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Factors Inducing Ex Parte Divorces

Anthony R. Fiorette

Ohio divorce laws are characterized by inconsistent judicial and legislative public policies which in many instances have outgrown their practical necessity. Setting forth the statutes and rules controlling the trial judge in divorce actions, the author argues that a mechanical application of the judge-adopted rules of "clean hands," recrimination, and collusion has encouraged ex parte proceedings which may prohibit the court from arriving at the truth. Mr. Fiorette considers the practical effect of these defenses to be a degradation of marriage and suggests that modern public policy should not discourage divorce when marital relations are such that the legitimate objects of matrimony have been destroyed. A reevaluation of the public policy and the statutes concerning divorce is necessitated by the numerous factors, including contractual separation by mutual agreement, which induce ex parte divorces with their attendant undesired results.

THE LAW OF domestic relations in Ohio is a patchwork of public policies, some established by the legislature and others declared by the judiciary. The courts have announced that the public policy of this state is to foster, protect, and preserve the marital status.¹ Working at cross purposes is the legislature, which by statute has established a public policy of permitting the dissolution of the marriage whenever there has been compliance with applicable divorce statutes.²

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The courts have asserted, without benefit of an express statutory basis, that public policy requires denial of a divorce to an applicant who is guilty of misconduct constituting a ground for divorce and denial to both spouses where each has been guilty of such marital misconduct.³ The courts maintain that it is the public policy of this state to deny a divorce where the parties have entered into a collusive agreement to with-

¹ *E.g.*, *Maimone v. Maimone*, 90 N.E.2d 383, 386 (Ohio Ct. App. 1949); *Phillips v. Phillips*, 48 Ohio App. 322, 324, 193 N.E. 657, 658 (1933); *Pashko v. Pashko*, 101 N.E.2d 804, 806 (Ohio C.P. 1951).

² OHIO REV. CODE §§ 3105.01-.99.

³ *E.g.*, *Sevi v. Sevi*, 168 N.E.2d 440, 441 (Ohio Ct. App. 1959); *Nelson v. Nelson*, 108 Ohio App. 365, 369, 154 N.E.2d 653, 657 (1958); *Sandrene v. Sandrene*, 121 N.E.2d 325, 326 (Ohio Ct. App. 1952); *Keath v. Keath*, 79 Ohio App. 517, 520, 71 N.E.2d 520, 522 (1946).

hold evidence from the court such as would prevent the granting of a divorce under the "clean hands" doctrine.⁴

The courts similarly hold it to be the public policy of Ohio to preserve the unity of family life, to encourage the spouses to live together, and to prevent separation.⁵ But a considerable time before the legislature passed a statute in 1887 allowing spouses to separate by mutual agreement and to make a complete property settlement,⁶ the courts had established that it was not contrary to public policy for the spouses to enter into "articles of separation," provided they did in fact separate. Such agreements, if fair and just, would then be enforced in equity. Where the spouses are separated, with or without an agreement, legislative enactment set forth the public policy to permit an action for "alimony only."⁷ The theory of "alimony only" actions has been judicially extended to authorize the trial court to make a division of property in the same manner as in the granting of a divorce.⁸

In addition, the courts have devised a fixed policy of mechanically applying the canonical doctrines of collusion, clean hands, and recrimination in every divorce case where there is an agreed arrangement not to defend or where the applicant is in court with unclean hands. This doctrine is applied regardless of other factual evidence in the case which should be considered by the court to enable it to administer justice according to the requirements of that case.⁹

While it may be urged that these public policies, to the extent that they are inconsistent, merely reflect the division of belief in modern society as to the sanctity of marriage, it is well to consider the causes inherent in this setting from which a vexing social problem has emerged.

By 1832, the trend towards the uncontested divorce case or the "ex parte proceeding" had become a definite source of annoyance to the trial court,¹⁰ and over the years the trend has even accelerated.

⁴ E.g., *Van DeRyt v. Van DeRyt*, 6 Ohio St. 2d 31, 35, 215 N.E.2d 698, 703 (1966); *Maimone v. Maimone*, 90 N.E.2d 383, 386 (Ohio Ct. App. 1949); *Campbell v. Campbell*, 75 N.E.2d 698, 699 (Ohio Ct. App. 1947).

⁵ See *Pashko v. Pashko*, 101 N.E.2d 804 (Ohio C.P. 1951).

⁶ 84 Ohio Laws 132, 133.

⁷ OHIO REV. CODE § 3105.17; see *Durham v. Durham*, 104 Ohio St. 7, 11, 135 N.E. 280, 281 (1922).

⁸ See *Griste v. Griste*, 171 Ohio St. 160, 163, 167 N.E.2d 924, 926 (1960); *Brewer v. Brewer*, 117 Ohio App. 263, 268, 192 N.E.2d 106, 107 (1962).

⁹ See *Harter v. Harter*, 5 Ohio 319 (1832).

¹⁰ See cases cited note 22, 32 & 64 *infra*.

On January 1, 1967, there were 5865 cases pending in Cuyahoga County on the divorce docket. From experience, it may be stated that of these cases, the vast majority which reach final decree will be disposed of as "uncontested matters."

