1970

An Idigent's Right to an In Forma Pauperis Proceeding in Pennsylvania Divorce Litigation - Analysis and a Proposal

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COMMENTS

AN INDIGENT'S RIGHT TO AN IN FORMA PAUPERIS PROCEEDING IN PENNSYLVANIA DIVORCE LITIGATION — ANALYSIS AND A PROPOSAL

I. INTRODUCTION

Although the problems related to an indigent instating a divorce action in Pennsylvania have long needed examination, the legal aspects of this problem have hardly been documented much less resolved. The reason for this neglect is a general indifference which pervades the entire subject and which stifles the resolution of many of the indigents' problems related to obtaining divorces. The cause of this indifference was highlighted by Judge Chauncey M. Depuy, Past Chairman of the Family Law Section of the Pennsylvania Bar Association, when he stated:

The law of Domestic Relations and of Support is not a dramatic part of the judicial edifice. It does not attract a lot of public attention or promise lucrative rewards to leaders of the Bar. Were we discussing the law of constitutional safeguards for the criminal suspect, or the law of personal injuries built on frightful accidents and astronomic verdict claims, or great anti-trust actions, there would, I suppose, be a lot more activity on the part of lawyers, old or young, trying to make a name for themselves. Quite modest rewards are in line for those who labor at repairing the torn and twisted fabric of family discord.2

However, despite this lack of attention in the past, there now appears to be new interest arising in this area in light of the United States Supreme Court's noting of probable jurisdiction to consider questions of the right of a poor person to proceed in divorce without payment of

1. For the purpose of this Comment an indigent will be defined specifically as a person who makes a gross income of less than eighty dollars per week. A family will be deemed indigent if its total earnings are not more than ninety-five dollars gross per week for two people, however, six dollars per week will be added for each additional dependent. A person or family will not be deemed indigent if he or they own more than three hundred dollars in real estate (excluding a small equity in a home), cash, securities; or in a bank account, or owning an automobile which is two years old or less and is not necessary for the applicant's employment. This standard of indigency is identical to the income qualification standards which are liberally applied by the Legal Aid Society of Philadelphia in accepting applicants as clients.

For a discussion of indigency standards under federal law, see note 126 infra.

For a broader definition of indigency, see BLACK'S LAW DICTIONARY 913 (4th ed. 1951), which defines an indigent "[i]n a general sense, as one who is needy and poor, or one who has not sufficient property to furnish him a living nor anyone able to support him to whom he is entitled to look for support."


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court costs and fees. Thus, the existing need and the present interest make important a close examination of the present state and practice of the divorce law in Pennsylvania as it affects indigents seeking divorces.

The examination shall begin with a discussion of the indigent's need and desire for divorce and will be followed by a discussion of those procedural elements of Pennsylvania divorce law which create substantial financial barriers to the indigent. In forma pauperis and legal aid services in Pennsylvania and their relationship to divorce will then be analyzed. Thereafter, constitutional and sociological considerations favoring the right to in forma pauperis proceedings for indigents will be discussed. Finally, proposals for eliminating cost barriers to the indigent's access to the divorce courts will be advanced and analyzed.

II. THE INDIGENT — DOES HE NEED AND DESIRE DIVORCE?

At the outset, it should be noted that the thesis of this Comment is not concerned with the substantive law of divorce, or with whether divorce is a particularly effective mode of resolving the indigent's family problems or whether divorces should be more liberally granted to the lowest economic class than to any other class. Instead, what is urged is that the indigent class be given the same access to the divorce courts as that enjoyed by the more affluent. The absence of this equal access is the focal point of this Comment.

