The FOIA must be considered in context, as it is applied and construed amidst other sources of law. While the FOIA signifies a move toward greater accessability to public documents, this movement has been thwarted to some extent by a combination of drafting infirmities, agency practices, judicial interpretations, and a lack of momentum on the public's part. Consequently the FOIA has not been overly praised as accomplishing what many hoped it would.[100] The major criticisms may be summarized as follows: (1) the agencies tend to broaden the statutory exemptions, both beyond their language and the purposes of the Act; (2) the agencies attempt to classify material under as many exemptions as possible[101] or else apply an exemption as a "blanket" over a file which contains both exempted and non-exempted records; and (3) the inertia of many agencies results in delays, and where court action is necessary the private citizen is at a disadvantage economically.

Experience under the FOIA will provide a basis for new legislation which is both necessary[102] and inevitable. Meanwhile, the agencies might be well-advised to review their practices and procedures and strive for an alignment with the FOIA. "There is little doubt that if government officials display as much imagination and initiative in administering their programs as they do in denying information about them, many national problems now in the grip of bureaucractic blight might become vulnerable to resolution."[103] The final source of enforcement for the FOIA, and the concepts it seeks to implement, is the most crucial: the bar and the public it represents.

STEVEN E. MAYER

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100 As stated in Huard, *The 1966 Public Information Act: An Appraisal without Enthusiasm*, 2 PUB. CONTRACT L. J. 213 (1969) at 213: "Upon close study, the new public information amendment to the Administrative Procedure Act is revealed as rather thin stuff. It will not displace the Magna Carta, our Constitution, or even the Natural Gas Act as an exemplar of significant social, economic, or political legislation."

101 *See, e.g.*, Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971).

102 *See generally* Katz, *supra* note 63, at 1284.

103 Nader, *Freedom From Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 5 (1970).

DISSOLUTION OF MARRIAGE IN IOWA: COLLATERAL DETERMINATIONS UNDER THE NO-FAULT CONCEPT

I. INTRODUCTION

In 1969 the Iowa legislature seriously confronted the issue of divorce reform in Iowa. A committee was appointed to study the inadequacies of the existing law and to recommend reform measures.[1] During the 1970 session of the legislature, the Committee's recommendations were considered, and a major statutory change was instituted. The resulting statute was the Dissolution Act, which became effective July 1, 1970.[2] The enactment of this legislation made Iowa the second state to have a no-fault divorce statute.[3] The reforms thereby assimilated into Iowa divorce law were considerably less radical in some respects than those originally envisioned by the Divorce Laws Study Committee;[4] however, in other respects, the legislators surpassed the prevailing expectations and the express recommendations of the Committee. For instance, the Committee had initially proposed that the courts admit all evidence going to the issue of marital breakdown.[5] Fault evidence was not to be excluded. In fact, the Committee specifically recommended that certain kinds of evidence be designated as relevant and within the scope of review by the courts. The list made specific reference to the inclusion of evidence of adultery, chronic alcoholism, conviction of a felony, and inhuman treatment[6]—all instances of marital fault. The statute, as finally drafted, did not include this list.[7] It is

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[1] Peters, *Iowa Reform of Marriage Termination*, 20 DRAKE L. REV. 211, 213 (1971). Peters' article provides a competent treatment of the legislative history and the drafting of no-fault legislation in Iowa. It is not the purpose of this Note to duplicate that study.

[2] IOWA CODE §§ 598.1-.34 (1973). The no-fault concept, as embodied in Iowa law, is expressed in § 598.17, which provides:

> A decree dissolving the marriage may be entered when the court is satisfied from the evidence presented that there has been a breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.

[3] California was the first state to institute major divorce reform. CAL. CIV. CODE §§ 4500-40 (1971). The provisions of this statute, which went into effect January 1, 1970, differ somewhat from those enacted in Iowa. For instance, § 4506 provides:

> A court may decree a dissolution of the marriage or a legal separation on either of the following grounds, which shall be pleaded generally:
>
> (1) Irreconcilable differences, which have caused the irremedial breakdown of the marriage.
>
> (2) Incurable insanity.

[4] Peters, *Iowa Reform of Marriage Termination*, 20 DRAKE L. REV. 211, 215 (1971).

[5] *Id.*

[6] *Id.* The Committee listed nine categories in all. The list is reproduced in its entirety in Peters' article.

[7] *Id.* at 216. In reviewing the legislature's treatment of this matter of fault evidence, Peters states: "Other than the above, the legislative history seems to make it clear that there is to be no vestige of the old fault concept. The *existence* of a dead marriage rather than the *cause* of death is to be the focus of judicial inquiry. Therefore,

noteworthy that the statutory implementation of the no-fault concept in Iowa law is remarkably uncompromising in this respect.[8] That is, the legislature does not in any way allude to a possibility that fault evidence would be considered.[9]

During the three years since the Dissolution Act went into effect, the potency of the no-fault aspect has been tested in the courts. To date, only twenty-three cases involving dissolutions under the new Act have reached the supreme court on appeal.[10] Recent decisions by the Supreme Court of Iowa reveal that a majority of that court construes the legislation as abrogating the notion of marital fault, not only with regard to the granting of the dissolution itself, but also as applied to the collateral matter of determining financial rights and duties.[11] The purpose of this Note is to analyze the changing attitude toward marital fault, to assess the degree to which fault is still extant in Iowa divorce law, and further to consider the standards which have replaced it.

II. Fault: Historical Treatment and Rationale

How fault got to be the focal point of divorce proceedings is an interesting question. As with many present-day legal ghosts, the answer involves in part the accidents and idiosyncracies of history. The history of marital fault, as it pertains to divorce law, had its origin in a period when fault made no difference whatsoever: during the Middle Ages, divorce was absolutely prohibited in England.[12] From the twelfth century until 1857, because of the influence of Christianity, marriage was regarded as a sacrament; and divorce, a sin.[13] Only two types of divorce were allowed at this time—parliamentary divorce[14] and

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it is unfair to say that the General Assembly changed only the labels and left the substance untouched."

[8] Iowa Code § 598.17 (1973). Compare this provision, for example, with Cal. Civ. Code § 4509 (1971), which provides: "In any pleadings or proceedings . . . evidence of specific acts of misconduct shall be improper and inadmissible, except where child custody is in issue . . . *or* at the hearing where it is determined by the court to be necessary *to establish the existence of irreconcilable differences.*" (emphasis added).

[9] Iowa Code § 598.17 (1973).

