[8] On this basis many psychologists believe that marriage dissolutions result from failure to satisfy each other's unconscious neurotic needs.[9] Equally as often however, economic, political, social class and role factors are emphasized.[10]

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5. Foster, *Conciliation and Counseling in the Courts in Family Law Cases*, 41 N.Y.U. LAW REV. 353 (1966).

6. Goldstein and Gitter, *On Abolition of Grounds for Divorce: A Model Statute and Commentary*, 3 FAMILY L. Q. 75, 84-85 (1969). [Hereinafter cited as Goldstein and Gitter].

7. R. J. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS, 72-75 (prepared for the Special Committee on Divorce of the National Conference of Commissioners on Uniform State Laws). [Hereinafter cited as Levy].

8. Tenney, *Divorce Without Fault: The Next Step*, 46 NEB. L. REV. 24, 49 (1967).

9. C. FOOTE, R. LEVY AND F. SANDER, CASES AND MATERIALS ON FAMILY LAW, 785-86 (1966). [Hereinafter cited as Foote, Levy and Sander].

10. Foster and Freed, *Unequal Protection: Poverty and Family Law*, 42 IND. L. J. 192, 194-96 (1966).

> [M]arital instability seems to be disproportionately related to: (1) youth at marriage; (2) low educational attainment; (3) low occupational status of one spouse or both spouses; (4) both spouses being members of the upper class on the one hand, or the "working" or "lower" class, on the other; (5) poverty; (6) remarriage. . . . These factors seem to interact in a great many ways; to try to isolate any one of them . . . would be extremely difficult at best.[11]

This lack of knowledge as to the causes of marriage breakdown does not mean that domestic law can't be effective in preserving the marital relationship. "Social policy, it is true, often determines or redefines what the law shall be, but sometimes the law itself clarifies or sets the norms of conduct for members of the society, and thereby sets social policy."[12] Thus, by stressing stability in the marriage relationship, domestic law may establish society's attitude and encourage such stability.

Domestic law has traditionally been of the preventative or restrictive type. What is needed, however, is legislation of a more positive kind. The state can do something to promote conditions more favorable to successful marriages by doing such things as establishing programs of sex education and by improving economic and social conditions making married life more tolerable.[13]

Such remedial measures, however, can be of only limited effectiveness without state uniformity of domestic law. Reform is not enough, there must also be uniformity.[14] The necessary uniformity will probably be slow in coming however, and steps toward reform made individually but in a uniform direction will be valuable in achieving the desired end.

II. THE INDIAN PROBLEM

The status of the Indian in the law has been obscured by the divided obligation of the Indian to the tribe, to state, and to the national government. Reciprocally, the obligation of the tribe, state and national government to the Indian has been equally uncertain. This triple governmental arrangement—tribe, state, and nation—has resulted in divided responsibility which has been both inefficient and ineffective.[15]

The jurisdictional problem which exists with regard to domestic law, however, is probably no worse than that which exists between

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11. Levy at 76.
12. Monahan, *State Legislation and Control of Marriage*, 2 J. FAMILY L. 30 (1962).
13. Hammer, *Divorce Reform in California; The Governor's Commission on the Family and Beyond*, 9 SANTA CLARA LAW. 32, 36 (1968). [Hereinafter cited as Hammer].
14. Levy at 9-12.
15. HEARINGS BEFORE THE HOUSE OF REPRESENTATIVES SUBCOMMITTEE ON INDIAN AFFAIRS, 82d Cong., 2d Sess. 44 (1952).

any two states. Title 25, section 11.28 of the Code of Federal Regulations provides: "[T]he Tribal Council shall have authority to determine . . . what shall constitute . . . marriage and divorce. . . ."[16]