The uncontested divorce case requires little adjudication because minimal evidence is presented for the trial court's consideration. The trial judge thus decrees according to the will of the applicant and is precluded from adjudicating rights and administering justice on the basis of the whole truth of the marital controversy. Matters of property rights, alimony, support, custody, and visitation privileges are not to be decreed lightly. After the broken home and disrupted family life, these are the means with which to commence rebuilding a new life for the parties and their minor children. Inadequate disposition of these vital matters usually results in economic injury, juvenile delinquency, and other social problems, with added burdens on the community. This is the price for the guaranteed divorce, even without collusive involvement.

I. CHANGING PUBLIC ATTITUDE TOWARD DISSOLUBILITY OF MARRIAGE

The notion entertained by some that marriage is not indissoluble and that it may be terminated developed quite early into a "public policy" which became firmly embedded in the social and legislative history of this state.¹¹ When Ohio was part of the Northwest Territory, a law relating to divorce was pronounced in 1795 by the territorial governor and judges at Cincinnati; in 1804 the Ohio Legislature passed its first enactment on divorce.¹² From the beginning of its history, the State of Ohio has permitted as a matter of public policy the procurement of divorce either by act of the legislature or by statute.¹³ In 1848, the supreme court ended the practice of "legislative divorces" by holding that divorces are the subject of judicial, not legislative, action and that the Ohio Constitution expressly prohibits the granting of divorce by the General Assembly.¹⁴

Throughout the United States and in Ohio, divorce is solely a statutory action, as the legislature may impose conditions or abolish

¹¹ See generally OHIO REV. CODE §§ 3105.01-.99.

¹² 3 Ohio Laws 177.

¹³ *DeWitt v. DeWitt*, 67 Ohio St. 340, 348, 66 N.E. 136, 139 (1902).

¹⁴ *Bingham v. Miller*, 17 Ohio 445 (1848); OHIO CONST. art. II, § 32.

the grounds entirely.¹⁵ The state allows divorces not as a punishment to the offending party or as a favor to the innocent party, but rather because it believes its own prosperity will thereby be promoted, although the public policy relating to marriage is to foster and protect the relationship, to make it a permanent and public institution, to encourage the parties to live together, and to prevent separation.¹⁶ It has been judicially noted that the public policy fostering, protecting, and preserving the marriage status continues to influence the trial judge until the applicant's right to a divorce is established in accordance with applicable laws; at that point the public policy relating to divorce takes over.¹⁷

Traffic on the "divorce road" has been and continues to be on the increase. It has been stated generally that "the number of divorces granted has increased tremendously in proportion to the population. The number of uncontested divorce cases and the ease with which divorce is procured are . . . well known . . ." ¹⁸ Similarly, "the sanctity of divorce has not made divorce less popular nor has it discouraged the perpetration of fraud in procurement of divorce."¹⁹ The trend is further demonstrated by decisions asserting that "divorces are at a scandalously high level in the United States today"²⁰ and that "the widespread attitude of disregard for the marriage contract is still a grave cause for concern,"²¹ as it has been in regard to *ex parte* hearings since 1832.²²

This rapid rise in the number of divorces granted, particularly in *ex parte* proceedings, indicates that the number of people in the United States who do not seriously regard the status of marriage as binding "until death do us part" has been and is constantly increasing.

II. LEGISLATIVE DIRECTIVES FOR HEARING AND GRANTING DIVORCES

Matters pertaining to residence, service, and other procedural requirements set forth in the divorce statutes are not a part of this

¹⁵ See *State ex rel. Haun v. Hoffman*, 145 Ohio St. 31, 60 N.E.2d 657 (1945); *State v. Sherwood*, 13 Ohio App. 403 (1921).

¹⁶ *Pashko v. Pashko*, 101 N.E.2d 804 (Ohio C.P. 1951).

¹⁷ See *Phillips v. Phillips*, 48 Ohio App. 322, 193 N.E. 657 (1933).

¹⁸ *Jelm v. Jelm*, 155 Ohio St. 226, 239, 98 N.E.2d 401, 408 (1951).

¹⁹ *Ibid.*

²⁰ *Pashko v. Pashko*, 101 N.E.2d 804, 809 (Ohio C.P. 1951).

²¹ *Van DeRyt v. Van DeRyt*, 6 Ohio St. 2d 31, 35, 215 N.E.2d 698, 703 (1966).

²² See *Harter v. Harter*, 5 Ohio 319 (1832).

discussion which is intended primarily to deal with the statutes and rules controlling the trial judge in the hearing of the divorce action after it proceeds to trial on the merits. The statutes pertinent thereto are sections 3105.11 and 3105.10 of the Ohio Revised Code. In the pertinent part of the former section, the legislature directs the trial judge as follows:

A judgment for divorce or for alimony shall not be granted upon the testimony or admissions of a party unsupported by other evidence. No admission shall be received which the court of common pleas has reason to believe was obtained by fraud, connivance, coercion, or other improper means²³