[10] Anthony v. Anthony, 204 N.W.2d 829 (Iowa 1973); *In re* the Marriage of Campbell, 204 N.W.2d 638 (Iowa 1973); *In re* the Marriage of Gudenkauf, 204 N.W.2d 586 (Iowa 1973); Walters v. Walters, 203 N.W.2d 376 (Iowa 1973); *In re* the Marriage of Bare, 203 N.W.2d 551 (Iowa 1973); *In re* the Marriage of Penney, 203 N.W.2d 380 (Iowa 1973); *In re* the Marriage of Jordan, 203 N.W.2d 314 (Iowa 1972); *In re* the Marriage of Jennerjohn, 203 N.W.2d 237 (Iowa 1972); Geisinger v. Geisinger, 202 N.W.2d 44 (Iowa 1972); *In re* the Marriage of Forest, 201 N.W.2d 728 (Iowa 1972); *In re* the Marriage of Collins, 200 N.W.2d 886 (Iowa 1972); *In re* the Marriage of Boyd, 200 N.W.2d 845 (Iowa 1972); *In re* the Marriage of Jayne, 200 N.W.2d 532 (Iowa 1972); *In re* the Marriage of Harrington, 199 N.W.2d 351 (Iowa 1972); *In re* the Marriage of Tjaden, 199 N.W.2d 475 (Iowa 1972); *In re* the Marriage of Williams, 199 N.W.2d 339 (Iowa 1972); *In re* the Marriage of Kurtz, 199 N.W.2d 312 (Iowa 1972); Hutcheson v. Hutcheson, 197 N.W.2d 594 (Iowa 1972); Morris v. Morris, 197 N.W.2d 357 (Iowa 1972); *In re* the Marriage of Neff, 193 N.W.2d 82 (1971).

The twenty cases listed above are treated specifically by the author. Three additional cases have been decided by the Iowa supreme court and reported since the writing of this Note: *In re* the Marriage of Carney, 206 N.W.2d 107 (Iowa 1973); *In re* the Marriage of Cook, 205 N.W.2d 682 (Iowa 1973); *In re* the Marriage of Link, 205 N.W.2d 751 (Iowa 1973).

[11] *In re* the Marriage of Williams, 199 N.W.2d 339 (Iowa 1972).

[12] Walker, *Beyond Fault: An Examination of Patterns of Behavior in Response to Present Divorce Laws,* 10 J. Fam. L. 267, 272 (1971).

[13] *Id.*

[14] *Id.*

divorce *a mensa et thoro*[15] (*i.e.*, a divorce from bed and board). The latter exception to the prohibition of divorce involved a decree enabling a man and woman to live separate and apart but prohibiting remarriage. This type of divorce was granted on the basis of fault. The rationale used was that the fault of one spouse relieved the innocent spouse somewhat of his marital obligation.[16] Thus, fault was actually used at this particular juncture to humanize the divorce law, and recognition of fault could be characterized as a liberalization of the law.

The Matrimonial Causes Act of 1857[17] gave the State jurisdiction over marriage and divorce. The change of forum did not, however, change the emphasis on fault.[18] Fault-orientation was retained in determining whether a divorce should be granted and what rights each party had on termination of a marriage.

Fault was not accepted in American divorce law merely because of a reluctance to break with the past. It was at once a recognition of individual moral responsibility and a recognition of a vital state interest. The state interest in encouraging marital stability and in maintaining the family unit is generally characterized as an interest in social stability and its consequent effect on political and economic stability.[19] Fault considerations have traditionally been one way in which a state maintains firm control over marital stability. States differ widely in the extent to which they exploit fault orientation to exert control.[20] Louisiana, for example, has persisted in making it difficult to obtain a divorce; and this has been accomplished by severely restricting the list of statutory grounds.[21] In this manner, through substantive measures, the

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[15] *Id.* at 273. This "partial divorce" was originally by ecclesiastical decree and was granted only at considerable cost; thus, divorce was a remedy available only to the wealthy. The bed-and-board divorce is still granted in some states (*e.g.*, New Jersey, Louisiana). Contrast divorce *a vinculo matrimonii*, which is a total divorce.

[16] *Id.* "Fault" was definitively limited to adultery, unnatural acts, and cruelty.

[17] 20 & 21 Vict., c. 85 (1857).

[18] Walker, *Beyond Fault: An Examination of Patterns of Behavior in Response to Present Divorce Laws*, 10 J. FAM. L. 267, 273 (1971).

[19] Note, *Untying the Knot: the Court and Patterns of Divorce Reform*, 57 CORNELL L. REV. 649, 650 (1972).

[20] For a thorough and up-to-date study of this subject, *see* Freed, *Grounds for Divorce in the American Jurisdictions*, 6 FAM. L.Q. 179 (1972). The most common statutory grounds for divorce are adultery, desertion, cruelty, imprisonment for a felony, alcoholism, and physical incapacity (*e.g.*, impotency). Separation is another fairly common ground. Others include bigamy, premarital pregnancy by another man, insanity, narcotic addiction, not providing financially for one's family, and fraud. It is interesting to note the wide divergence in legislative definitions of marital "fault." Several states extend the definition to reach "indignities." Illinois specifically lists attempted murder of one's spouse by poison or other means showing malice and also infecting one's spouse with venereal disease. Rhode Island includes as a ground "gross misbehavior and wickedness." North Carolina expressly mentions homosexuality and sexual acts with a beast as within the legal definition of "fault" in that state. Wyoming includes a husband's vagrance. And Puerto Rico's divorce law recognizes a husband's proposal to prostitute his wife as marital "fault."

[21] 5 LA. CIV. CODE ch. 1, art. 138, 139 (1971). "Immediate divorce" may be granted for either of two causes—adultery or conviction of a felony. In addition, a divorce may be obtained on several other grounds (*e.g.*, abandonment, public defamation, habitual intemperance, etc.) after one year has expired under a judgment of bed-and-board divorce.

state mandates marital longevity. Other states are less assertive of control, though in varying degrees, and many states are now in the throes of reform.[22] Where a state's substantive treatment of divorce requirements is liberal, the state is still apt to assert nominal control through procedural provisions.[23]