The problem of the Indian under the law is greatly complicated by cultural, economic, social and educational conditions. The Indian culture is in a state of transition brought about by the drastic change in social and economic conditions. The productive potential of the reservation land is not sufficient to sustain the entire Indian population. This makes it necessary for many Indians to leave the reservation in search of employment, a step which most will not take because it forces the severance of family ties. The Indian possesses no particular skill, so any job he does find is primarily of the unskilled type and usually seasonal. This all results in an extremely low income.[17] A survey of the Sisseton-Wahpeton Sioux, the major tribe on the Devils Lake Reservation, showed a 75% dependence on welfare, either state or federal. The survey points out that, on the average, these Indian families have only about 20% of the income per person that the average American family receives.[18]

The Indian suffers also from an inadequacy of education. This is due largely to their poverty but is added to by migratory living, lack of motivation, lack of facilities, language barriers, and segregation.[19]

The Indian is often confused when confronted with the white man's law.[20] To help prevent such confusion, any Indian legislation should be written in readily-understood, non-technical language. This is important also to the success of the local informal judicial system in which capable members of the tribe with no legal training participate as Associate Judges.

The Indian problem is very complex, but its primary manifestation is in poverty. Although it is probably not wise to treat only the symptoms, legislation aimed at easing problems brought on by poverty may reduce the pressure so that the cause may eventually be eliminated.

III. MARRIAGE

A. *The Goal of Marriage Law*

"Any inquiry into the adequacy of present domestic legislation might well begin with marriage laws and procedures, since many divorces are but the severing of ties that never should have been

16. 25 C.F.R. § 11.28 (1969).
17. FARBER, O'DEAN AND TSCHETTER, INDIANS, LAW ENFORCEMENT AND LOCAL GOVERNMENT, 11 (June, 1957), Report No. 37, S. Dak. St. Univ. Governmental Research Bureau).
18. *Id.* at 12.
19. North Dakota Indian Affairs Commission, Report No. 4, 9-10 (October, 1956).
20. Farber, O'Dean and Tschetter, *supra* note 17, at 77.

made in the first place."[21] Marriage is the creation of the legally protected family relationship; quite naturally regulation of what relationships are created will affect their stability and the degree of state intervention that will be necessary for their preservation.

The most easily implemented state control over family creation is of the licensing type whereby marriage is permitted only if certain requirements are met. As a result, marriage legislation is largely preventative.[22] For example, age restrictions are designed to ensure that the parties possess sufficient maturity to enter into a successful, lasting marriage, and waiting periods are aimed at reducing the number of marriages hastily entered into.

Marital legislation of this type presupposes an understanding of the causes of marriage failure; this assumption is not valid to any substantial degree. Although some general causes of marital instability are known and preventative measures may be effective to some degree, any harsh restrictions probably prevent at least as many happy as unhappy marriages.[23] Moreover, because of their preventative nature, marriage laws—in particular, licensing statutes—have an effectiveness of relatively short duration. "Where there has been a violation of a preventative policy which was undetected in time to prevent a marriage and the creation of a family, it is usually too late for the prevention to be effective as to that particular family."[24]

Preventative or restrictive measures can be effective but they must be supplemented by more positive legislation. What is really needed is broad educational, economic, and social programs whereby conditions can be made more favorable to effective legislation.[25]

B. *The Indian Marriage Problem*

In the area of marriage law there is no severe problem peculiar to the Devils Lake Indian Reservation that calls for drastic reform; they merely need marriage law included in their code. Their code, as it stands now, has adopted relevant North Dakota domestic law by reference. This is inadequate primarily in that the Tribal Court possesses no authority to issue marriage licenses or perform marriage ceremonies. At present a couple must go off the reservation to the County Court to obtain a license. If the tribe is to succeed in becoming an independent, self-governing body, it must have expressed in its own code adequate self-regulatory power, including the power to create a marital realtionship.

21. Note, *The National Tragedy of Divorce*, 30 J. AM. JUD. SOC. 180, 181-82 (1947).
22. See Levy at Append. D, 1-10.
23. Hammer at 35-36.
24. Foote, Levy and Sander at 179.
25. Hammer at 36.

C. *Marriage Law Provisions*

1. Age Requirements

"The assumption that youthful marriages are particularly susceptible to divorce has general support from public attitude and most sociologists and authors."[26] For this reason minimum age requirements attempt to promote marriage stability by aiming at preventing hasty and immature marriages.