The statute contains no express language making collusion, clean hands, or recrimination a defense which the court must recognize and apply, nor does it set up any defense whatever. However, to reiterate, the trial court is directed to receive no "admission" which it has reason to believe was obtained by improper means.²⁴ It has been judicially asserted that if a dilution of the divorce laws is desired, the forum for change should be the General Assembly and not the courts;²⁵ likewise, if the divorce laws are to be "hardened," that should also be done by the legislature and not by the courts. Nor does it seem proper to invoke equitable power and jurisdiction for the application of the defenses of collusion, clean hands, and recrimination in light of case law indications that "there must be a statutory basis upon which to exercise those powers before they may be put into play."²⁶

Connivance is not to be confused with collusion. Whereas "a connivance in divorce law is a married party's corrupt consenting to evil conduct of the other whereof afterwards he complains,"²⁷ collusion includes any agreement between the parties to present no defense to the action for the dissolution of the marriage tie which, if defended, would not be dissolved under the clean hands rule.²⁸ Beginning with the first divorce statute enacted in 1804,²⁹ the only statutory guideline provided for the exercise of judicial discretion in granting divorces has been "proof to the satisfaction of the court."³⁰

²³ OHIO REV. CODE § 3105.11.

²⁴ *Ibid.*

²⁵ *Van DeRyt v. Van DeRyt*, 6 Ohio St. 2d 31, 35, 215 N.E.2d 698, 703 (1966).

²⁶ *Haynie v. Haynie*, 169 Ohio St. 467, 469, 159 N.E.2d 765, 766 (1959).

²⁷ *Backenstoe v. Backenstoe*, 14 Ohio Dec. 353, 355 (C.P. 1904).

²⁸ See *Maimone v. Maimone*, 90 N.E.2d 383, 386 (Ohio Ct. App. 1949).

²⁹ 3 Ohio Laws 177.

³⁰ OHIO REV. CODE § 3105.10.

The pertinent part of the present state statute on the subject directs: "The court of common pleas shall hear any of the causes for divorce or annulment charged in the petition and may, upon proof to the satisfaction of the court, pronounce the marriage contract dissolved and both of the parties released from their obligations"³¹

A reasonable construction of the statute refers to the "satisfaction" of the particular judge hearing the case. Upon proof to his satisfaction of any of the causes for the action, he may grant the divorce. Conceivably, what may satisfy one judge may not be sufficient to another. A judge's ideology, philosophy, and lessons from life's experiences necessarily play some part in his view of the particular case, and recognizing this basic fact, the legislature prudently has provided a built-in power for the exercise of discretion as measured only by the court's satisfaction. But, in practice, the courts have deemed themselves further obligated, as evidenced by a long history of case law, to require an applicant to come into court with clean hands, to be free of conduct constituting a ground for divorce, and to be free of collusive conduct before a divorce may be granted. Judicial restraint is based upon the assumption that in every case, regardless of the circumstances, the public interest will thereby be served. This is not the broad discretion conferred by statute or expected in the exercise of judicial functions. It is rather the mechanical application of the judge-adopted rules of collusion, clean hands, and recrimination, without benefit of the express statutory basis, which has given impetus to *ex parte* proceedings which in turn have the effect of prohibiting the court from arriving, in the majority of cases, at the real truth of the matter.³² It would seem reasonable to assume, after more than a hundred years, that the courts have some awareness of the fact that litigants who feel that they must have a divorce will pursue their advantages in an *ex parte* proceeding under the existing system.

III. MECHANICAL APPLICATION OF DEFENSES INDUCES EX PARTE HEARINGS

Numerous articles have appeared in various legal periodicals during the past thirty years on the subject of the canonical defenses of collusion, clean hands, and recrimination. The authors have traced the circumstances of the origin and application of these defenses, their acceptance by the ecclesiastical courts of England, and

³¹ *Ibid.*

³² *Harter v. Harter*, 5 Ohio 319 (1832).

their adoption by the American courts in the early part of the nineteenth century. More pertinent to this discussion are the strong reasons advocated in the various articles for repudiating the rules which make any of such defenses an absolute bar to the granting of divorces.³³

A. *Development of Ohio Law*

The recorded Ohio story on the subject appears to begin with *Mattox v. Mattox*,³⁴ where a plaintiff-wife, suing for divorce on the ground of adultery, was herself found to be living in adultery and to have given birth to an illegitimate child. The court stated that the divorce statute could not be construed as offering a bounty to the guilty but was intended for the relief of injured innocents, that the case had to be decided by principles which prevailed in courts of equity, and that since the plaintiff-wife had not come into court with clean hands, her petition must be dismissed.³⁵ Further, the court made clear that the ground on which the divorce was denied was not new in the practice of that court. Thus, the spouses were left where the court found them — in a state of adultery. From that point on, the Ohio courts in trial of divorce and alimony actions have followed the principles announced in the *Mattox* case, although not without finding it necessary to justify the application of the clean hands and recrimination doctrines on a basis other than on equitable powers and jurisdiction.³⁶

In 1902, the supreme court in *DeWitt v. DeWitt*³⁷ determined that the divorce court cannot exercise general equity powers and jurisdiction and that in trial of divorce and alimony matters, the trial judge was to be controlled by statute and could not nullify the positive requirements of the statute.³⁸ Notwithstanding this change