In focusing upon the barriers to an indigent's access to the divorce courts, it is appropriate to first determine whether he needs and desires a divorce. Unfortunately, the true needs and desires of individuals are difficult if not impossible to document, and this is especially true with respect to indigent divorces. While there have been numerous sociological studies concluding that there is a "generally inverse relationship between


In Boddie, where several cases were consolidated, the plaintiffs filed divorce complaints against their respective spouses in the Connecticut Superior Court, but since the plaintiffs were indigent and could not pay the entry fee (forty-five dollars), the sheriff's service fee (fifteen dollars average) and the publication fees, they filed financial affidavits requesting the fees be waived. The superior court refused to hear the motion on the basis that it did not have the authority to do so (Superior Court Judge Joseph S. Longo, sitting on the Family Relations Session, April 2, 1968). The plaintiffs then brought a civil rights action in the district court claiming that the imposition of such fees on indigents was unconstitutional and requested that the State of Connecticut be forced to accept the divorce complaint without the payment of fees. The district court granted the state's motion to dismiss on the grounds that the legislature should provide the relief requested and that it was improper for them to act in the absence of the legislature's action. 286 F. Supp. 968 (D.C. Conn. 1968). While the district court noted the existence of a classification of civil suitors based on financial ability to pay court costs, it added that:

[W]e do not feel that the present system, undesirable as it is, is a denial of a right so fundamental that the Constitution, by the equal protection or due process clause, forbids the state from its continuance.

286 F. Supp. at 973.

economic position and proneness to divorce," these studies, while somewhat applicable to indigents, are not truly indicative of the dimensions of the indigent's divorce needs. Since the indigent has never been able to afford divorce, it is impossible to arrive at an accurate statistical relationship between indigent marriages and divorces. The indigent is often faced with two alternatives: (1) live in his unhappy home; or (2) desert his family. Needless to say, both activities are impossible to record statistically. There are, however, clear indications that the indigent needs access to divorce courts. The conclusion reached by the attorneys in

5. Goode, Economic Factors and Marital Stability, 16 AM. SOC. REV. 802, 806 (1951). In this article Goode cites support for this general correlation in five other independent studies. Id. In referring to one of these studies Goode stated:

This was essentially an ecological study, using data from the 1930 Census, and it demonstrated clearly the relationship between low income and high divorce rate. High mobility, dense population, and anonymity characterize the tracts with high divorce rates, and it is almost unnecessary to point out that these are also areas of low income.

Id. at 804.

Moreover, studies which have focused upon occupation indicate that the professionals, semi-professionals, and proprietors were the least prone to divorce, while laborers, service workers and semi-skilled are the most prone to divorce. Id. at 805.

After compiling these results, Mr. Goode states that:

The statistical results at least suggest what common sense asserts, that economic factors may be of importance in marital stability. We are not surprised, then, that economic matters occupy the top position in Terman's list of husband-wife complaints, or that Schroeder's list of "real causes" of divorce gives economic factors as No. 2 or No. 1 depending on how they are regrouped.

Id. at 807. The author is referring to L. Terman, Psychological Factors in Marital Happiness 105 (1938), and C. Schroeder, Divorce in a City of 100,000 Population 106 (1939). Id. at 807 n.16.

6. See Kephart & Monahan, Desertion and Divorce in Philadelphia, 17 AM. SOC. REV. 719 (1952); Kephart, Occupational Level and Marital Disruption, 20 AM. SOC. REV. 456 (1955). This study recognized that:

When Philadelphia desertion cases were analyzed by occupational level, the idea of the "poor man's divorce" failed to materialize, at least to the degree that had been expected; in fact, when the bottom three occupational categories (service, laborer, unemployed) are combined, the figures indicate that for whites these groups are only slightly overrepresented in desertion cases, while among Negroes, surprisingly, these categories are slightly underrepresented.

Id. at 464, 465.

However, the study went on to indicate that:

[The] findings raise a perplexing question, namely, what is the family stability pattern of the lowest occupational level? Is it possible that this bottom socio-economic rung maintains stronger family ties than has been supposed? This is questionable in view of the marital-adjustment studies wherein a positive correlation is found between marital happiness and home ownership, steadiness of income, etc.

Another possibility is underreporting; i.e., perhaps the lowest occupational groups experience widespread desertions which are not reported in the same ratio as the middle or upper occupational groups. Deserted wives in this instance may not wish to see their husbands return and may not report their spouses to the Court. This could account for the fact that among Negroes the lowest classes are underrepresented in reported desertion cases, since in those groups the failure of the husband to assume his marital responsibilities is still a lingering tradition.