> There is some evidence that youth marriages are less stable than marriages contracted when the spouses are older; there seems little doubt that a disproportional percentage of youth marriages are migratory, and in a disproportional percentage of youth marriages the girl is pregnant. . . . [V]ery little is as yet known as to whether youth alone can be considered responsible for the observed instability of youth marriages.[27]

Whatever the causes, there seems to be a high probability of divorce for the very youthful marriage and age requirements may eliminate this instability to some degree.[28]

Application of such a restriction in too harsh a manner however, stands a chance of preventing sound as well as unstable marriages. To meet this possibility, the provision for judicial discretion in age requirements seems advisable in view of the fact that migratory marriage and the establishment of an informal family relationship are alternatives for the couple.[29]

2. Premarital Counseling

It seems to be quite generally agreed that many of the causes of marital instability may be abolished by a broad program of family life education through which preparation for marriage would begin before the decision to marry has been made.[30] Until such a program can be implemented, and as a useful supplement to it, premarital counseling would be of the following benefit:

> (1) Couples in situations in which a marriage would seem inadvisable could be helped to rethink their decision. . . .
>
> (2) When the marriage is brought about by pregnancy the real motive could be established. . . .

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26. Monahan, *Does Age at Marriage Matter in Divorce?* 32 SOCIAL FORCES 81, 82 (1953) .[Hereinafter cited as Monahan].
27. Levy at 23-24.
28. Monahan at 84-85.
29. Levy at 26.
30. *See* Furlong, *Youthful Marriage and Parenthood: A Threat to Family Stability,* 19 HASTINGS L. J. 105, 117-53 (1967).

(3) Those couples who have thought through their position and approach marriage in a positive manner may be helped to avoid pitfalls, establish communications and advance toward a wholesome relationship.

(4) A relationship would be established with a marriage counselor which would make it possible for the couple to return early enough to be helped at any future time of friction.

(5) It would provide an unbiased third party to help them meet realistically their situation apart from the prejudices of friends and relatives.[31]

3. Waiting Period

An apparent correlation has been found between marriages hastily entered into which disregard waiting period requirements and a high divorce rate.[32] With regard to this instability "[t]here is no doubt that imposition of some waiting period does in fact prevent some very hasty marriages which the parties may regret."[33] Even a short waiting period tends to eliminate marriages that result from dares, jokes, intoxication and short-run sexual desire.[34]

When a couple is denied a license to marry by the local authority, they often resort to the alternative of going to a neighboring state under whose laws they qualify. Waiting period provisions in many of these states have tended to decrease such migratory marriages.[35]

4. Prohibition of Incestuous Marriage

As to the possible harm of an incestuous marriage, "[g]eneticists agree generally that the only effect upon offspring would be an increased chance of transmitting any disease or weakness which already existed in the blood line. Such incestuous relationships may be treated not as biologically harmful but only as sociologically improper."[36]

The prohibition of marriage between marital relatives has little logical support. The concept grew out of the religious notion that husband and wife become one flesh and blood. Today the reasons of genetic and social policy which support continuation of consanguinity as a bar to marriage do not support affinity as such an impediment.[37] Furthermore, most authorities agree that there is no social or engenic justification for prohibition of first cousin marriages.[38]

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31. *Id.* at 131-33.
32. Foote, Levy and Sander at 237.
33. Levy at 26.
34. Monahan, *State Legislation and Control of Marriage*, 2 J. FAMILY L. 30, 36 (1962).
35. Foote, Levy and Sander at 264.
36. Bucca v. State, 43 N.J. SUPER. 315, 321, 128 A.2d 506, 510 (Ch. 1957).
37. Foote, Levy and Sander at 211.
38. *See, e.g.*, Moore, *A Defense of First Cousin Marriage*, 10 CLEV. MAR. L. REV. 136 (1961).