³³ Bradway, *Collusion and the Public Interest in the Law of Divorce*, 47 CORNELL L.Q. 374 (1962); Bradway, *The Myth of the Innocent Spouse*, 11 TUL. L. REV. 377 (1937); Chafee, *Coming Into Equity With Clean Hands*, 47 MICH. L. REV. 1065 (1949); Moore, *A Critique of the Recrimination Doctrine*, 68 DICK. L. REV. 157 (1963-1964); Raskin & Katz, *The Dying Doctrine of Recrimination in the United States of America*, 35 CAN. B. REV. 1046 (1957); Comment, *Modification of the Ancient Doctrine of Recrimination*, 4 ARIZ. L. REV. 89 (1962); Comment, *Divorce Reform in Texas — The Path of Reason*, 18 SW. L.J. 86 (1964).

³⁴ 2 Ohio 233 (1826).

³⁵ *Ibid.*

³⁶ *DeWitt v. DeWitt*, 67 Ohio St. 340, 350, 66 N.E. 136, 139 (1902).

³⁷ 67 Ohio St. 340, 66 N.E. 136 (1902).

³⁸ *Id.* at 351, 66 N.E. at 139.

of view, the supreme court found that the *Mattox* case was correctly decided.³⁹

By 1933, the courts were holding that not only must there be an injured party but also the injured party must be free from fault amounting to a legal ground for divorce before the court would be warranted in granting a decree of divorce.⁴⁰ The belief of a trial court that it would be better for the parties to have a decree of divorce is not to be a controlling consideration.⁴¹

In 1945, a court of appeals, following the principle established in *DeWitt*, reiterated that the divorce statutes do not expressly confer any jurisdiction to enforce the equitable rule as to clean hands or the similar canonical doctrine of recrimination.⁴² It maintained that enforcement of the doctrine by the courts of this state was based on the concept that he who seeks redress for the violation of a contract resting on mutual dependent covenants "must himself have performed the obligation on his part, rather than on the equitable maxim of 'clean hands.'"⁴³

In 1953, after section 3105.20 was amended to contain the language that "in any matter concerning domestic relations, the court shall not be deemed to be deprived of its full equity powers and jurisdiction," a court of appeals declared that the clean hands and recrimination doctrines by reason of said amendment may now be applied as an exercise of equitable power and jurisdiction.⁴⁴ But, the supreme court later held that there must be a statutory basis before they may be put into play.⁴⁵

Thus, with or without equitable powers and jurisdiction, the Ohio courts have found means to employ these canonical doctrines in divorce and alimony matters and to disclaim any discretion in their application. Repeatedly, the doctrine of comparative rectitude has been repudiated.⁴⁶

³⁹ *Id.* at 348, 66 N.E. at 138.

⁴⁰ *E.g.*, *Phillips v. Phillips*, 43 Ohio App. 322, 193 N.E. 657 (1933).

⁴¹ *Id.* at 323, 193 N.E. at 657.

⁴² *Opperman v. Opperman*, 77 Ohio App. 69, 74, 65 N.E.2d 655, 658 (1945).

⁴³ *Id.* at 74-75, 65 N.E.2d at 658.

⁴⁴ *Nelson v. Nelson*, 108 Ohio App. 365, 369, 154 N.E.2d 653, 657 (1958); *Lewis v. Lewis*, 103 Ohio App. 129, 132, 144 N.E.2d 887, 889 (1956).

⁴⁵ *Haynie v. Haynie*, 169 Ohio St. 467, 469, 159 N.E.2d 765, 766 (1959).

⁴⁶ *Sevi v. Sevi*, 168 N.E.2d 440, 442 (Ohio Ct. App. 1959); *Sandrene v. Sandrene*, 121 N.E.2d 324 (Ohio Ct. App. 1952); *Keath v. Keath*, 78 Ohio App. 517, 520, 71 N.E.2d 520, 522 (1946).

B. *Practical Effect of Recrimination and Unclean Hands Defenses*

Where both spouses are found to be guilty of misconduct constituting grounds for divorce, neither would be entitled to a divorce.⁴⁷ Also, in an uncontested divorce action where the evidence discloses the plaintiff to be guilty of misconduct constituting a cause for divorce, the court may invoke the clean hands doctrine and leave the parties, as they were found,⁴⁸ in the undefined and dangerous category of a "husband without a wife" and a "wife without a husband."⁴⁹

Though often averred, it is questionable whether it has ever been shown precisely how the public interest is served in those instances where reconciliation has been proven to be utterly impossible, where the parties are firmly settled in living apart, and where the marriage status which public policy seeks to protect is reduced to a mere sham and family life is nonexistent. Public policy ought not discourage divorce where the relationship between husband and wife is such that the legitimate objects of matrimony have been utterly destroyed. Marriage is degraded and frustrated when the courts use it as a device for punishment.⁵⁰

The traditional function of courts is to administer justice in each case in accordance with the circumstances of that case, yet the task is not accomplished by the court's "washing its hands" of the case solely because the applicant for divorce is in court with unclean hands. Conceivably, there are situations in which public interest may require that the litigants be given an opportunity to wash their unclean hands instead of being relegated to a life of sin and error.