Id. at 463.

But consider the fact that other factors related to economic level bear out the conclusion that there is an inverse proportional relationship between income level and the propensity for divorce. See also R. Williamson, Marriage and Family Relations 537 (1966), which indicates that the city dweller is more prone to divorce than his rural counterpart, and that Negroes have a higher rate of divorce than whites. See also Foster & Freed, Unequal Protection: Poverty and Family Law, 42 IND. L. J. 192, 196 (1967); and Goldstein & Katz, The Family and the Law 412-14 (1965), which indicates that substandard housing is an important element in family breakdown.
New York City’s legal service program highlights this need. They observed that the reason domestic relations cases (including divorces) are the predominate legal aid requested by their clients is that their clients’ low income is a causal factor in breaking up their families.7

The extent of the indigent’s need and desire for divorce is strongly illustrated by several recent studies conducted to determine the nature of the legal counselling most desired by indigents. One such study concerned the legal aid system which was put into effect in 1966 in 26 counties of Northern Wisconsin. This system, established by the Office of Economic Opportunity, enabled the indigent to go to the lawyer of his choice to receive whatever legal aid he desired without charge.8 “Of the first 86 cases, 63 were divorce suits and 9 were custody and support actions growing out of earlier divorces.”9

Similarly, in a recent survey analysis of the legal needs of the public, Preble Stolz discussed two surveys which had endeavored to determine the type of legal aid most desired by indigents.10 The first survey was a compilation of the percentage of the types of cases handled by the Legal Aid Office in Washington Township, Alameda County, California.11 It was determined that 53.6 percent of the applicants for legal aid had some sort of family law problem and that 38.8 percent had a problem dealing expressly with divorce, annulment, or separate maintenance. The second survey was based on data from the Annual Statistical Reports of the National Legal Aid and Defender Association which compiles reports from various legal aid offices throughout the country.12 The average percentage of family law cases taken by all legal aid societies filing reports from 1957 through 1966 was 42 percent. The percentage taken by Philadelphia in 1966 was 26 percent, and the percentage taken by Pittsburgh was 46 percent of their total caseloads. While both of these surveys indicate the great desire of indigents to receive divorces as well as other family law assistance, the figures given are not an exact

8. Graham, *Judicare — or How to Get a Free Divorce*, N.Y. Times, Sept. 4, 1966, § 1, at 6, col. 5. This system should be distinguished from the typical legal services program, wherein the poor person must go to a particular legal services law office. Many legal service offices will not handle certain types of cases, most often they exclude divorce cases.
9. Id. at col. 6:
   Most American legal clinics either discourage or refuse divorce cases, yet 42 per cent of the total legal aid case load involve divorce. When England started its [Judicare] program in 1950, 80 per cent of the clients wanted divorces.
   Since then the rate of matrimonial disputes among English legal aid cases has declined to about 40 per cent. Judicare officials predict that its high ratio of divorce cases will go down as soon as the first rush for long-delayed divorces is over.
11. STOLZ, supra note 10, at 8–9; citing The First Applicants to the Washington Township Legal Assistance Office (Southern Alameda County, California), (Statistical Memoranda, Mimeographed, 1966–67). The percentages compiled are based on the first five hundred clients.
picture of the indigent's desire for divorce. Although legal aid offices do provide free counsel, they usually do not pay court fees and costs with the result being that the studies' figures do not reflect the number of indigents who were discouraged from seeking free divorce counsel because of the requirement that they pay these costs. Nevertheless, the available evidence does seem to support the conclusion that there is a definite need and desire for divorce among the indigent class.

To further illustrate this need and desire for divorce and the problems arising from the indigent's difficulty in obtaining a divorce, the following actual case study is presented. Mrs. C., who is almost 48 years old, was separated from her husband, J., in 1942. In 1953, Mrs. C. met Mr. M., and she has since bore him three children. In 1965, Mr. M. became totally disabled, and, on the advice of the Board of Public Assistance, Mrs. C. and Mr. M. took up residence together so that she could give him the continuous care his condition requires. They are prevented from becoming man and wife by virtue of Mrs. C.'s marriage to her long unheard from husband. Moreover, Mrs. C. and Mr. M. have been barred from public housing on the grounds they were not legally married. Divorce and remarriage would remove this obstacle, but Mrs. C. cannot afford a divorce. Although this is only one example, it is reflective of the problems existing in many present situations.