5. Inclusion of Annulment with Divorce

Quite frequently annulment is used as no more than another technique for avoiding a marriage which has failed or been found unsatisfactory, on the basis of some technical impediment. The California Governor's Commission on the Family was "convinced that the essential question presented in the annulment of a voidable marriage does not differ from that presented in any dissolution of marriage case," and they recommended "the removal of the annulment of voidable marriages as a separate form of action and the coalescence of all dissolution proceedings . . . into a single form of action governed by a single standard."[39]

> The annulment concept is an historical idiosyncrasy which, for good reason, has not been able to maintain even conceptual integrity; the void-voidable dichotomy introduces needless interstate complexity and . . . substantial hardships have been visited on individual spouses and on the children of what may have been for all other purposes stable family relationships.[40]

Granted, the state has an interest in the validity of marriage but it has no unique interest in preserving the distinction between marriage validity and divorce.[41]

As a method of eliminating the void-voidable distinction by which some of the grounds for an annulment action could be preserved, annulment should be limited to situations in which the marriage is deemed initially invalid by specific statute and in which the grounds for annulment are easily ascertainable.[42]

IV. DIVORCE

A. *The Goal of Divorce Law*

A good divorce law should seek to strengthen the stability of marriage,[43] but once a marriage has broken down and is no longer functional, the state's problem is no longer marriage stability but dissolving a marriage fairly, without bitterness, distress or humiliation and safeguarding the rights of the parties by regularizing procedure in the interests of an orderly society.[44] The solution to this problem does not lie in making divorce more difficult.[45]

A suggested guide for divorce legislation has stated that a divorce statute must:

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39. REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY, 35-36 (1966).
40. Levy at 17.
41. *Id.* at 18.
42. Goldstein and Gitter at 97.
43. Levy at 83.
44. Lichtenberger, *Divorce Legislation*, 160 ANNALS 116 (1932).
45. *See* Foote, Levy and Sander, "A Quadrilogue on Divorce Policy," 769-95.

> [L]eave the decision to divorce or remain married with the adults involved [and] acknowledge the inability of the law to order highly personal human relationships. . . .
>
> [P]rotect the parties from coerced decisions [by] safeguard[ing] the interests of the children, and provid[ing] the adult partners with an opportunity to avoid "rash" decisions.
>
> [N]either discourage cooperation and good-faith efforts to resolve the difficult issues of finance and custody, nor aggravate the tensions and hostile emotions that accompany the breakup of a marriage.
>
> [F]acilitate the development . . . of sound reorganized family relationships.
>
> [M]ake divorce equally available to people who, because of financial incapacity, are unable to meet counsel and court costs or other expenses. . . .[46]

B. *The Indian Divorce Problem*

As stated earlier, outwardly at least, poverty is the primary problem of the Indian. Law in general and divorce law in particular may be discriminatory as applied to the poor in that lack of financial resources may deny them access to the courts. This requiring of wealth for access to the judicial process is not only manifestly unfair but also raises serious Constitutional questions under the Equal Protection clause of the Fourteenth Amendment.

There exists on the Devils Lake Reservation a great many extra-legal relationships and a high rate of illegitimacy. It has been suggested that poverty and unrealistic divorce laws have combined to bring this about.[47]

Many couples on the reservation have created an informal family relationship in which one or both of the individuals are validly married to another and, because they cannot afford a divorce, are unable to legalize their relationship by marriage. This situation may even be a cause of family breakup. "In poor communities, estranged spouses enter into relationships with third parties without obtaining a dissolution of their marriage. When such relationships . . . become common, the institution of marriage loses its sanctity in the eyes of the community resulting in further family breakup."[48]

C. *Divorce Law Provisions*

1. Abolition of Fault as Grounds for Divorce

The distinguishing feature of present divorce law is the notion of "fault"—the matrimonial offense. The fault system requires that,

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46. Goldstein and Gitter at 85.
47. Foster and Freed. *Unequal Protection: Poverty and Family Law*, 42 IND. L. J. 192, 193-94 (1966).
48. Hammer at 50.

