COMMITTEE: JOINT COMMITTEE -- DOMESTIC RELATIONS COMMITTEE
DATE: August 17, 1970
PLACE: State House, Hearing Room 11
CHAIRMAN: Rep. Alan E. Norris

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I wish to represent to you gentlemen that I have been teaching this subject continuously since 1932 and I have practiced law since 1929, and I am a grandfather, father, and a husband, so that I can claim right or wrong views from experience in each one of those areas. Now I wish to commence my remarks to you gentlemen that I am not ready to accept what the California law proposes to do, but there seems to be a growing feeling that everything that happens in California is a cure for everything everywhere. Now I hold the view that a marriage contract is one of the highest contracts -- and one of the most important contracts, and one of the most far-reaching contracts that a man and woman can ever enter into during a lifetime. And I can't conceive under the circumstances and the importance of the family to the community, and the raising of children, ~~what~~ why any man or woman should be permitted to be released from that contract merely by a change of mind. And that is all irreconcilable differences are. A change of mind. I strongly cling to the view that fault should be the basic reason for dissolving a marriage -- a fault recognized by the people through their legislators. However, I feel that the courts have, during the years, without benefit or the support of legislative action -- adopted certain defenses which they permit to be raised, and they recognized and which they recognize as clean hands, recrimination and collusion. I think that the clean hands doctrine went through a -- if I may burden you -- originally in the Mattox case way back in 1822 -- the court said where a woman was bringing an action for divorce on the ground of adultery, and the husband was in the course of that trial, became informed of the fact that she herself was living in a state of adultery and had given birth to an illegitimate child, and the court said, and took the view, that the legislature never intended that a divorce should ever be granted to a person who is not innocent of

marital fault. Later on the courts began giving it a change of equity until we get into the DeWitt case, about 60 Ohio State, in which the court said the domestic relations court had no equitable powers, and therefore, could not base that reason for recognizing clean doctrines on the ground of equitable powers. Then they went on the theory that the real reason for applying the doctrine of clean hands was that when people had mutual obligations under a contract, one could not complain what the other was doing, if the one complaining had already done the same thing; and so finally the Legislature adopted in the 3105.20 giving the court in domestic relations, equitable powers, so that the Court of Appeals in the Newall case - that is out just this week - the Ohio Bar reiterates that that provision of the statute that the court of domestic relations, or the divorce court, has unlimited powers of equity. They can do anything involving any matter relating to domestic relations, excepting as the court of appeals said that they can't use one act of maximum equity, to defeat another -- that equity is intended to do equity -- equity is never intended to result in inequity.

What the court is saying in the Newall case is that the court may apply the doctrine of clean hands if they see fit. I wrote an article in 1967 which appears in Volume 18, page 1189, of Western Reserve Law Review, and I went into detail on all of these matters and I concluded then by saying that the time has come for a reform in Ohio relating to divorce, alimony, separation and enforcement of support for the wife, child support, custody and visitation privileges, and I suggested the Bar and the Legislature provide the leadership -- so I feel that, while the right to bring an action for divorce should be based on a fault -- the court in deciding should not be precluded from evaluating which of the parties is less at fault. In other words, if -- we must keep in mind that we have a judge sitting on the bench who has run through the test and gamut of election, competition -- he is a human being, a part of that community and knows what the thinking of that community is, he is experienced in the worldly ways, he is as street wise as anyone

