THE THREE ELEMENTS OF DIVORCE

There are three major elements of divorce, or decisions arising from divorce, that must take place during a divorce proceeding:

(1) **Cause of Action**. The cause of action refers to the legal authority under which the personal status of individuals may be altered from "married" to "divorced". The cause of action, or grounds for divorce, is a question of law. Altering the personal and legal status of an individual requires a legal action, and cannot be considered a decision of equity. It is understood in American jurisprudence that the jurisdiction to grant a divorce is (1) judicial, (2) statutory, and (3) limited.

a. **Judicial**. The legal clause prohibiting special (private) laws granting divorces which can be found in several state constitutions bans legislative acts of divorce.[1] Instead, these divorce clauses require legislatures to prescribe general laws listing the causes of divorce which can then be adjudicated by the courts when a spouse files their petition. As such, it is the state constitution which vests power to adjudicate and grant divorces within the judicial branch.

The granting of divorce is thus a judicial action, which implies discretionary authority to affirm or deny a petition for divorce based on the facts at hand. "Every judicial action must… involve the following elements; a primary right possessed by the plaintiff and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting upon the defendant springing from this delict, and finally the remedy or relief itself."[2]

It should be understood that a judge, when granting a divorce, maintains the freedom to say "yay" or "nay" depending on the factual circumstances and then to apply the law accordingly. Unfortunately, no-fault divorce laws have been interpreted to mean that a judge *must* grant a divorce without exception whenever a spouse alleges "irretrievable breakdown" (i.e. insupportability, irreconcilable differences).[3] This transforms the decision to grant a divorce from a judicial/discretionary action to a ministerial/administrative action. In effect, no-fault laws revoke the discretionary power of judges and ties them to a pre-determined outcome. This means that every petition for a divorce will necessarily be granted (if there are no technical errors in the petition itself).

[1] For Example, Texas Constitution, Article III, Section 56 (13)
[2] *Page v. Winter*, 240 S.C. 516, 126 S.E.2d 570 (1962).
[3] "[T]here are no defenses and no triable issues of fact..." There was an "awareness by the drafters of the legislation that there is no defense to the no-fault ground… " *A. C. v. D.R.*, 32 Misc.3d 293, 306 (NY Sup. Ct., Nassau County 2011). "As the court properly held, there is 'no defense to the no-fault grounds.'" *Palermo v. Palermo*, 2011 NY Slip Op 33607 (NY Sup. Ct., Monroe 2011).

b. **Statutory**. The state constitutions require state legislatures to enact general laws granting divorces. In *Maynard v. Hill (1888)*, the Supreme Court also affirmed that "marriage…has always been subject to the control of the legislature. [This] body prescribes… the procedure or form essential to constitute marriage… and the acts which may constitute grounds for its dissolution." Thus, it is understood today that all grounds for divorce are statutory, and thus a creature of the state (in contrast to being a creature of nature, *extrastate*).

   This becomes important in the debate over whether divorce is a fundamental right. While the U.S. Supreme Court has recognized **marriage** as a fundamental right, it has never affirmed **divorce** to be a fundamental right. This is because the State Constitutions, the ruling in *Maynard v. Hill (1888)*, and the ruling in *Boddie v. Connecticut (1971)* all affirm that the judicial procedures to dissolve a marriage are state-created (procedures created by the state legislatures). In other words, divorce is a creature of the state and can only be understood as a legislative right, not a fundamental right. The legislature defines the causes and procedures for divorce; the courts follow these procedures in order to make a decision.

c. **Limited Jurisdiction**. Because divorce is a creature of the state [legislature] and must be prescribed in a general and uniform manner, the grant of divorce is subject to limited jurisdiction. This means that jurisdiction to grant a divorce is not something that develops from common-law principles. The cause of divorce is specific and limited to the particular subject-matter assigned by the statute being invoked. Whatever limitations are incorporated into the divorce statute must be respected by the courts. Limited jurisdiction simply means that judges have the authority to hear and decide on cases only of a particular subject-matter (i.e. adultery, abandonment, incarceration, on-going continued drunkenness, etc.). No-fault laws fail to place any limitations on divorce and do not assign any subject-matter to be regulated, which is why judges will always grant a no-fault divorce when requested by one or both spouses. No-fault laws do not regulate the behavior of spouses, but instead regulate and affirm the viewpoint of a spouse who alleges that their marriage has become irretrievably broken. No-fault laws thus allow divorce for any reason and for no reason at all, and this is the so-called "limitation" prescribed by the no-fault divorce statute.