III. No-Fault under the Iowa Dissolution Act

There is no question that fault grounds were abrogated, at least in part, by the Dissolution Act of 1970.[24] The Act by its terms puts the fault inquiry to rest with regard to the marriage termination itself. Simply expressed, the matter of whether or not to grant a dissolution is no problem for the courts: if both parties want the dissolution, it will be granted; if only one party is convinced that a marital breakdown has occurred with no reasonable likelihood of a satisfactory solution, the court will agree. There is to date no record of a dissolution proceeding wherein one party persistently asserted the claim of marital failure, while fulfilling basic statutory requisites, but was denied a divorce. Put another way, where there is a questionable marital situation with the parties in disagreement about staying married, a dissolution will generally be granted.[25] This is an extreme departure from the prior policy of denying divorces if they were collusive or if an innocent party opposed the divorce.[26] Furthermore, there is no indication that the present trend will be reversed. A recent amendment to the Dissolution Act made conciliation efforts mandatory *only if* requested by one of the parties.[27] Previously, participation in conciliation attempts had been mandated without regard to the wishes of the parties involved.[28] This legislative easing of the prerequisites to divorce is parallelled by judicial treatment. For instance, the definition of "corroboration" for the purpose of the Dissolution Act is liberal. The court construes the term to embrace, not only supporting testimony, but also a spouse's failure to deny the

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22 The list of states with no-fault statutes now includes California, Colorado, Florida, Iowa, Kentucky, Michigan (whose Act is similar to Iowa's), New Hampshire, and Oregon. A number of other states have added "incompatibility" to their list of fault grounds as a no-fault alternative.

23 Iowa Code §§ 598.17, 598.18 (1973).

24 *In re* the Marriage of Williams, 199 N.W.2d 339, 344 (Iowa 1972).

25 This statement assumes *some* evidence of a "questionable marital situation." In the *Boyd* case, corroboration took the form of a conciliator's opinion, which would have been inadmissible if properly objected to. *In re* the Marriage of Boyd, 200 N.W.2d 845, 851 (Iowa 1972).

26 *See, e.g.*, Nichols v. Nichols, 257 Iowa 458, 459, 133 N.W.2d 77, 78 (1965), in which the court said: "Their married life together consisted of eight hours spent together in the upstairs of the Monona County jail. Their marriage was ill-advised, prompted by plaintiff's suspicion of pregnancy and a mistake, but courts in Iowa do not have authority to dissolve marriages on the grounds that the parties made a mistake." The court further states that the divorce statute (prior to reform) offers relief only to an innocent party. Even innocent parties were denied relief under some circumstances. In *Erickson v. Erickson*, 154 N.W.2d 106 (Iowa 1967), it was decided that insults and beatings had been condoned and that such condonation operated as a defense to the divorce action.

27 Iowa Code § 598.16 (1973). If neither party objects, waiver of conciliation is discretionary with the court upon a showing of good cause.

28 Iowa Code § 598.16 (1971).

claim of marital breakdown or other circumstantial support.[29] The Iowa supreme court, in fact, pays only perfunctory attention to the corroboration requirement, stating in a recent case that this requirement is "almost repugnant" to the philosophy of no-fault dissolution.[30] The court's reluctant adherence to this statutory requirement[31] is, in effect, a sign of its unwillingness to deny divorces for failure to meet what it regards as an unnecessary evidentiary standard.[32]

When the idea of no-fault divorce came under attack in California, the California Governor's Commission made it clear that the no-fault statute enacted was *not* divorce by consent.[33] This stance demonstrates a defensiveness on the part of reformers in this area of law. While some reformers have been heard to insist that no-fault does not make divorce "easier,"[34] other proponents of reform admit that the new laws do facilitate marriage termination but qualify this admission by pointing out that men and women have always found ingenious ways to circumvent laws they found unduly burdensome.[35] Further, some point out that where there is a discrepancy between law and practice, the result is often disrespect for the law.[36] A recognition of this problem has been credited as one of the persuasive factors underlying the Iowa reform.[37]

In the past, Iowa couples have been denied divorces in situations which one could, with some certainty, characterize as "marital breakdowns."[38] Because of mutual fault no divorce was possible under the old law.[39] Now dissolution is granted in Iowa without regard to fault by one party as a prerequisite.[40] The dissolution itself is available with a minimum of additional stress. The Uniform Marriage and Divorce Act, researched and drafted under the au-

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29 *In re* the Marriage of Boyd, 200 N.W.2d 845 (Iowa 1972); *In re* the Marriage of Collins, 200 N.W.2d 886 (Iowa 1972).

30 *In re* the Marriage of Collins, 200 N.W.2d 886, 890 (Iowa 1972).

31 IOWA CODE § 598.10 (1973). The court in the *Collins* case points out that the purpose of § 598.7, the corroboration provision under the Old Act, was to prevent collusion. The court argues that this purpose is absolutely inappropriate under the Dissolution Act, since "collusion" would, in fact, be evidence supporting the proposition that a marital breakdown existed. *In re* the Marriage of Collins, 200 N.W.2d 886, 890 (Iowa 1972).

32 *In re* the Marriage of Collins, 200 N.W.2d 886, 890 (Iowa 1972).

33 Note, *Marital Fault v. Irremediable Breakdown: The New York Problem and the California Solution*, 16 N.Y.L.F. 119 (1970).

34 *See, e.g.*, Cannell, *Abolish Fault-Oriented Divorce in Ohio—As a Service to Society and to Restore Dignity to the Domestic Relations Courts*, 4 AKRON L. REV. 92, 104 (1971).

35 A familiar example in the area of divorce is the Nevada divorce. Other less familiar types—the "shoebox divorce" (where the marriage license is "filed" in a shoebox), "jumping over a broom"—are explained in Walker's article. Walker, *Beyond Fault: An Examination of Patterns of Behavior in Response to Present Divorce Laws*, 10 J. FAM. L. 267, 279 (1971).

36 Traynor, *Law & Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230, 236 (1956).

37 Perjury was commonplace under the old statute.

38 Erickson v. Erickson, 154 N.W.2d 106 (Iowa 1967); Nichols v. Nichols, 133 N.W.2d 77 (Iowa 1965).

39 IOWA CODE § 598.18 (1971).

40 *In re* the Marriage of Kurtz, 199 N.W.2d 312 (Iowa 1972). A divorce had previously been denied. The petition for dissolution was dismissed by the trial court. The Iowa supreme court reversed, stating that the new Act required different evidence and used different standards; therefore, res judicata did not bar the action.

thority of the National Conference of Commissioners on Uniform State Laws, goes even further than current state reforms, suggesting that a divorce be granted if one party swears under oath that the marriage has failed.[41] As yet, however, this law has met with significant opposition.[42] Where this type of law is adopted, there is implicit in such adoption the understanding that individuals can be trusted to define "fault" and to decide what constitutes a viable marriage. Also implicit is an acceptance of the supremacy of private interests over those of the state.