13. Realizing that he could not afford the divorce costs, the indigent could be discouraged from even attempting to obtain the free legal counsel, or the indigent might approach the legal aid office only to be informed that he must pay the costs of litigation. In either case, the records of the legal aid office would not record this individual as a client served. For a discussion of divorce litigation costs in Pennsylvania, see notes 17-35 infra and accompanying text.

14. This was a case study supplied by the Community Legal Services, Inc., of Philadelphia, Pennsylvania.

15. The following are two other case studies supplied by Community Legal Services, Inc., which serve to illustrate the problems which permeate this area on an individual level.

(1) Mrs. J. is twenty-six years old. She has two children by her husband, who left her in July, 1961 after a period of domestic disharmony which resulted from his refusal to support Mrs. J. and the children.

In 1963, after her husband's departure, Mrs. J. became close with Mr. T., whom she had known since she was thirteen years old. She and Mr. T. wished to marry, but were barred by Mrs. J.'s inability to pay for a divorce. Mr. T. wanted to adopt the children, if legally possible. Moreover, Mr. T.'s income of about sixty dollars per week would probably have taken Mrs. J. and the children off public assistance, which now pays her $80.10 every two weeks.

Unfortunately, Mr. T. died, at age twenty-seven, on May 1, 1967. If Mr. T. and Mrs. J. had been married, she would have been eligible for Social Security benefits upon his death.

Although Mr. T. is dead, Mrs. J. still wants a divorce, so that she can continue with the "new start" in life first inspired by Mr. T. Since she is only twenty-six, it is not unlikely that she will someday find another man with whom to share her life. As part of this "new start" she has gone back to school, under Operation Alphabet, in order to obtain her high school diploma. She hopes to become a surgical technician or inhalation therapist. But Mrs. J. cannot afford a divorce.

(2) Mr. L. is a public assistance recipient with four minor children. Over two years ago his wife departed without warning. Mr. L. has made arrangements to purchase a small house for his family from the Philadelphia Housing Development Corporation.

However, Mr. L. cannot get title insurance for the house, because his wife would have an interest in any real property owned by him, and for that reason FHA will not insure a mortgage for him. Mr. L. is thus precluded from participating in a
Thus, it seems that it can reasonably be concluded from the above discussion that indigents have a substantial need and desire for divorces to both solve marital and other legal difficulties and to free themselves from an unhappy marital bond. However, even if this need and desire were only minimal, the financial barriers to divorce erected by the legal system would be significant, and the need for reform urgent, in order to protect the rights of those individual indigents who would otherwise seek a divorce if prohibitive costs were not involved.

III. Cost Analysis of Divorce Proceedings in Pennsylvania

In the preceding discussion, much emphasis was placed on the cost factor involved in obtaining divorces. In order to fully comprehend these cost factors the divorce procedure in Pennsylvania must be examined, with particular attention being attributed to the expenses created by these procedures. The current statutory divorce provision, enacted in 1929, provides a few divorce procedures which must be followed, but, more importantly, delegates broad power to the common pleas courts to create the necessary procedures, provided they do not conflict with those procedures established by the state supreme court. In addition, the state supreme court is delegated the primary responsibility for establishing the Pennsylvania Rules of Civil Procedure which govern much of the procedure related to divorce actions. The following discussion of this procedure, in the order in which it would normally be encountered by the divorce litigant, will suffice to explain both the indigent's confusion over the myriad of technical aspects of divorce procedure and his inability to surmount the financial barriers which they erect.

The institution of a divorce action is governed by rule 1123 of the Pennsylvania Rules of Civil Procedure which states that "[a]n action

housing program which was designed to assist him, for the reason that he cannot afford to get a divorce.