else could be, and I think far more competent than a person who is going to administer in a bureaucracy whether or not a divorce should be granted. That individual represents the thinking of the community and when you charge him with the responsibility of determining whether or not that he should grant a divorce to the one lesser at fault, that he will do that job. That judge isn't sitting up there as a partisan - he - certainly he has ideology, we all have our own backgrounds that lead us to think this way instead of that way. That is all washed out in the election. If the people don't like his ideology, they aren't going to elect him. That is our system, and if they get somebody elected that they don't like because of his ideology - they have to endure that situation until they get an opportunity to change it. That is the price of democracy. So I have great confidence in the Judges doing a good job on that matter, and therefore, I feel that the doctrine of clean hands and recrimination should be eliminated, and the court empowered to grant a divorce to the party less at fault. Now another thing that I believe in is the fact of collaboration. I have sat in my office - and I am sure every lawyer that has practiced in this field could say the same thing. They will come and they will give you a story that it is horrible, intolerable - events happening in the home, and when you ask them - have you any witnesses? - the wife will say my husband is a perfect angel in the presence of other people, and the other way around. And the result is that sometimes you have to bring in 12, 13, 14, 15-year old children. I tried a case for ten days before Judge Kowinski- not too long ago - and the only witnesses that the plaintiff's wife could bring in, and the father's for that matter, of any consequence- other than character witnesses - were the children. And the court found both of them at fault - these people can't ~~get~~ live together, if they were even under under the same roof, there might be a fatal shooting -- and the court denied both of them a divorce. So now they don't know which way to turn. There is a husband without a wife, and a wife without a husband. She has to wait until something happens in order to force an obligation for their support.

Because, once a court refuses to grant a divorce, it loses jurisdiction in the case, it has no contr ol over custody, no control over the support of the minor children. It loses complete jurisdiction of the matter and they are thrown back into society, a sordid situation. And that is not very commendable to exist in a society - an enlightened society - of ours. So I think a divorce case should be tried as any other civil case -- you don't have to have collaborating testimony in a personal injury case - if you don't you might lose it. But is is not compulsory, as it is now. Now that brings me to another viewpoint - collusion. Collusion is also a judge made rule of law, borrowed from the archiac laws of the ecclesiastical courts. Now collusion means that if two minds meet and agree that one or the other will not defend the law suit,

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it may facilitate property settlement, in these cases. Now on the matter of property settlement. Once a divorce is granted and a matrimonial home has burned to the ground, there are ashes that remain and nothing happens. And the ashes that remain are the matter of property rights, wife-support, child-support, visitation rights. These are the material things that are left after the marital home is destroyed and these are the only things that are in the hands of trial court and from these material things, property-rights, child-support, alimony of the wife, custody of minor children -- and on these things, and only these things, can the court build a new life for the husband - and a new life for the wife - and a new life for the children. And they are not matters that are to be lightly regarded. And whatever the Legislature should do, in my opinion, is to protect the rights of property, wife-support, child-support, visitation-rights, by leaving it to the court in making it a judicial determination. And in that connection I think that Ohio woefully lacks its duty towards the wife -- there is no law in Ohio that makes it unlawful, no criminal law-penalty, which makes it unlawful to support a wife, - failure to support a wife. And I think that should be considered - most states have it - some kind of a

provision in which a willful failure to support a wife -- we do have a law which requires a man is guilty of a felony if he fails to support his wife while she is pregnant. Well she needs support when she is not pregnant too. And, before I forget it, in my opinion the new Ohio civil rules favor runaway fathers and runaway mothers. Runaway fathers and husbands I should say. In what respect. A young lady came in my office the other day and her husband works for one of these big companies that sends their men around. They bought property in Cleveland, and then he was transferred to Texas, so they go down and make a home down there in Texas. She is down there for awhile. He sends her back home. They have got children - are buying property up here - and then after the required residence requirements alleged have been established, she gets notice that he wants a divorce. Now by reason of the rules of procedure in Texas which are similar in scope as the Ohio - he can litigate down t here in Texas the question of property rights, the question of alimony, the question of custody -- while she is up here in Cleveland. She hasn't got the money to go down there personally and battle her case. She has to do it through a lawyer -- who will not have the benefit of her presence and testimony. In that sense, the rules are apt to favor the runaway father-- favor the runaway husband. Now under the old ones that prevailed in Ohio before the adoption of the rules of civil procedure, all that husband could do down in Texas is get a divorce -- unless she went down there and submitted to the jurisdiction of that court. But now he can be a thousand miles away, and while he is down there, and the poor woman who has three and four children to take care of, can't work -- she can't go down there and defend herself from that court. And the judgment will follow -- that probably has resulted because the Ohio rules of civil procedure are patterned greatly after the Federal rules of civil procedure, and the Federal rules of civil procedure were never geared to handle divorce matters, and I think that members - and I know that Judge Milligan has some views for revision which he will present to the right persons at the appropriate time in respect to that. Now I also would like to lend my support to Judge Milligan's observations to this group on the matter of living apart. I think if the Legislature