While the use of no-fault in the dissolution itself is a settled matter, the fading importance of the fault factor in determining the outcome of custody and property disputes has only recently become apparent. During the past year, the Iowa supreme court addressed itself to the matter of fault as it affects these secondary considerations. The statements of the court's position were unequivocal but not exhaustive.[43] Finding only sketchy guidelines written into the Code,[44] the court interpreted legislative intent to indicate the advisability of giving fault less weight than previously in making collateral determinations.[45] The decisions in *In re the Marriage of Forest*[46] and *In re the Marriage of Williams*[47] are essential to an understanding of the present status of Iowa divorce law. However, the picture they present is not complete.

IV. Custody: How Important Is Fault?

Marital fault in the custody context was an issue squarely faced by the Supreme Court of Iowa in 1972 in deciding the *Forest* case.[48] The facts of this case may be documented as follows: the couple involved had been married eleven years. There were two children, a ten-year-old son and an eight-year-old daughter. The family life had been "normal," though the father was characterized as somewhat inattentive. The mother was, according to the court as fact-finder, "a good wife, mother, and homemaker,"[49] with the exception of the last year or so, when there were admitted indiscretions on her part. The court examined all the above factors as pertinent to a determination of "the best interests of the children,"[50] and affirmed the lower court's award of custody to the mother. This decision would seem to belie a considerable de-emphasis on marital fault where custody questions are to be decided. However,

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41 Uniform Marriage and Divorce Act § 305 (1970).

42 In no state did it gain official acceptance. It is, in fact, being redrafted because of ABA objections.

43 *In re* the Marriage of Forest, 201 N.W.2d 728, 729 (Iowa 1972); *In re* the Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972).

44 Iowa Code § 598.17 (1971).

45 *In re* the Marriage of Williams, 199 N.W.2d 339 (Iowa 1972).

46 201 N.W.2d 728 (Iowa 1972).

47 199 N.W.2d 339 (Iowa 1972).

48 201 N.W.2d 728 (Iowa 1972).

49 *Id.* at 729.

50 *In re* the Marriage of Forest, 201 N.W.2d 728, 729 (Iowa 1972); Forsyth v. Forsyth, 172 N.W.2d 111, 114 (Iowa 1969); Lovett v. Lovett, 164 N.W.2d 793, 802 (Iowa 1969); Utter v. Utter, 155 N.W.2d 419, 421-22 (Iowa 1968).

when all the usual criteria[51] are applied to this fact situation, the weight given to fault (here, the mother's misconduct) is surprising. The court alludes to those considerations favoring a custody award to the mother—the devotion and competence she had displayed thus far in child-rearing, her close relationship with the children, the ages of the children, and the fact that one child was a girl. The court then sets these facts up vis-à-vis the few facts militating toward an award of custody to the father—namely, his love for the children and his lack of marital fault by traditional standards. Other factors, not specifically mentioned by the supreme court in this case, but given controlling weight in other decisions, also favored an award to the mother. These factors were the status quo (the fact that the mother had been in continuous custody)[52] and the inference favoring motherhood,[53] which was only impliedly a concern.[54] The issue to be decided in the *Forest* case[55] was whether the mother's behavior showed that she would be a poor custodian of the children. In custody proceedings, fault is relevant to the extent that it establishes that one parent would be a "poor custodian."[56] Although there was no reference in the *Forest* opinion to evidence of maternal neglect during the latter years of the marriage, such evidence appears crucial if fault is a valid element in determining custody. Even with most of the evidence on one side of the scales, the court in *Forest* ruled with some hestitancy, saying that the misconduct "creates nagging uncertainty about her fitness as custodian"[57] and that the court is not "free from all doubt"[58] in allowing Mrs. Forest to have custody. Another indication of the overriding concern with marital fault in custody determinations is the court's statement that "[a]bsent the misconduct, we would quickly grant Mrs. Forest custody."[59]

A reading of the *Forest* decision leaves one with a suspicion that the attitudinal shift concerning marital fault has had inconsequential bearing in the custody area. One of the dissenting justices in *Williams* agrees, insisting that the legislature made a fundamental change in the law on the primary issue (*i.e.*, the dissolution itself) but did not purport to deal with custody law. "The issue of custody is governed by what is in the best interest of the children. . . . The new act did not abolish that rule, nor did the act provide that the parties' conduct cannot be considered in determining the children's best

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51 For a complete study of custody considerations in Iowa, *see* Note, *Factors in Determining Child Custody in Iowa*, 20 DRAKE L. REV. 383 (1971).

52 *In re* the Marriage of Forest, 201 N.W.2d 728 (Iowa 1972). *See also In re* the Marriage of Neff, 193 N.W.2d 82 (Iowa 1971); Raabe v. Raabe, 191 N.W.2d 551 (Iowa 1971); Maikos v. Maikos, 260 Iowa 382, 147 N.W.2d 879 (1967). The court does of late place primary emphasis on the desirability of leaving the children where they are. It is, therefore, incumbent upon attorneys to win custody disputes in the first instance; an appeal will be weighted against the loser of the first bout.

53 *See, e.g.*, Forsyth v. Forsyth, 172 N.W.2d 111, 114 (Iowa 1969).

54 Where the children are very young, the mother will be favored. The same is true where the child—or one of the children—is a girl.

55 201 N.W.2d 728 (Iowa 1972).

56 *Id.* at 729.

57 *Id.*

58 *Id.* at 730.

59 *Id.* at 729.

interest."[60] It would be totally incorrect to conclude that *In re the Marriage of Forest*[61] stands for the proposition that the courts do not rely on fault evidence in awarding custody. Rather, it may more accurately be concluded that there has been no appreciable change in the ordering of custody criteria. Fault is still afforded substantial weight. Two additional inferences with regard to fault may be drawn from the holding in *Forest* and other recent cases: (1) the definition of "fault" in the context of custody fights is very narrow,[62] and (2) in order to be considered, fault must be admitted[63] or proved.[64] The first inference derives from the court's use of the term "fault" almost exclusively with reference to adulterous conduct.[65] It is admitted that an activity similarly censured under traditional values might qualify,[66] but the term "fault" as it is commonly used by the Iowa supreme court is a euphemistic allusion to adultery.[67] The second inference finds support in a recent case, in which a wife successfully defended herself against the husband's charges.[68] To state that *proof* of fault allegations is required is to state the obvious. Nevertheless, it is difficult to formulate with any certainty the standard of proof employed by the courts, because a surprising number of cases involve a spouse's admission of misconduct.[69]