16. For an analysis of the indigents' constitutional right to free divorces, see pp. 298-306 infra.


18. 72 Pa. Stat. tit. 23, § 66 (1965), provides:
The several courts of common pleas are hereby authorized to make and adopt such rules and practice as may be necessary to carry this act into effect, and to regulate proceedings before masters, and to fix their fees.

Mr. Freedman, in commenting on Pennsylvania's divorce procedure stated:

The simplification of legal procedure, long advocated, is now an accepted fact. The remedy most generally approved is the expansion of the rule-making power of the courts. Through this device the remedy is entrusted to the judiciary, who by training and experience are better able to establish and maintain it than is the legislature in its biennial sessions.

2 A. Freedman & M. Freedman, Law of Marriage and Divorce in Pennsylvania 1030 (2d ed. 1957) [hereinafter cited as Freedman]. This work is considered the classic Pennsylvania treatise on family law.

19. The Pennsylvania Rules of Civil Procedure 1121-36 suspend and supplement the divorce law. Rule 1121(b) provides that, except as otherwise provided by the rules, the procedure in divorce action shall be in accordance with the Rules of Civil Procedure relating to an action in assumpsit. See generally 2 Freedman, supra note 18, at 1030-31.
shall be commenced by filing a complaint with the prothonotary."20 A
typical filing fee is fifteen dollars.21 The complaint must be served by
the sheriff within thirty days of the filing.22 The procedure for service
is fixed by rule 1124 which requires personal service upon a defendant
inside the Commonwealth by the sheriff in any county of the Common-
wealth, or by constables of the county in which the action is pending
if so authorized by local court rule.23 Sheriff's fees can become quite
costly depending upon the distance of travel necessary to personally
serve the defendant. Typically, sheriff's fees range from eight to fifteen
dollars plus a set cost per mile travelling expense.24 Service outside the
Commonwealth may be accomplished by having an attorney, other than
the plaintiff's attorney, personally serve the defendant, or by registered
mail.25 Service by attorney, although expensive, is a sure means of
service, while service by registered mail is only valid where the return
receipt is personally signed by the defendant26 who may avoid service
by simply refusing to accept the letter or to pick it up at the post office.

Service by publication is available either where the plaintiff cannot
make personal service on the defendant within the Commonwealth by
sheriff or constable, or chooses not to make service by attorney or regis-
tered mail outside the Commonwealth.27 Since divorce, especially, among
the indigent, is the type of action where personal or registered mail
service is difficult due to the desertion factor, and, since service by at-
torney involves considerable expense, service through publication is very
often the only practical alternative. Costs for publication can run any-

21. A survey taken by the authors of this Comment indicates that filing fees vary from $6.00 to $20.50.
   In March of 1970 twenty-one community legal aid societies in various coun-
   ties in Pennsylvania were sent a questionnaire concerning their use of in forma pauperis
   proceedings in divorce (on file at Villanova Law Review office) [hereinafter cited as
   Pennsylvania Survey]. From the thirteen responses received certain con-
   clusions can be drawn. This survey will be cited occasionally throughout the text and
   footnotes wherever appropriate.
22. Since the Supreme Court of Pennsylvania's procedural divorce rules fix no
   specific time limit for service, the general rules of assumpsit control, PA. R. Civ.
   P. 1121 (1967). These rules require service within thirty days after filing, though
   the complaint may be reinstated any number of times. PA. R. Civ. P. 1009, 1010(b).
23. PA. R. Civ. P. 1124(a) (1), (2).
25. PA. R. Civ. P. 1124(a) (3) (a), (b).
26. PA. R. Civ. P. 1124(a) (3) (b). Also the use of registered mail within the
   Commonwealth is invalid under the rules, thereby making impossible the elimina-
   tion of sheriff's fees in that situation. PA. R. Civ. P. 1124(a) (3) (b). See also Huntington
27. PA. R. Civ. P. 1124(b), states:
   If service cannot be made under Subdivision (a) (1) or (a) (2) of this rule
   and has not been made under Subdivision (a) (3) of this rule, and the sheriff or
   constable has made a return or affidavit of "Not Found," the plaintiff, without
   reinstatement of the complaint, shall have the right of service by publication. The
   prothonotary, upon the filing of a praecipe for publication, shall write on the
   complaint "Service by Publication Directed." Publication shall be made by the
   sheriff once a week for three successive weeks in such manner as the court by
general rule or special order shall direct. If service is made by publication, the
   sheriff shall send the defendant a notice of the pendency of the action by regis-
tered mail to his last known residence set forth in the complaint.
where from twenty-five to one hundred and fifty dollars depending on
the space charges levied by the local newspaper.\textsuperscript{28}