before a divorce is granted, one spouse be pronounced guilty and the other innocent. The guilty is held responsible for the marriage breakdown when in fact the offense has no actual relationship to the cause of the breakdown.[49]

Although the goal of domestic law is to promote stable marriage relationships, this is not to say that it should preserve marriages that are marriages in name only by preventing their dissolution. The state's interest is in the functional, viable, family relationship; others do not serve the purpose that make a family worthy of the state's protection.[50]

The primary evil of the fault-based divorce procedure is that it encourages the aggressive forces that may be already undermining the family. The hatred caused by the accusations necessary to present divorce proceedings is likely to destroy any possibility of conciliation and divide the loyalty of the children.[51] Furthermore, by requiring grounds for divorce, the law fails to afford relief where one spouse who has been living apart from the other spouse and cohabiting with a third party for a number of years wishes to legitimatize the irregular union and the children of it but is prevented from doing so by lack of grounds for a divorce.

Present divorce law, with its requirement of fault and the defenses allowed, frequently denies divorce when one spouse objects. If it is to be the state's policy that no marriage can be established without the full and free consent of the parties, why should it not also be the policy that no marriage must be maintained without the full and free consent of husband and wife?[52]

The decision as to whether the marriage is no longer functional and whether dissolution is necessary can probably best be made by the parties directly involved. Although the decision is a difficult one and the parties may not be sufficiently objective, the abolition of state-created excuses at least makes it clearer as to just what the decision actually is.[53]

If fault is not to be required, what evidences the point at which the relationship is no longer functional and its preservation is no longer in the interest of the state? A number of systems have been suggested, from consent to incompatibility, to breakdown of the marriage.[54] The ultimate in abolishing fault, of course, would be to permit it upon consent of the parties. The primary objection to the consensual principle is that it makes divorce a totally private under-

49. Foote, Levy and Sander at 177.
50. Goldstein and Gitter at 78-79.
51. *Id.* at 81.
52. *Id.* at 86.
53. *Id.* at 83-84.
54. In 1969 California adopted the Family Law Act which establishes grounds for divorce as "irreconcilable differences leading to irremedial breakdown of the marriage." WESTS ANN. CIV. CODE § 4506(1).

taking, completely ignoring the state's interest in the stability of the marriage. The goal of divorce law should still be to minimize state intervention, but not to exclude it entirely.[55]

The "breakdown" approach under which divorce is granted if the marriage is shown to have ceased to be a productive relationship, probably has the most to recommend it; it is relatively easy to determine objectively; it allows a certain amount of judicial latitude; it is politically acceptable and it probably occurs closest to the point at which the marriage actually ceases to be functional.[56]

It has been argued that the abolition of fault and the point-of-breakdown measurement would permit divorce too readily which would lead to marital instability. However, "[t]he social, emotional, religious forces which contribute to the monogamous ideal are simply too strong, the marginal influence of the divorce law on individual behavior too weak, to make it likely that easy divorce will increase the incidence of either family instability or divorce in contemporary society."[57]

2. Procedural Revision

Although divorce consent alone would be too broad, giving the court inadequate opportunity to protect the state's interest, there must be some substitution of administrative for judicial process whereby the procedure would be made less accusatorial and more compatible with the absence of grounds. The California Governor's Commission on the Family suggested that:

> [T]he process be begun by the filing of a neutral petition . . . instead of by the filing of an antagonistic complaint. . . . This petition, filed by either spouse, would simply request the court to inquire into the continuation of the marriage, rather than setting forth specific grounds. . . .[58]

In view of the fact that under present divorce provisions it is probably difficult for many couples to stop once the divorce machinery has been started, even when they no longer want a divorce,[59] the registration method of initiating divorce proceedings could be followed by a number of safeguards by which the court could also ensure adequate consideration of the state's interest in the preservation of the marriage. These could include reports of

55. Levy at 59, quoting "Putting Asunder: A Divorce Law for Contemporary Society," (The Report of a Group Appointed by the Archbishop of Canterbury, January, 1964) para. 46-48.

56. *See* Levy at 90-97.

57. *Id.* at 92.

58. REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY, 17-18 (1966).

59. Levy at 122.

social service agencies,[60] marriage counseling,[61] adjournment of proceedings to permit further attempts at reconciliation,[62] privacy of the proceedings,[63] a delay or "cooling-off" period[64] and judicial discretion in determining financial settlement and child custody.[65]

A modified divorce-by-application procedure, by reducing the role of the attorney, would also be an important step toward solving the problems of the poor. "[P]resent procedures are accessible only to persons who are able to pay an attorney's fee. This fee, especially in the case of an uncontested divorce, may be disproportionate to the minimal services rendered."[66]

3. Marriage Counseling

As one of the procedural adjustments to the abolition of fault as grounds for divorce, marriage counseling might prove to be a valuable tool in reducing the incidence of marital dissolution. It has been estimated that as many as one-half of the divorce cases that are filed might be abandoned or dismissed if the couple were enabled to receive counseling assistance.[67] A number of the parties to divorce proceedings are quite willing to give their marriage another chance and are in need of counseling more than divorce.[68]

A great many couples fail to appreciate their marital responsibilities or lack the understanding and ability to cope with the problems which most marriages normally experience. A scheme whereby the court could discover which couples' marital difficulties could be solved would allow for further counseling and possibly the saving of the marriage.

Many divorcing couples who may be unable to volunteer to reconcile will nonetheless respond to judicially initiated reconciliation counseling.[69] As a secondary effect, the counseling session may also serve to promote more stable second marriages. Even if the marriage can't be saved, the counseling may calm the parties and improve their post-divorce adjustment.[70]

4. Delay in Granting Divorce Decree

Any registration application method of instituting divorce proceedings, even if modified to limit its consensual nature, should

60. *See, e.g.*, Note, *Terminating a Marriage in Nebraska*, 43 NEB. L. REV. 156, 174 (1963).
61. *See infra.*
62. *See, e.g.*, Levy at 122.
63. *Id.* at 117.
64. *See infra.*
65. *See infra.*
66. Hammer at 49.
67. Ralls, *The King County Family Court*, 28 WASH. L. REV. 22, 26 (1953).
68. McIntyre, *Conciliation of Disrupted Marriages by or Through the Judiciary*, 4 J. FAMILY L. 117-18 (1964).
69. Levy at 122.
70. McIntyre, *supra* note 67, at 129.

provide some safeguard to prevent hasty decisions.[71] Some required lapse of time between the application and the decree would accomplish this,[72] and also provide the necessary time for investigation into the conditions and circumstances surrounding the marriage, marital counseling, and for agreement as to financial arrangements and child custody.[73]

5. Judicial Discretion in Financial Arrangements and Custody

Even when the parties to marriage agree in wanting a divorce, quite frequently they are unable to agree as to how their property will be divided or who shall have custody of the children. The lack of agreement as to these matters should not be a bar to divorce if divorce is truly necessary. The court is in a good position to decide, as between the parties at least, what the agreement should be in fairness to all.

The conditions of poverty that widely exist on the Devils Lake Reservation, however, create special circumstances. Quite often neither party to the divorce is in a position to adequately provide for the children. In such cases the court should be empowered to deny custody to both parents and make some other provision more in the interest of the child's welfare.

The child's "best interests" has frequently been the guide for judicial determination as to custody. The interests of the child of course, should definitely be considered, but to preserve the "parental right" notion, there should be required a specific finding of detriment to the child in order to award custody to a non-parent.[74]

> The . . . courts have avoided the formulation of a clear-cut definition of "unfitness" applicable to all guardianship or custody cases, and it has been stated that the variable and complex nature of human relationships and conduct renders it impossible and undesireable. . . .[75]

In line with this opinion it seems advisable to allow the court considerable discretion in determination of custody.

V. PROPOSED TRIBAL CODE PROVISION
DOMESTIC RELATIONS

§3.1 Marriage

(a) Jurisdiction

The Devils Lake Sioux Tribal Court shall have authority to issue marriage licenses to any Indian.