The *Forest* case presents the clearest statement of the Iowa law on custody under the Dissolution Act. Only four other cases involve appeals from custody decrees under the Act,[70] and only one of the four involves marital misconduct serious enough to be given weight.[71] The parties in *In re the Marriage of Bare*[72] were both criticized by the court—the wife for drinking and "flagrant sexual indiscretions,"[73] the husband for lying under oath.[74] The court said that "conduct of the parties, good and bad, is admissible in evidence as it bears on and reflects the character and fitness of the respective parties for custody of children."[75] This is a somewhat more forceful statement of the import of fault evidence than had previously been made by the Iowa supreme court operating under the no-fault concept. The court in fact awarded custody to the mother

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60 *In re* the Marriage of Williams, 199 N.W.2d 339, 350 (Iowa 1972).
61 201 N.W.2d 728 (Iowa 1972).
62 *See, e.g., In re* the Marriage of Forest, 201 N.W.2d 728 (Iowa 1972).
63 *Id.*
64 *In re* the Marriage of Jordan, 203 N.W.2d 314 (Iowa 1972).
65 *In re* the Marriage of Bare, 203 N.W.2d 551 (Iowa 1973); *In re* the Marriage of Forest, 201 N.W.2d 728 (Iowa 1972); *In re* the Marriage of Williams, 199 N.W.2d 339 (Iowa 1972).
66 *In re* the Marriage of Bare, 203 N.W.2d 551 (Iowa 1973).
67 *In re* the Marriage of Forest, 201 N.W.2d 728 (Iowa 1972); *In re* the Marriage of Williams, 199 N.W.2d 339 (Iowa 1972).
68 *In re* the Marriage of Jordan, 203 N.W.2d 314 (Iowa 1972).
69 *See, e.g., In re* the Marriage of Forest, 201 N.W.2d 728 (Iowa 1972).
70 *In re* the Marriage of Bare, 203 N.W.2d 551 (Iowa 1973); *In re* the Marriage of Jordan, 203 N.W.2d 314 (Iowa 1972); *In re* the Marriage of Jennerjohn, 203 N.W.2d 237 (Iowa 1972); *In re* the Marriage of Neff, 193 N.W.2d 82 (Iowa 1971).
71 *In re* the Marriage of Bare, 203 N.W.2d 551 (Iowa 1973).
72 *Id.*
73 *Id.* at 553.
74 *Id.*
75 *Id.* at 554.

but pointed out that "a proper record might have been made for placing custody in a third party."[76] Two cases under the Act include only incidental discussions of fault. In *In re the Marriage of Neff*,[77] allusions to marital misconduct were at a minimum. The court properly concentrated on circumstances of the child's life, expressing concern over the limited time the mother was able to spend with the boy. Although the father submitted evidence of behavior which "did not set a very good example,"[78] (the mother coming home late from work on a motorcycle with a male companion), the supreme court dismissed this charge as insufficient to deprive the mother of custody. *In re the Marriage of Jordan*[79] was also decided on the basis of non-fault considerations, since the wife successfully defended herself against charges of misconduct. *In re the Marriage of Jennerjohn*,[80] the fourth dissolution involving the collateral issue of custody, was a far-from-unanimous decision. Custody of the two minor children was granted to the mother despite the trial court ruling to the contrary, psychiatric evidence of the mother's emotional instability, testimony by an older son favoring a custody grant to the father, similar testimony by the children involved, the status quo, *and* some evidence of "indiscretions" on the part of the mother. The court addresses itself to the matter of fault as it relates to parenthood as follows: "Many of petitioner's criticisms are superficial and point out no apparent evidence of harm to the children's well being."[81] The court in the *Jennerjohn* case properly considered whether maternal misconduct had manifested itself in maternal neglect. This treatment of fault in custody proceedings is thus in certain respects more careful than usual. Nevertheless, the award itself may be questioned on other bases.

Other recent cases elucidate specific non-fault factors that may also be controlling where custody awards are at issue. In *Miller v. Miller*,[82] decided under the old statute, custody was awarded to the father. The basis seemed to be a reluctance to disturb the status quo,[83] the mother's indiscretions and neglect of the family,[84] and her testimony in praise of the father.[85] The mother's lack of aggression in requesting custody during the proceeding was also permitted weight.[86] The court's concern in this case was not so much with the fault evidence establishing the mother's misconduct as with the status quo.[87] Cases under both the old and new acts verbalize apprehension over changing a child's place of residence, once established. A second factor used in conjunc-

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76 *Id.*
77 193 N.W.2d 82 (Iowa 1972).
78 *Id.* at 85.
79 203 N.W.2d 314 (Iowa 1972).
80 203 N.W.2d 237 (Iowa 1972).
81 *Id.* at 242.
82 202 N.W.2d 105 (Iowa 1972).
83 *Id.* at 112.
84 *Id.* at 108.
85 *Id.* at 111.
86 *Id.* at 113.
87 *Id.* at 112. The supreme court quotes *Eddards v. Suhr*, 193 N.W.2d 113 (Iowa 1971), a custody dispute which was not incidental to a divorce: "[T]he status of children should be quickly fixed and, thereafter, little disturbed."

tion with fault considerations and status quo concerns is the "presumption" favoring the mother. Lay knowledge of divorce law generally acknowledges this feature. However, the court frequently disclaims its importance, expressing the idea with varying degrees of conviction.[88]

States less progressive than Iowa are also witnessing the decline of fault, however halting the progress. The Supreme Court of Alabama ruled in 1971, for instance, that a wife's adultery does not forever bar her having custody.[89] The Uniform Act makes several suggestions with respect to custody. Predictably, it stresses that the interests of the child and not the wishes of the parent should be paramount.[90] Two other recommendations are more startling, more courageous: (1) that fault notions be "deliberately and expressly excised,"[91] and (2) that the "adversary trappings" of marital litigation be reduced.[92] It is suggested that the parties be encouraged to settle the custody issue out of court.

V. No-Fault and Its Financial Implications

The Uniform Act extends the elimination of fault to the handling of property settlements and support provisions. It is suggested in the Act that a dissolution of marriage be treated like the dissolution of a partnership with the assets distributed accordingly.[93] The implementation of this idea would involve a division of the property acquired by either spouse during the marriage as the first step.[94] Only where such division of assets proves insufficient would there be a supplementary award of alimony and then only if "appropriate under the circumstances."[95]

The Supreme Court of Iowa recently moved ahead in this area. Prior to *In re the Marriage of Williams*,[96] decided during the summer of 1972, the importance of the fault factor in determining the outcome of property disputes had been a matter ripe for speculation. The guidelines provided by the Code provision were vague, calling only for whatever order "shall be justified."[97] The provision replaced the old statutory demand that the award be "right."[98] The change in requirement merely testified to a less pompous view of the human capacity for achieving a wise settlement of marital rights and obligations on termination of a marriage. Beyond the evidence of humility over the human

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88 The weight given to the factor of motherhood has been given various expressions by the Iowa supreme court. In 1962 it was called a presumption. Harwell v. Harwell, 253 Iowa 413, 418, 112 N.W.2d 868, 872 (1962). In 1969 it was referred to as an inference which "readily yields." Forsyth v. Forsyth, 172 N.W.2d 111, 114 (Iowa 1969). In 1970 it was characterized as "but an inference." Jones v. Jones, 175 N.W.2d 389, 391 (Iowa 1970).