One court did find that it should not apply the clean hands doctrine and thereby deny a divorce to the litigants where each had a prior spouse living at the time of their marriage ceremony.⁵¹ However, the statute expressly specifies that "having a prior spouse living" is a ground for divorce, and a denial of divorce in such a case would appear to be an abuse of discretion.⁵² Other courts have mentioned that a trial judge is vested with unlimited discretion in

⁴⁷ *Ibid.*

⁴⁸ *Nelson v. Nelson*, 108 Ohio App. 365, 369, 154 N.E.2d 653, 657 (1958).

⁴⁹ *Head v. Head*, 2 Ga. 191, 206 (1847).

⁵⁰ *De Burgh v. De Burgh*, 39 Cal. 2d 858, 864, 250 P.2d 598, 601 (1952).

⁵¹ *Smith v. Smith*, 72 Ohio App. 203, 214-15, 50 N.E.2d 889, 894 (1943).

⁵² *Eggleston v. Eggleston*, 156 Ohio St. 422, 428, 103 N.E.2d 395, 398 (1961).

applying the clean hands doctrine,⁵³ but whenever the applicant was found guilty of misconduct constituting a ground for divorce, the clean hands doctrine was applied and the divorce denied.⁵⁴

C. *Adoption of the Collusive Test*

From a social point of view, it is hard to defend a rule that recrimination is an absolute bar to the granting of a divorce.⁵⁵ To implement the enforcement of the clean hands and recrimination doctrines, the rule of collusion was also adopted and applied by the courts without the benefit of an express statutory basis.⁵⁶ The evil of collusion lies in the making of any agreement to conceal or withhold evidence from the court of such misconduct on the part of the applicant which, under the clean hands doctrine, would preclude the granting of a divorce.⁵⁷ Courts are required to be vigilant against collusion, fraud, or imposition when the husband or wife seeks to dissolve the marriage bond. The court in the divorce hearing represents the state, and any agreement to withhold or conceal such pertinent evidence would tend to defeat the state's interest in the preservation of that marriage and is therefore repugnant to the law.⁵⁸ Neither the court nor counsel may aid or encourage any collusion in the procurement of a divorce, and a collusive agreement openly arrived at is no less repugnant to the settled policy of the law than is a secret agreement.⁵⁹ Recently, the Ohio Supreme Court reiterated that "because of the interest of the public in the preservation of the marital status, divorce suits are accorded different treatment from ordinary civil actions and *it becomes the duty of a court in such cases to be vigilant against collusion and to see that there is compliance with the applicable statutes.*"⁶⁰ To constitute collusion there must be some agreement between the parties for concealing and withholding evidence. One party, acting alone,

⁵³ *Slyh v. Slyh*, 135 N.E.2d 675, 676-77 (Ohio Ct. App. 1955); *Flatter v. Flatter*, 130 N.E.2d 145, 147 (Ohio Ct. App. 1954).

⁵⁴ *Underwood v. Underwood*, 89 N.E.2d 167 (Ohio Ct. App. 1949).

⁵⁵ *Vanderhuff v. Vanderhuff*, 144 F.2d 509 (D.C. Cir. 1944); *De Burgh v. De Burgh*, 39 Cal. 2d 858, 250 P.2d 598 (1952).

⁵⁶ *Maimone v. Maimone*, 90 N.E.2d 383 (Ohio Ct. App. 1949).

⁵⁷ *Id.* at 386.

⁵⁸ *Ibid.*

⁵⁹ *Id.* at 387.

⁶⁰ *Van DeRyt v. Van DeRyt*, 6 Ohio St. 2d 31, 35, 215 N.E.2d 698, 703 (1966), quoting with emphasis from *State ex rel. Haun v. Hoffman*, 145 Ohio St. 31, 32, 60 N.E.2d 657, 658 (1945).

cannot make such action collusive.⁶¹ Worthy of mention here is the rule under present English law that "collusion is no longer an absolute bar to relief."⁶²

D. *Reevaluation of Public Policy*

After asserting that a court cannot ignore the growing awareness that a marriage in name only is not a marriage in any actual sense, a California court appropriately stated:

It bears noting how frequently divorces are uncontested. In many cases neither spouse is "innocent," and yet, by agreement, one of them defaults to ensure a divorce. Thus a strict recrimination rule fails in its purpose of denying relief to the guilty. Moreover, it exerts a corrupting influence on the negotiations that precede the entry of such a default. The spouse who more desperately seeks an end to a hopeless union is penalized by the ability of the other spouse to prevent a divorce through the assertion of a recriminatory defense, and the more unscrupulous partner may obtain substantial financial concessions as the price of remaining silent. Were the clean hands doctrine properly applied, it would encourage estranged couples to bring their differences before the chancellor, where the interests of society as a whole can be given proper recognition and where settlement negotiations can be supervised and unfair advantage prevented.⁶³

It may bear further observation of how the advantages of *ex parte* proceedings become evident to litigants who desire to avoid scandal and to protect the dignity of the family and its members. In spite of repeated complaints by the supreme court since 1832 that "perhaps there is no statute in Ohio more abused than the statute concerning 'divorce and alimony,' and perhaps there is no statute under which greater imposition is practiced upon the court and more injustice done to individuals,"⁶⁴ there has been no relaxation of its rules requiring the mechanical application of the defenses of collusion, clean hands, and recrimination which have served to induce *ex parte* proceedings.