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71. Levy at 58.
72. Note, *Chattanooga Divorce Report*, 19 TENN. L. REV. 944 (1947).
73. Goldstein and Gitter at 91-92.
74. *See* J. Goldstein and J. Katz *supra* note 2, at 281-99.
75. O'Brien v. O'Brien, 259 A.C.A. 437, 442, 66 CAL. REPTR. 424, 427 (1968).

(b) Tribal Custom Marriage Abolished

Marriages hereinafter entered into by Tribal custom shall not be considered valid or legal.

(c) Recognition of Foreign Marriages

All marriages entered into outside of the Reservation, which are valid according to the laws of the jurisdiction in which they were contracted, shall be given full effect on the Reservation.

(d) Nature of Marriage

A marriage is a personal relation arising out of a civil contract, to which consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by solemnization.

(e) Solemnization

A marriage may be properly solemnized by any recognized clergyman or judge within the Devils Lake Sioux Reservation.

(f) Application for Marriage License

Any unmarried Indian, eligible by age and otherwise as hereinafter defined, upon application to the Clerk of the Devils Lake Sioux Tribal Court, may obtain a marriage license.

A license shall not be issued hereunder if either of the parties have been previously divorced unless they provide the Clerk of Court with a certified copy of the divorce decree.

(g) Age Requirements

Any unmarried male of the age of eighteen (18) years or more and any unmarried female of the age of fifteen (15) years or more and not otherwise disqualified is capable of consenting to and entering into a marriage.

Any males under twenty-one (21) years of age and females under eighteen (18) years of age are to be considered minors, and parental consent is required in order for them to be married. In addition the couple must be given premarital counseling by a recognized clergyman or member of the court.

The couple applying for a marriage license must obtain the signature of a third party as to the truth of their stated ages.

Marriage of persons below the minimum age may be permitted upon petition by the parents if it is shown that the couple exhibits exceptional maturity and the circumstances are such that marriages would be in their best interests.

Whenever a parent or guardian gives consent to the marriage of a minor, he or she thereby assumes the responsibility in part to provide for the minor and the children born until the minor be-

comes of age. The assumption of this responsibility is to be stated in a written consent.

(h) Waiting Period

There must intervene between the application for a license and the issuing of the same not less than ten (10) days. During this time the application must be publicly posted or otherwise published.

(i) Medical Examination

No application for a marriage license shall be accepted by the Clerk of Court unless there has been filed with him a statement signed by a licensed physician within the last 30 days that each applicant has been given an examination, including a standard serological test and that he is not infected with syphilis in a communicable stage.

(j) Recording by Clerk of Court

A copy of the Certificate of Marriage must be returned by the person solemnizing the marriage to the Clerk of Court. A record must be kept by the Clerk of Court of all marriage licenses issued and all certificates of marriage returned following solemnization.

(k) Incestuous Marriage Prohibited

Marriage between: parents and children of any degree, brothers and sisters, uncles and nieces, aunts and nephews shall be void from the beginning.

(l) Legitimacy

A child born before wedlock becomes legitimate by the subsequent marriage of its parents.

§3.2 Dissolution

(a) Jurisdiction

The Devils Lake Sioux Tribal Court shall have authority to grant divorces, separations and annulments to any Indian whether marriage was entered into under a marriage license issued by Clerk of the Devils Lake Sioux Tribal Court or any other civil authority.

The court shall have authority to determine temporary custody and support upon application for dissolution made hereunder while such matter is pending.

(b) Procedure

The Chief Judge must approve all divorces, separations and annulments granted hereunder.

The court may request a report from the Bureau of Indian

Affairs regarding the parties and their children.

(c) Tribal Custom Divorce

Divorces under Tribal custom hereinafter shall not be considered valid or legal.

(d) Termination of Marriage

Marriage is dissolved only by (a) the death of one of the parties or (b) the judgment of a court of competent jurisdiction decreeing a dissolution of the marriage.

A. *Divorce*

(a) Application for Divorce

Any Indian married person or couple may file an Application for Divorce with the Devils Lake Sioux Tribal Court.