were to add an additional ground for living apart for some specified time, automatically a ground for divorce, that it would eliminate a lot of adultery that is going on, a lot of perjury that is going on, after all if a man and wife have lived apart - either involuntary, or voluntarily, after two years the marriage may be regarded as destroyed and you might as well legally destroy it, as it has been factually destroyed. Also, I lend my support to the Judge's view about considering whether or not a father ought to be obligated to support a child beyond the age of 21, if he is in attendance in a college, university, or a school of higher training. That matter is often the subject of contract in a separation agreement, and courts have supported having enforced such provisions. I recognize, however, that trifling with enlarging the support beyond age 21 - and even if confined to one particular area, such as being in college, may give the Legislature a lot of trouble. But I think the idea is good.

Now I come to another -- as I pointed out -- I would like to make this article in the Western University Law Review, a part of my remarks to this committee, and in this report or article, I point out that partial divorces are easily procured in Ohio. So far as the divorce itself is concerned, the Legislature has placed a lot of safeguards around the marriage. You used to have to have personal service to get a divorce -- you had to wait six weeks -- you had to have collaborating testimony -- the court was not permitted to accept admissions under conditions which the court felt were corruptive -- these were all safeguards planted by the Legislature around the institution of marriage so as not to make it easy to destroy that marriage. Yet by following that policy, they enacted a statute which encourages the people to separate. 3105.06, under that law, anybody - a husband and wife - could separate without reason. They don't have to go to any court - any public body - they don't have to give any reasons, they just separate. Once separated, the marriage is factually destroyed.

Now one more remark I would like to make -- because I don't want to take too much time. The matters of separation agreement -- under this

statute the parties when they separate -- and then upon separation -- they make an agreement which the courts have construed to include the division of property, the support of either of them, and support of the minor children. Now there is no law which compels the parties to present such an agreement to the court. Now in Wisconsin, whenever the parties, asking for a divorce, appear before the court they are required by statute to present to the court any agreement entered into regarding property division - for the court to pass upon. In Ohio, under the present state of the law as I read it, and as I reported to the Bar Family Law Committee, of which I am a member, once a separation agreement is presented to the trial court in a divorce court, in a divorce case, the trial court has no authority to change or alter that agreement, unless one of the parties has complained about any provision of that agreement in a pleading. It has to be raised by an issue in the pleading. Well that means that the court becomes a rubber stamp in approving an agreement which he cannot - if he finds to be unfair - and unjust - to either the children or -- as to the children he is, of course, free to make his own orders. But as to the parties, he is powerless. Conceivably, a separation agreement could be entered into in 1965, when the parties have only two children, and certain conditions - the matter may not come before the court until 1970 -- now the court states that the test of the validity of that agreement as to its fairness of the time it was entered into and that isn't what the statute on divorce and alimony says. The statute on divorce and alimony says the court shall consider the property coming to either of the parties, by virtue of the marriage, personal and real estate, real property of the parties and the earnings at the time of the decree. Now the court should have that authority to say, gentlemen - or parties - you made an agreement in 1965. Under the economic conditions then, it may have been all right. But I am granting the decree here now -- I have got to fix alimony, and I have got to make division of property now -- as of now -- I must reject your agreement. The court should have that power and authority to do so.

Gentlemen I want to thank you.

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