89 Stephens v. Stephens, 255 So. 2d 338, 341 (Ala. 1971).

90 Uniform Marriage and Divorce Act § 402 (1970).

91 *Id.* This recommendation is set out in the prefatory note.

92 *Id.* This, too, is discussed in the prefatory note.

93 *Id.* § 308. The prefatory note provides further discussion.

94 *Id.*

95 *Id.*

96 199 N.W.2d 339 (Iowa 1972).

97 Iowa Code § 598.21 (1973).

98 Iowa Code § 598.14 (1966).

condition and the indication of a less stringent evidentiary requirement pursuant thereto, it was unclear what the provision meant in terms of reform. The *Williams* case[99] is a declaration of the policy that marital fault should have no bearing on support awards. The trial court had admitted that it considered fault when the award was made.[100] The supreme court, in arriving at a conclusion on this issue, examined the statute itself and found little indication of clear direction on the point. The Dissolution Act does not specifically prohibit the use of fault evidence, nor does it allow for the allegation of fault grounds in the petition.[101] In the absence of a certain legislative directive, the court looked to the history of the Act, noting the Committee's recommendations that fault evidence be admitted and the legislature's exclusion of the Committee's list of specific areas of marital fault.[102] Giving credit to the position the legislature took on this issue and also to the obvious purpose of the Act itself,[103] the Supreme Court of Iowa, by a 6-3 decision, ruled that marital fault would not be considered at all in determining the division of marital property and the basis for awarding alimony and child support. Prior to this case, there had been some predictions that fault would have weight where the financial settlement was involved.[104] According to the majority opinion in *Williams*, these predictions were wrong. The court's ruling was a succinct statement of the law as it now stands:

> In order to carry out this obvious legislative intent and give effect to the object sought to be accomplished, we hold not only the "guilty party" concept must be eliminated but evidence of the conduct of the parties insofar as it tends to place fault for the marriage breakdown on either spouse must also be rejected as a factor in awarding property settlement or an allowance of alimony or support money. Usually both spouses contribute to a breakdown of the marital relations which makes necessary an adjustment of their rights and obligations.[105]

The court then refers to the *Schantz* criteria,[106] saying that evidence of the

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99 199 N.W.2d 339 (Iowa 1972).
100 *Id.* at 341.
101 IOWA CODE §§ 598.5, 598.17 (1973).
102 Peters, *Iowa Reform of Marriage Termination*, 20 DRAKE L. REV. 211, 215-16 (1971).
103 *In re* the Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972).
104 Baer and Davis, *"Merit" in No Fault Divorce*, 60 ILL. B.J. 766, 769 (1972).
105 199 N.W.2d 339, 345 (Iowa 1972).
106 Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968). Here is the complete list set out in *Schantz*:

A. PREMARITAL CRITERIA:
1. Social position and living standards of each party.
2. Their respective ages.
3. Their respective mental or physical condition.
4. What each sacrificed or contributed, financially or otherwise, to the marriage.
5. The training, education and abilities of each party.

B. POSTMARITAL CRITERIA:
1. Duration of the marriage.
2. Number of children, their respective ages, physical or mental conditions, and relative parental as opposed to financial needs.
3. Net worth of property acquired, contributions of each party thereto by labor

fourth postmarital factor will no longer be admissible on the issue.[107] The court thus implies that the other criteria set out in *Schantz* will still be useful as the basis for judgments on the question of support. In considering the demise of fault with regard to alimony and property divisions, these *Schantz* guidelines become important, because they constitute the court's new definition of "fairness." The entire set of standards can be broken down into three catagories: (1) economic information,[108] (2) duration of the marriage,[109] and (3) good conduct deserving of reward.[110] Given a marriage of reasonable duration,[111] the economic factors become crucial. Case law indicates that where there are small children, the mother will be presumed to be unable to go outside the home to work, and the husband will be ordered to pay alimony, as well as child support—and this despite any fault or misconduct by the wife.[112] The considerations are almost wholly economic. The court is at least theoretically clear on the point that financial decisions can not be made with punishment in mind. An analysis of recent decrees provides an inconclusive test of this theory.[113]

The court in *Williams*[114] reaches its decision with some difficulty. This is evidenced not only by the strong dissent but also by the tendency to rely rather heavily on secondary materials and to quote them extensively[115] without, however, venturing to expressly incorporate the quoted passages. The opinion would be more vulnerable to attack if the court had expressly approved the quotations. (One writer, for example, sets up "fault" and "fairness" as dichot-

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or otherwise, net worth and present income of each party.
4. Conduct of the spouses and particularly that of the guilty party.
5. Present physical and mental health of each party.
6. Earning capacity of each party.
7. Life expectancy of each party.
8. Any extraordinary sacrifice, devotion or care by either spouse in furtherance of a happy marriage or in preservation of the marital relationship.
9. Present standards of living and ability of one party to pay balanced against relative needs of the other.
10. Any other relevant factors which will aid in reaching a fair and equitable determination as to respective rights and obligations of the parties.

107 *In re* the Marriage of Williams, 199 N.W.2d 339, 346 (Iowa 1972).

108 Note that this category includes all of the abovementioned criteria except postmarital criteria one, four (no longer used), and eight.

109 This is post-marital criterion one.

110 Criterion eight is discussed with reference to the admissibility of fault evidence in the *Williams* dissent.

111 The *Tjaden* case is notable for the short marriage involved therein. The duration factor was given *some* weight—*i.e.*, the wife did not get permanent possession of the home which the husband had owned prior to the marriage; however, one wonders at the "equities" of a case where the husband and his son are forced to move into another residence (the attic of his mother's home) pursuant to the award. *In re* the Marriage of Tjaden, 199 N.W.2d 475, 477 (Iowa 1972).

112 *See, e.g., In re* the Marriage of Williams, 199 N.W.2d 339 (Iowa 1972).

113 Conclusions could properly be rested on a review of the briefs, records, and opinions of cases decided since *Williams*. The sampling should probably be limited to cases wherein custody is not an issue. As yet, few cases are available in this category. Marital fault is alluded to in the *Gudenkauf* case, one of the few available cases; this allusion is, of course, unnecessary.