In case only one spouse files an application hereunder, the other spouse shall be given notice thereof by personal service as in §2.6(c), or if personal service fails, the court shall order such other notice as is most likely to effect actual notice.

If within one year of the filing of an Application hereunder, no Petition for Divorce has been made under subsection (b), the Application shall cease to remain in force. The Application for Divorce shall contain the names of the parties to the marriage, the date and place of the marriage, the date and place of birth of each child of the marriage, and the current residence of each party.

(b) Petition for Divorce

Ninety days after the filing of an Application for Divorce, either or both spouses may petition the court for a Decree of Divorce. If the court finds that the circumstances do not require it, the 90-day waiting period may be waived.

(c) Marital Counseling

Upon the filing of an Application for Divorce under subsection (a), the court may require that they receive marriage counseling from a person appointed by the court.

(d) Grounds for Divorce

Before the court may grant a Decree of Divorce there must be a showing that there are irreconcilable differences between the spouses which have caused the breakdown of the marriage.

(e) Irreconcilable Differences Defined

Irreconcilable differences are those grounds which are determined by the court to be substantial reasons for not continuing

the marriage and which make it appear that the marriage should be dissolved.

Irreconcilable differences are evidenced by, but not limited to: (1) desertion or living apart for a period exceeding 6 months, (2) extreme cruelty, (3) habitual intemperance, (4) adultery.

(f) Continuation of Proceedings

If it appears that there is a reasonable possibility of reconciliation, the court shall continue the proceedings for a period not to exceed 30 days from the filing of the Petition. During the period of the continuance there shall be made available to the parties an opportunity for further marriage counseling.

(g) Financial and Custody Arrangements

Before the court can issue a Decree of Divorce there must be a showing that the spouses have voluntarily reached reasonable financial agreement and custodial arrangements for their children. The Decree shall include the terms of the spouses' agreement.

When the spouses do not reach agreement, or whenever only one spouse makes application to the court, the court shall decide the financial and custody issues.

Where it appears that neither spouse is suited to properly care for the children, the court shall provide for the placing of the children in a foster home.

Custody should be awarded in the following order of preference:

(1) To either parent according to the best interests of the child, but, other things being equal, custody shall be given to the mother if the child is of tender years.

(2) To the person in whose home the child has been living in a wholesome and stable environment.

(3) To any other person deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

Before the court makes any order awarding custody to a person other than a parent, without the consent of the parents, it must make a finding that an award of custody to a parent would be detrimental to the child.

A custody order may be changed at any time upon a showing by a party to the original action of a substantial change in circumstances.

(h) Effect of a Decree of Divorce

The Decree of Divorce shall restore to each of the spouses the

status of being single and unmarried. However, the legitimacy of children of the marriage is in no manner affected.

B. *Separation*

(a) Decree of Separation

A Decree of Separation may be obtained under the same circumstances and in the same manner as provided in §3.2A.

(b) Effect of Decree of Separation

The Decree of Separation is identical to the Decree of Divorce in all respects except that the parties retain their married status.

(c) Divorce Following Separation

At any time not less than 90 days after a Decree of Separation has been issued, either or both spouses may petition the court for a Decree of Divorce. Terms of the Separation agreement shall be incorporated into the Divorce Decree.

C. *Annulment*

(a) Grounds for Annulment

An action to declare a marriage null and void shall be the same as for a Decree of Divorce or Separation except that no waiting period need precede the Decree. The following marriages are void and an action shall be maintainable for these reasons only:

(1) Incestuous marriage—Marriage between: Parents and children of any degree, brothers and sisters, uncles and nieces, aunts and nephews.

(2) Bigamous marriage—Where one of the spouses at the time of the marriage is validly married to some other person.

(3) Non-age—By the spouse under the legal age for marriage. Actions must be commenced not later than 6 months after the spouse reaches legal age for marriage.

(b) Legitimacy

Children conceived before a Decree of Annulment are to be considered legitimate in every respect.

DAVID V. OPLAND