Once the complaint is filed and notice has been served, the rules of
Civil Procedure provide that when the divorce action is at issue,\textsuperscript{29}
and upon the motion of either party, a master\textsuperscript{30} may be appointed who
will hear, as a substitute for a court hearing by a judge, the testimony
of the parties.\textsuperscript{31} A transcript of this hearing is then forwarded to the
court along with the master's report and recommendation for the judge's
consideration. The extent of the expense created by the master system
will vary from county to county since each common pleas court is au-
thorized by the Act of 1929\textsuperscript{32} to establish its own master's fees.\textsuperscript{33} Our

\textsuperscript{28} See Pennsylvania Survey, supra note 21. For a discussion of notice by
publication, see pp. 314-19 infra.

\textsuperscript{29} The rules provide that the divorce action is at issue when an answer has been
filed or, in the event of no answer, either twenty days after personal service or com-

\textsuperscript{30} While rule 1133(a) allows the judge to hear the divorce himself, that course
is very seldom followed because "[t]he bulk of the administration of the Pennsylvania
divorce law is done by masters." Comment, The Administration of Divorce: A
master system, see Comment, supra, at 1223.

The mastership system was not originally a statutorily mandated procedure.
In Middleton \textit{v}. Middleton, 187 Pa. 612, 164, 41 A. 291 (1898), the state supreme
court held that "[w]hile the court may appoint an examiner to take testimony and
report it, there is no authority under the act to appoint a master to find facts
and suggest a decree." The following year the legislature expressly appointed
the master of such powers. \textit{Act of March 10, 1899}, Pub. L. 8 (repealed
1911). See 3 Freedman, supra note 18, at 1233-34.

There was no statutory requirement that a master be a member of the bar.
the superior court declared that no one other than an attorney should be appointed
to be a master. In addition some local rules specifically require this.

In Philadelphia County an uncontested divorce is almost invariably heard by
a master, and masters are also quite commonly appointed in contested cases. See
Comment, supra, at 1208.

\textsuperscript{31} Pa. R. Civ. P. 1133(a).


\textsuperscript{33} Pa. Stat. tit. 23, § 66 (1965). While masters' fees are set by the county,
additional compensation may be awarded by the local court in its discretion. Rule
1133(a)(2)(b) of the Philadelphia Common Pleas Court states, \textit{inter alia}:
The sum of $188.50 shall be deposited with the prothonotary when the motion
for the original notes of testimony transcribed and filed by him.

The Philadelphia Bar Association has been accused of using the fifteen dollars per
divorce to finance its midtown luncheon club; M. Bloom, \textit{The Trouble with
Lawyers} 60 (1968), a less than worthwhile use considering the added burden it
places on the divorce plaintiff.

\textbf{Phil. C. P. Rule 1133(a) 2(b) further provides, \textit{inter alia}, that "[n]o
additional compensation shall be paid to or received by the master, except \textit{after the
filing of the master's report, upon petition and rule of the master therefor, and
express allowance by the court." Cf. Bair \textit{v} Bair, 3 Chester County Rep. 234 (1947); see
also 3 Freedman, supra note 18, at 1254-56. All the procedural costs may be
thrust upon the losing party. The divorce laws state that "[t]he court may award costs to
the party in whose behalf the sentence or decree shall pass, or may order that each party
shall pay his or her own costs, as to it shall appear to be just and reasonable." Pa. Stat. tit. 23, § 56 (1965).
However, in the case of indigents both parties are usually unable to pay costs. While
the court is authorized to make all costs payable by the losing party, or require each

\begin{itemize}
\item \textit{The Philadelphia Law Review, Vol. 16, Iss. 2 [1970], Art. 2}
\end{itemize}
Pennsylvania Survey indicates that masters fees range from seventy-five to one hundred and fifty dollars and that all counties use the system in both contested and uncontested divorces. Furthermore, since the testimony taken at the master's hearing is charged to the plaintiff, stenographer's fees create another expense. In addition to the above costs, numerous other filing costs, although less significant, may also arise during the passage of litigation.