114 199 N.W.2d 339 (Iowa 1972).

115 *Id.* at 343-45.

omous.)[116] In the articles cited by the supreme court, there is, as the court claims, unanimous support for the idea that marital fault is *not* a factor under the no-fault statutes.[117] A few authorities have, however, expressed a contrary view.[118]

The court in *Williams* disavowed a tendency to be influenced by considerations of fault, and in the few cases to come down after *Williams* there is generally no allusion to marital misconduct where custody is not at issue.[119] Even so, there is some support for the theory that information of this sort will somehow find its way to the supreme court on appeal in cases where fault evidence is inappropriate.[120] Prior to *Williams*, such evidence was no doubt included in the record on appeal because of uncertainty on the trial court level as to whether or not marital fault was applicable to the issue of alimony and property division. A number of trial courts had, however, voiced a consistent disregard for such information.[121] The dissenting opinion in the *Williams* case suggests the foolish naivete of pretending that fault evidence will be ignored. One dissenter says simply that the new rule will not work.[122] In implementing this new rule, two types of problems become apparent: (1) the temptation of an innocent party to bring such evidence to the court for the influence, conscious or unconscious, it may have on alimony awards[123] and (2) the difficulty of looking to marital fault on one issue and ignoring it for other purposes.[124] Neither problem appears insurmountable, however, *if* there is fundamental agreement with the no-fault concept itself. It is submitted there is not. The *Williams* dissent contains convincing arguments for allowing evidence of marital fault on the issue of alimony. The dissent takes the position that fault should still be *one* of the factors considered.[125] The dissenting justice reiterates the point that dissolution is an equity action, that equity looks at the whole situation, and that under the old Act the amount of alimony was governed by "what is just, fair, and equitable between the parties."[126] The dissenters con-

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116 *Id.* at 345.

117 The research materials utilized by the court are listed. *In re* the Marriage of Williams, 199 N.W.2d 339, 343 (Iowa 1972). *See, e.g.*, Note, *The No Fault Concept: Is This the Final Stage in the Evolution of Divorce?*, 47 NOTRE DAME L. REV. 959 (1972).

118 Baer and Davis, *"Merit" in No Fault Divorce*, 60 ILL. B.J. 766 (1972).

119 *See, e.g.*, Walters v. Walters, 203 N.W.2d 376 (Iowa 1973).

120 *See, e.g., In re* the Marriage of Harrington, 199 N.W.2d 351 (Iowa 1972); *In re* the Marriage of Kurtz, 199 N.W.2d 312 (Iowa 1972).

121 For instance, the record from the Boone District Court in *In re the Marriage of Harrington*, 199 N.W.2d 351, 354 (Iowa 1972), indicated that the court did not consider fault evidence as applied to property division: "The Court is going to sustain the objection with the comment that it is my understanding that the fault concept in dissolution cases is no longer present; that we are primarily to officiate the division of the assets." Contrast this with the *Williams* case, where the Marshall District Court admits that it did consider marital fault.

122 199 N.W.2d 339, 350 (Iowa 1972).

123 The *Harrington* case illustrates this; the *Gudenkauf* case, decided since *Williams*, is another example. *In re* the Marriage of Gudenkauf, 204 N.W.2d 586 (Iowa 1973).

124 *In re* the Marriage of Williams, 199 N.W.2d 339, 350 (Iowa 1972).

125 *Id.*

126 *Id.*

tend the rule was not abolished by the new Act and further that fairness dictates the necessity of considering marital fault.[127] A second dissenting opinion concurs in the first dissent but adds another version of "fairness." The justice states that evidence of one spouse's good conduct (*Schantz* criterion eight) will be "emasculated" if not viewed in the light of the bad conduct of the other spouse.[128] That is to say, saintliness will not be fully appreciated. It is recommended in this opinion that evidence of misconduct be admitted for the limited purpose of putting good conduct in context.[129] It makes no sense, however, to say on the one hand that the realities of judicial practice make it impossible to ignore fault evidence for property purposes where it has been given significant attention on the custody issue and then to suggest, on the other hand, that an even more subtle thought process be employed—the "limited purpose" device within the narrow scope of certain financial criteria. Besides, this recommendation, it is submitted, is a blatant attempt to skirt the issue.

The essential problem is with the value of having a no-fault law. Since most divorces are uncontested except as to collateral disputes over custody and property,[130] allowing fault evidence on these issues effectively destroys the no-fault concept. The force of no-fault reform is defeated if marital fault becomes once more the crux of every dissolution proceeding. The argument for disallowing fault evidence is, therefore, equally compelling. One goal of the divorce reform in Iowa was to limit the bitter presentation of those details of married life that culminate in marital failure.[131] If this is a worthy goal, then the restraint involved in withholding from the court facts that *arguendo* go to the question of fairness is not an intolerable sacrifice.

Other states also face this problem somewhat indecisively. Some Code provisions are written with the express purpose of settling the matter, but unclear draftsmanship—probably stemming from disagreement over the relationship of fault to fairness—frequently results.[132] Other no-fault statutes have not been in use long enough to provide court decisions construing the no-fault provisions in those jurisdictions.[133] For this reason the Iowa decision in *Williams* takes on added importance.

In terms of the theory of divorce reform, *Williams* is an important case; but it is questionable whether the case, as a matter of practicality, is very significant. A superficial comparison of the financial aspects of the cases decided under the Dissolution Act with those decided prior to the recent divorce reform provides some interesting information. Since decisions are on a case-by-case basis and since there are many variables, it is difficult to ascertain patterns.

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127 *Id.*
128 *Id.* at 351.
129 *Id.*
130 Cannell, *Abolish Fault-Oriented Divorce in Ohio—As a Service to Society and to Restore Dignity to the Domestic Relations Courts*, 4 AKRON L. REV. 92, 104 (1971).
131 Peters, *Iowa Reform of Marriage Termination*, 20 DRAKE L. REV. 211, 213 (1971).
132 CAL. CIV. CODE § 4509 (1971).
133 *See, e.g.*, Mich. Stat. Ann. § 25.86 (1971).