In presenting its analysis of this problem, the Court of Appeals for Cuyahoga County asserted the following:

It has been suggested that the law against collusive decrees is more honored in its breach than its observance. We are told in

⁶¹ *Campbell v. Campbell*, 75 N.E.2d 698, 699 (Ohio C.P. 1947).

⁶² *Nash v. Nash*, 2 WEEKLY L. REP. 317, 320 (1965).

⁶³ *De Burgh v. De Burgh*, 39 Cal. 2d 858, 869, 250 P.2d 598, 604 (1952).

⁶⁴ *Harter v. Harter*, 5 Ohio 318-19 (1832); *accord*, *Van DeRyt v. Van DeRyt*, 6 Ohio St. 2d 31, 34, 215 N.E.2d 698, 703 (1966); *Jelm v. Jelm*, 155 Ohio St. 226, 231, 98 N.E.2d 401, 404 (1951).

argument that the enormous number of divorce cases on the docket of the Common Pleas Court and the multitude of complex social problems arising therefrom make necessary the adoption of short cut measures to insure the efficient and prompt disposition of pending cases. We answer these arguments by asserting that it is our duty to declare and apply the law as we find it. Also, it is the duty of this court and of courts of original jurisdiction to uphold the public policy of the state as declared in the authoritative pronouncements of the supreme court. Any action of a trial court calculated to subvert that policy is an abuse of discretion.⁶⁵

On the other hand, the supreme court has correctly asserted that "what was in the interest of public policy or conducive to public welfare 100 years ago may not be so today."⁶⁶ Courts ought not perpetuate error. When a rule is out of harmony with the conditions of modern society, the reason for the rule no longer obtains, and what is judge invented should be judge destroyed.⁶⁷

IV. SEPARATION BY MUTUAL AGREEMENT INDUCES EX PARTE PROCEEDINGS

It is the public policy of this state that the parties may not, by their own choice or whim, dissolve the "contract" which made them man and wife.⁶⁸ Neither may the contract be abrogated because of "mere inconvenience, unhappiness or incompatibility of temperament or disposition, or the desire for pre-marriage freedom, or because the marital comforts and pleasures of life are not provided as abundantly as was anticipated and expected."⁶⁹ The public policy of Ohio also demands strict compliance with divorce statutes which are "'designed to prevent the sundering of the marriage ties for slight or trivial causes.'⁷⁰ The marriage status may be dissolved only by death or by divorce in accordance with applicable statutes.⁷¹ In addition it has been declared to be the public policy of this state to prevent separation of the spouses, to encourage their living together, and to preserve the unity of family life.⁷²

Paradoxically, it has long been the settled public policy to enforce in equity articles of separation entered into by the spouses

⁶⁵ *Maimone v. Maimone*, 90 N.E.2d 383, 387 (Ohio Ct. App. 1949).

⁶⁶ *Jelm v. Jelm*, 155 Ohio St. 226, 230, 98 N.E.2d 401, 404 (1951).

⁶⁷ *Montgomery v. Stephan*, 359 Mich. 33, 49, 101 N.W.2d 227, 235 (1960).

⁶⁸ *Siebert v. Siebert*, 32 Ohio App. 487, 168 N.E. 223 (1929).

⁶⁹ *Id.* at 491, 168 N.E. at 224.

⁷⁰ *Kennedy v. Kennedy*, 111 Ohio App. 432, 434, 165 N.E.2d 454, 456 (1959).

⁷¹ *Dibble v. Dibble*, 88 Ohio App. 490, 510, 100 N.E.2d 451, 461 (1950).

⁷² *Pashko v. Pashko*, 101 N.E.2d 804, 806 (Ohio C.P. 1951).

without inquiring into the cause therefor and without need of any judicial approval.⁷³

A. *Statutory Separation by Contract*

The canon law did not allow parties bound in marriage to separate and withdraw from cohabitation without the sentence of a legal tribunal to that effect, and the court, in making suitable provision for the wife and children, could enforce its orders by spiritual censure⁷⁴ — something which our law cannot do. In Ohio, a spouse excluded without cause from the marital dwelling may, if he or she so desires, enlist the aid of the law to gain readmission.⁷⁵ But where the spouses are separated by agreement or otherwise, there is generally no legal procedure to compel return to cohabitation.⁷⁶

It has been suggested that the Ohio General Assembly eventually supported the principle "that while divorce ought not to be the subject of mutual agreement, and accomplished at will, yet there ought to be some provision that something less than a divorce, for instance an immediate separation, might well be the subject of mutual agreement."⁷⁷ In any event, that, among other things, is precisely what the General Assembly accomplished in enacting the Husband and Wife Act of March 19, 1887.⁷⁸ In granting the "wife" the power to contract as if unmarried (*femme sole*), the right she previously had in equity to agree to an immediate separation was not curtailed. Under the act⁷⁹ the spouses may enter into any engagement or transaction with each other that conforms with the rules controlling the actions of those in a confidential relationship.

