# ON THE DISTINCTION BETWEEN MUTUAL AND UNILATERAL NO-FAULT DIVORCE

## Background

The distinction between mutual no-fault divorce and unilateral no-fault divorce is rarely made in the course of public debate, but this distinction is incredibly important. Typically, when victims refer to "no-fault divorce", they are emphasizing the injustice of the unilateral and arbitrary nature of the divorce action itself for which there is no defense. The divorce industry, however, almost never emphasizes the unilateral nature of no-fault and only acknowledges it reluctantly when confronted with this reality by the opposition. Proponents of no-fault divorce, such as the Family Law Section of the State Bar Association and their constituents, portray no-fault divorce as a mutual decision between two consenting adults and ironically argue that the government should not interfere with spousal relationships and force the continuance of marriage when two spouses become unhappy in the relationship (i.e. enforcing a monogamous union that is regulated by public law). Yet, nearly all no-fault divorce laws in this country are unilateral and do NOT require the mutual agreement of both parties. This is expressed in the following ways:

## Examples

MINNESOTA: "The courts look at the existing **subjective** attitude [of the petitioner]."[1]

NEBRASKA: "The allegation that a marriage is 'irretrievably broken' is the **sole** allegation necessary for dissolution."[2]

NEW YORK: "The relationship… has broken down irretrievably… provided that **one** party has so stated under oath."[3]

TEXAS: "On the petition of **either** party to a marriage…"[4]

VIRGINIA: "On the application of **either** party if and when they have lived separate and apart without any cohabitation and without interruption for one year…"[5]

## Conclusion

It therefore follows that the language used in these divorce laws and their judicial interpretations are singular, and thus unilateral in nature. While these divorce laws do not exclude the possibility of both parties mutually agreeing to a no-fault divorce, the structure of the law itself is exclusively unilateral rather than mutual. If one was to change the structure of the law to become mutual, the state legislatures would need to adjust the statutory language accordingly (i.e. on the petition of **both** parties; provided that **both** parties; the **dual** allegations; **objective** and **mutual** attitudes).

[1] Hagerty v. Hagerty, 281 N.W.2d 386, 388 (Minn. 1979)
[2] Else v. Else, 219 Neb. 878, 367 N.W.2d 701, 703 (1985)
[3] NY Domestic Relations Law 170(7)
[4] Texas Family Code, § 6.001
[5] Virginia Domestic Relations Code, Chapter 6 § 20-91



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It is a misnomer that no-fault divorce laws require mutual agreement. While the introduction of no-fault laws may have initially required this, additional legislative efforts have altered mutual no-fault to unilateral no-fault. This phenomenon is best exemplified in New York where its mutual no-fault law was initially enacted in 1966; whereas New York's unilateral no-fault law was enacted in 2010. Ironically, the mainstream media claimed that New York was the last state to introduce no-fault divorce and called the 2010 law a "true no-fault divorce statute".[6] Nevertheless, the only change made from the 1966 law to the 2010 law was the transition from the mutual agreement of both parties to the unilateral decision of one party.

**Recommendations**

When speaking of no-fault divorce, it is best to use the term "unilateral" to indicate the important difference between the mutual nature and the unilateral nature of the law. Between 2018 and 2020, the Texas GOP changed its party platform from recommending the repeal of "no-fault divorce" to "**unilateral** no-fault divorce", which brings awareness to the fundamental critique of this issue. While we recommend the full and total repeal of no-fault divorce in general, it is more realistic, expedient, and would be more persuasive to just focus on the repeal of [unilateral] no-fault divorce, which many more people tend to agree with.

Given our current and existing no-fault regime, we also recommend a divorce law that requires both parties to agree to the terms and conditions of child custody, including terms of modification, as a precondition to divorce.

Alternatively, we recommend a 50/50 custody presumption for a mutual no-fault divorce whereby both parties are in agreement; a ~70/30 (or similar) custody presumption in favor of the reluctant spouse who contests the no-fault divorce; and a ~70/30 (or similar) custody presumption in favor of a petitioner in a fault-based proceeding who alleges an injury-in-fact. This creates the proper incentive structures to encourage the continuance of marriage and discourage divorce.

[6] https://www.oalaw.com/blog/divorce-family-matrimonial/no-fault-divorce-in-new-york-state/