Even so, some conclusions find adequate support. First, it should be noted that the absolute withholding of an alimony award where the wife was "at fault" was a practice which was judicially changed under the old statute.[134] In *Conkling v. Conkling*,[135] for example, a guilty wife was awarded $500 per month in alimony; in *Miller v. Miller*[136] another guilty wife was awarded $150 per month, as well as a property settlement amounting to approximately one third of the couple's assets—and this despite the fact that the husband had been awarded custody of the children (one requiring expensive medical care). In the *Williams* case [137] the wife—a "guilty" party under the old statute—was awarded twenty-five per cent of the assets plus $100 per month in alimony plus $100 per month in child support. If fault is discounted completely and the *Schantz* criteria are applied, the award in the *Williams* case is probably "justified," as required by the Act. It is, at any rate, apparent that the no-fault award in *Williams* was *not* impossible under the old statute. A second major point is also suggested by the cases: it is not likely that the components of "fairness" will be agreed upon. The term lends itself to considerable difficulty of definition and must finally be limited in terms of some policy considerations. Some factors will be written off as too minor to divert the court's attention; others (such as fault) will be excluded because of a preponderance of disadvantages incident to inclusion. Recent cases illustrate problems of fairness completely unrelated to the fault issue. *In re the Marriage of Tjaden*,[138] for instance, involved an award to the wife of $100 per month plus the use for a period of five years of a home purchased by the husband. The factor which creates questions of fairness in this case is the duration of the marriage—fourteen months. In another recent case, *Hutcheson v. Hutcheson*,[139] the award to the wife was $1000 per month in alimony plus the family residence. The doctor-husband contested the award, arguing that it was based on his earnings during a period of his life when he was working sixteen-hour days and that he was no longer able to maintain that schedule. The Iowa supreme court responded by ordering his assets put in trust to make payments during the year following the hearing. A review at the end of that year would, the court said, determine the necessity of modification. The goal was to prevent a deliberate lessening of income. The preventive measure seems extreme. The *Hutcheson* case provided another interesting view of the implementation of the economic criteria used in making an award. The court took judicial notice of financial needs beyond those submitted by the wife.[140] *In re the Marriage*

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[134] Miller v. Miller, 202 N.W.2d 105 (Iowa 1972); Conkling v. Conkling, 185 N.W.2d 777 (Iowa 1971). The old rule under *Fivecoat v. Fivecoat*, 32 Iowa 198 (1871), was that a guilty party could not be awarded alimony *unless* such party was the meritorious cause of the wealth *and* the other party was not entirely innocent.

[135] 185 N.W.2d 77 (Iowa 1971).

[136] 202 N.W.2d 105 (Iowa 1972).

[137] 199 N.W.2d 339 (Iowa 1972).

[138] 199 N.W.2d 475 (Iowa 1972).

[139] 197 N.W.2d 594 (Iowa 1972).

[140] *Id.* at 597.

of Campbell, another case decided within the last year, based the support awards on the principle that the mother of a pre-school child need not work.[141] This is true, despite the difficulty of maintaining two households on a single salary. The cases just cited—*Tjaden, Hutcheson, Campbell*—suggest the possibility that future discussions of "fairness" will not turn on the fault issue.

VI. Conclusion

At this point it can be stated with a fair amount of confidence that the Iowa legislature and the courts have given their approval to no-fault as it applies to divorce law, although this approval is not unanimous. The *Williams* decision demonstrates the Iowa supreme court's willingness to enlarge somewhat the express legislative confines of the doctrine through a necessary construction of legislative intent. The next few years will demonstrate the workability of the no-fault reform as applied to the area of alimony and child support. There will be several indicators of the acceptance of the Iowa supreme court's ruling: action or inaction by the Iowa legislature, treatment in the lower courts of Iowa, and the response to the *Williams* decision in other states. For the present, the decision can be regarded as a good faith attempt by the court to forward the spirit of no-fault legislation. It is anticipated that the legislature will proceed in the same spirit, revising the Dissolution Act where it is indicated.[142]

Judith M. German

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141 204 N.W.2d 638 (Iowa 1973).

142 Several areas might be mentioned. The Uniform Act suggests, for instance, that "separation agreements" be used with regard to financial rights in order to facilitate dissolution. This is directly contrary to the old rule (expressed recently in *Gudenkauf*) that antenuptial agreements restricting alimony are void as against public policy because they facilitate dissolution. If the recommendations under the Uniform Act find acceptance, a change of this nature would be statutory. Another statutory provision that should be reevaluated in light of the no-fault concept is the remarriage provision, which has only minimal effect in its present form. (The one-year waiting period may be waived by the court; the requirement may also be circumvented through marriage in another state.)

REMEDIES FOR CONFLICTS OF INTEREST AMONG PUBLIC OFFICIALS IN IOWA

The concept of conflicts of interest originated in the common law of trusts which dictated that a trustee could not, without authority, be pecuniarily interested in the affairs or interests of the beneficiary. It was further recognized that the public official, being in a position of public trust, has "the obligation of acting solely in the interests of the cestui que trust, the public."[1] This reasoning led to the prohibition of such offenses as bribery, embezzlement, and extortion.[2] While these prohibitions proved to be an asset to the criminal law of many states, little or no recognition was given, until recent years, to many "minor" abuses, such as those occurring when a public official is in a position to award a public contract to his own firm. Today, the questionable conduct of public officials is not as overt as was the earlier criticized conduct of the trustee. In present day public life such conduct falls within the gray area of subtle and illusive conflict situations encompassing a vast span of activities, such as influence peddling, gift giving, arrangements, promises, friendships and kinships for which there are no precise statutory definitions or remedies.

However, the problem of attacking overt or subtle conflicts of interest is not a simple problem of proper legislation and enforcement. Because the pay scale for most public officials on the state and local levels is inadequate to attract a great many competent full-time employees, many individuals may be unwilling to divest themselves of their private business and professional interests in order to enter public life. A strict rule prohibiting persons from holding public office while retaining these private interests would be unacceptable since it would deter those qualified people from entering public service.[3] Thus, somewhere in the gray area between the extremes of total prohibition and no restriction at all lies the optimum level of regulation.[4]

The process of defining "conflict of interest" often follows a circuitous path. One commentator has noted, "much like 'sin', few can define a conflict of interest, yet all are against it."[5] As a general rule, though, where it appears that the type of conflict sought to be prohibited is capable of being specifically and objectively defined, statutes with criminal sanctions are often found to be most appropriate. Yet where it is unusually difficult to objectively define which conflicts are or should be illegal, criminal sanctions may have an undesirable effect, because the fear of being accused of vaguely defined criminal miscon-

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[1] Note, *Conflict of Interests: State Government Employees*, 47 VA. L. REV. 1034 (1961).
[2] *Id.*
[3] Note, *Conflicts of Interest of State and Local Legislators*, 55 IOWA L. REV. 450 (1969).
[4] *See* note 1, *supra* at 1076.
[5] *See* note 3, *supra* at 451.