(2) **Custody of Children**. The custody of children is a question equity, meaning fairness as determined by the judge presiding over custody disputes. Generally, the legal principle regulating custody is the "best interest of the child" standard, which is vague, overbroad and ill-defined. This often leads to arbitrary decisions. Some states have started to install a presumption of 50/50 custody, meaning that as a starting point, the default standard of custody will be that each parent is given 50% custody over their children. While legal presumptions can be overcome, generally speaking, this requires additional effort in litigation, as the default decision will automatically assume a 50/50 split barring other compelling circumstances. So far, the 50/50 standard applies to all three types of divorce: (1) fault-based divorce, (2) no-fault by mutual agreement, and (3) unilateral no-fault. There are two types of custody: (1) physical custody, and (2) legal custody.

(a) **Physical Custody**. Physical custody refers to a parent's right and obligation to take care of the child on a daily basis. Physical custody allows the parent to have the right for the child to live with him/her. Typically, there is a primary physical custodial parent and a secondary physical custodial parent. However, the 50/50 presumption standard is changing this two-tiered system. The Family Law Section and divorce attorneys in general do not like the 50/50 standard, as this obviously minimizes the billable hours of endless negotiations that arise from custody disputes. Skeptics of the 50/50 presumption also point out that depending on the type of divorce (i.e. mutual and unilateral no-fault), this may incentivize divorce rather than discourage it.

(b) **Legal Custody**. Legal custody refers to the parental right to make decisions about the child's medical care, schooling and education, and religious upbringing.

(3) **Allocation of Property**. Property allocation is a question equity, meaning fairness as determined by the judge presiding over property disputes. Property disputes are arbitrated on the basis of two different legal theories: (1) Community Property, and (2) Equitable Distribution. This will differ state-to-state. There are approximately nine states that rely on Community Property principles, while the rest of the U.S. states rely on equitable distribution principles.

(c) **Community Property**. This is a designation of the ownership of property by the married couple. Any income and any real or personal property acquired by either spouse during the marriage are considered community property and thus belong equally to both partners of the marriage (50-50 ownership). Community property states divide property "equally" as opposed to "equitably".

(d) **Equitable Distribution**. In states that use equitable distribution, courts try to achieve a fair allocation of property based on a list of factors or guidelines set forth by state law. Some factors that a court may consider include the duration of the marriage, the value of the marital property, each spouse's contribution to the marital property, the spouses' respective sources of income or earning capacities, and the economic circumstances of each spouse upon the division of property. Some states consider certain misconduct (i.e. adultery) to be a relevant factor as well. Other states explicitly list out in detail the various factors to consider. And still others are using mathematical formulas as guidelines to arrive at valuation divisions. Equitable distribution states divide property "equitably" as opposed to "equally".

Historically, Community Property is a concept influenced by Christian thinking about the proper uses of private property: what is the husband's is also the wife's and likewise what is the wife's is also the husband's. There is mutual ownership formed out of the common economy of the marriage relation. In other words, the "two shall become one" even in the ownership of property.

Historically, Equitable Distribution is a concept influenced by classical liberals, libertarians and Marxists, and can more broadly be described as "secular". For example, in pre-revolutionary Russia, the Orthodox Church regulated domestic relations, and applied Common Property

principles in disputes arising from divorce. When the Communists took power in 1918, they changed the Family Code in order to dissolve any notion of Common Property. As a result, the state recognized the individual achievements, contributions and ownership by a husband or a wife separately, rather than recognizing the common achievements, contributions and ownership by the marriage as a common community and single social identity.

This is best expressed in New York's Domestic Relations Law Section 50:

> § 50. Property of married woman. Property, real or personal, now owned by a married woman, or hereafter owned by a woman at the time of her marriage, or acquired by her as prescribed in this chapter, and the rents, issues, proceeds and profits thereof, shall continue to be her sole and separate property *as if she were unmarried*, and shall not be subject to her husband's control or disposal nor liable for his debts.