Upon this right of spouses to contract with each other, a further limitation was imposed. Under the act⁸⁰ a husband and wife are not permitted to alter their "legal relations," that is, alter the rights and obligations of husband and wife, including the right of dower and the distributive share in the estate of the other, unless

⁷³ *Garver v. Miller*, 16 Ohio St. 528, 532 (1866); *Thomas v. Brown*, 10 Ohio St. 247, 250 (1859); *Bettle v. Wilson*, 14 Ohio 257, 269 (1846).

⁷⁴ *Hope v. Hope*, 1 Sw. & Tr. 94, 95-97, 164 Eng. Rep. 644, 645 (Div. & Mat. 1858).

⁷⁵ *Hickle v. Hickle*, 6 Ohio C.C.R. 490, 509 (1892).

⁷⁶ *E.g.*, *Proctor v. Proctor*, 2 Hag. Con. 292, 302, 161 Eng. Rep. 747, 751 (1819).

⁷⁷ *DuBois v. Coen*, 100 Ohio St. 17, 30, 125 N.E. 121, 125 (1919) (dissenting opinion).

⁷⁸ 84 Ohio Laws 132.

⁷⁹ Presently OHIO REV. CODE § 3103.05.

⁸⁰ OHIO REV. CODE § 3103.06.

they agree to an immediate separation and actually do live apart from each other.⁸¹

(1) *Authorization of Partial Divorce.*—Thus, what may be regarded as a “partial divorce” became authorized by statute. A mutual agreement for separation may be entered into at any time, and no reason or cause is required by law. Moreover, upon separating, the spouses have been allowed under the statute to make provision for the support of either and for their minor children during the separation and to effectuate a complete property settlement.⁸² Of course, such agreements must meet the requirements of rules controlling the actions of persons who occupy a confidential relationship.⁸³

In conclusion, there seems to be no presumption that such an agreement for the settlement of property rights made in contemplation of a possible divorce is necessarily collusive, although the divorce court will look to all the circumstances of the case to determine whether the contract has that effect.⁸⁴

(2) *Judicial Enforcement of Separation Agreements.*—Where a court in its divorce decree adopts the language of such a separation agreement and incorporates the agreement into the decree, it becomes an order of the court and is enforceable as such.⁸⁵ A decree based on an agreement of the parties is not subject to modification after expiration of the court term in which the original decree was rendered, absent a reservation of jurisdiction with reference thereto, unless mistake, misrepresentation, or fraud is present.⁸⁶

But the trial court in a divorce case is under no compulsion to approve a separation agreement previously entered into by the parties.⁸⁷ The court is not restricted by any former agreement existing between the parties, which at least must be fair and equitable. Guidelines for evaluating such agreements are furnished solely by the present financial status of the spouses, their probable income, and their present means of support.⁸⁸ Further, it is the duty of the

⁸¹ Hoagland v. Hoagland, 113 Ohio St. 228, 232, 148 N.E. 585, 587 (1925).

⁸² Tullis v. Tullis, 138 Ohio St. 187, 194, 34 N.E.2d 212, 216 (1941).

⁸³ Hoagland v. Hoagland, 113 Ohio St. 228, 148 N.E. 585 (1925), interpreting OHIO REV. CODE § 3103.06.

⁸⁴ Dreitzler v. Dreitzler, 115 Ohio App. 231, 233, 184 N.E.2d 679, 681 (1961); Riggle v. Riggle, 148 N.E.2d 72, 76 (Ohio Ct. App. 1957); Purmont v. Purmont, 32 Ohio N.P. (n.s.) 313, 319 (C.P. 1933).

⁸⁵ Holloway v. Holloway, 130 Ohio St. 214, 217, 198 N.E. 579, 580 (1935).

⁸⁶ Newman v. Newman, 161 Ohio St. 247, 118 N.E.2d 649 (1954).

⁸⁷ See 18 OHIO JUR. 2D *Divorce and Separation* § 184 (1956).

⁸⁸ Stark v. Stark, 8 Ohio L. Abs. 287, 289 (C.P. 1929).

trial court to determine whether such agreements are fair and just before permitting their incorporation into the decree of divorce.⁸⁹

B. Separation by Other Than Mutual Agreement

When spouses separate by other than mutual agreement, similar results ensue. The conjugal relations are severed. The unity of family life is destroyed. Children and spouses alike lose the wholesome atmosphere of domestic happiness, and the marriage status exists in name only. The legislative and judicial thinking have demonstrated an awareness of these consequences. Prior to the 1953 amendment to section 3105.20,⁹⁰ the trial judge in actions for "alimony only" was not authorized to make a division of property.⁹¹ The court in such actions was limited to granting relief for alimony, custody, child support, and visitation privileges. It was reasoned that in such actions, the marriage contract was not dissolved and a future reconciliation would restore the wife to her former status and rights. A division of property was not proper so long as the marriage status subsisted.⁹²

With the amendment providing that in any matter concerning domestic relations the court shall not be deemed to be deprived of its full equity powers and jurisdiction, the public policy in actions for "alimony only" has been extended to permit the court to make similar property settlements as in the granting of a divorce.⁹³

After the spouses have separated and have altered their "legal relations" with a complete property settlement, an *ex parte* divorce decree becomes a necessity in most cases.

V. OTHER FACTORS INDUCING EX PARTE PROCEEDINGS

The separation and property settlement, whether agreed to by the parties or set forth in a decree in an "alimony only" action, does not, of course, solve all of the problems which result from the

⁸⁹ *Hassaurek v. Markbreit*, 68 Ohio St. 554, 580, 67 N.E. 1066, 1068 (1903); *Maimone v. Maimone*, 90 N.E.2d 383, 387 (Ohio Ct. App. 1949); *accord*, *Dreizler v. Dreizler*, 115 Ohio App. 231, 233, 184 N.E.2d 679, 680 (1961).

⁹⁰ OHIO REV. CODE § 3105.20.

⁹¹ See 51 Ohio Laws 377 (1853); *Durham v. Durham*, 104 Ohio St. 7, 11, 135 N.E. 180, 181 (1922).

⁹² *Ibid.*

⁹³ *Griste v. Griste*, 171 Ohio St. 160, 163, 167 N.E.2d 924, 926 (1960); *Brewer v. Brewer*, 117 Ohio App. 263, 268, 192 N.E.2d 106, 107 (1962), *appeal dismissed*, 174 Ohio St. 317, 189 N.E.2d 79 (1963).

marital disruption. If the relations between husband and wife are such that family life has become oppressive and intolerable, recourse to the divorce court by either may be anticipated despite the obstacles of possible recriminatory defenses. Sooner or later the desire for freedom may lead either spouse to the divorce court.

There appear to be reasons other than the desire to be free to remarry that may compel either or both spouses to seek a final dissolution of the marriage by a divorce decree.

A. Change in Financial Status

A property settlement which was fair, just, and equitable at the time it was made by the parties may not be acceptable to a divorce court several years later because of material changes in the financial status of the parties. In a divorce action the trial judge, when allowing alimony, is guided exclusively by the Ohio Revised Code: "The court of common pleas may allow alimony as it deems reasonable to either party, having due regard to property which came to either by their marriage, the earning capacity of either and the value of real and personal estate of either, at the time of the decree."⁹⁴ The court may, under appropriate circumstances, refuse to approve the agreement previously entered into by the parties and may make its own award at the time of the decree as to what it deems fair.⁹⁵ Permanency and stability of the property settlement finally agreed upon by the parties are greatly desired by each spouse, and approval of the agreement by the divorce court removes uncertainty as to this problem.⁹⁶

B. Federal Tax Consequences

A federal tax problem furnishes another incentive to seek a final decree of divorce where transfers of property are involved in a property settlement between the spouses. The Internal Revenue Code provides for certain property settlements:

Where husband and wife enter into a written agreement relative to their marital and property rights and divorce occurs within 2 years thereafter (whether or not such agreement is approved by

⁹⁴ OHIO REV. CODE § 3105.18.

⁹⁵ *Ziegler v. Ziegler*, 166 Ohio St. 406, 407, 143 N.E.2d 589, 590 (1957); *Roberts v. Roberts*, 113 Ohio App. 33, 36-37, 177 N.E.2d 281, 284 (1961); *Brewer v. Brewer*, 84 Ohio App. 35, 37, 78 N.E.2d 919, 920 (1948); *Leibrock v. Leibrock*, 107 N.E.2d 418, 424-25 (Ohio C.P. 1952); *Stark v. Stark*, 8 Ohio L. Abs. 287, 289 (C.P. 1929).

⁹⁶ See *Newman v. Newman*, 161 Ohio St. 247, 118 N.E.2d 649 (1954).

the divorce decree), any transfers of property or interests in property made pursuant to such agreement —

- (1) to either spouse in settlement of his or her marital or property rights, or
 - (2) to provide a reasonable allowance for the support of issue of the marriage during minority,
- shall be deemed to be transfers made for full and adequate consideration in money or money's worth.⁹⁷

The federal tax regulations prescribe certain filing requirements, and it appears: (a) that a gift is not made until the property is actually transferred; (b) that the divorce must be granted within two years from the date the agreement is executed; (c) that a return should be filed in the year the agreement is executed even though there has been no transfer of property; and (d) that a certified copy of the final decree of divorce should be furnished to the District Director not later than sixty days after the divorce is granted.⁹⁸ Transfer of property made between spouses in conformance with the statute and the regulation pertaining thereto seemingly will not be taxable as "gifts."

VI. CONCLUSION

Reform in the laws of Ohio relating to divorce, "alimony only," separation and to the enforcement of support for the wife, child support, custody, and visitation privileges is long overdue. But it should be a studied reform. The bench and bar are most qualified and have a duty to provide the necessary leadership and impetus for such an undertaking. In the interim, some of the evils resulting from ex parte proceedings can be remedied by applying the doctrines of collusion, clean hands, and recrimination not mechanically but in the broad discretion of the court under its "full powers of equity" as the justice of the particular case may require.

⁹⁷ INT. REV. CODE OF 1954, § 2516.

⁹⁸ Treas. Reg. § 25.6019-3 (b) (1958).