Moreover, in addition to those costs which arise through statute or court authority derived therefrom, counsel fees and other non-parties to pay for his own costs, it is significant to note that it cannot require the successful party to pay for the costs of the losing party. Id. For a more detailed discussion of costs, see 3 FREEDMAN, supra note 18, at 1294.

34. Stenographers' fees arising from the master's hearing run at least twenty-five dollars and possibly more depending on the length of the transcript. See Pennsylvania Survey, note 21 supra.

35. Additional litigation fees, expenses and costs which are required by statute and ordinance in Philadelphia County to be paid to the Prothonotary are as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acceptance of service</td>
<td>$0.50</td>
</tr>
<tr>
<td>Answer</td>
<td>$0.50</td>
</tr>
<tr>
<td>Bill of Particulars</td>
<td>$0.50</td>
</tr>
<tr>
<td>Certificate of Divorce or Appointment</td>
<td>3.50</td>
</tr>
<tr>
<td>Complaint</td>
<td>2.50</td>
</tr>
<tr>
<td>Direction for Publication including return of service</td>
<td>1.00</td>
</tr>
<tr>
<td>Entering a Decree in Divorce or Petition</td>
<td>1.50</td>
</tr>
<tr>
<td>Final Costs</td>
<td>13.50</td>
</tr>
</tbody>
</table>


It is also important to note that where the wife is the plaintiff in the divorce action the defendant husband will be required to pay all the costs. 2 FREEDMAN, supra note 18, at 978. See also 2 FREEDMAN, supra note 18, at 983, for a list of expenses found allowable to the wife by various Pennsylvania courts. Included are the wife's traveling expenses, board and lodging and subsistence during the hearing; similar expenses are allowed for her witnesses, counsel expenses, and expert witness fees.

In addition the wife may receive an allowance from her husband for such expenses during the pendency of the divorce proceedings. "In case of divorce . . . the court may, upon petition, in proper cases, allow a wife reasonable alimony pendente lite and reasonable counsel fees and expenses." Pa. Stat. tit. 23, § 46 (1965).

The distinction between costs and expenses is confusing. Under section 46 the wife is allowed from the husband all reasonable expenses incurred in the divorce suit. Part of these expenses may be "costs," such as master's fee, or sheriff's fee. However, since "costs" of the losing party cannot be placed on the successful party, see note 33 supra; if the wife loses the suit, her husband can recover from her the "costs" — part of the expenses he was required to give her under section 46. See 2 FREEDMAN, supra note 18, at 984-86.


As early as 1843, before adoption by the divorce law, Pa. Stat. tit. 23, §§ 1-69 (1964), it was stated that:

[T]he husband is obliged to pay the expenses incurred by his wife in prosecuting or defending a divorce . . . . It is an incidental authority to the power given this Court to decree a divorce. Without it, in many cases, the wife being in poverty, must fail in a just suit instituted by her, or be defeated in an unjust one prosecuted by her husband against her.

1 Pars. Eq. Cas. 77 (1843).

The Pennsylvania Supreme Court later agreed, stating: "[t]his rule is necessary; otherwise she might be denied justice for want of the funds required for the vindication of her rights." Graves v. Cole, 19 Pa. 171, 173 (1852).

Obviously, the wife's right to have her costs paid is going to be valueless if the husband is indigent or if he has deserted her and cannot be subjected to court order.
statutory expenses — e.g., transcript and detective fees — arise naturally out of divorce proceedings. The complexity of the proceedings inevitably require anyone seeking or defending against a divorce to turn to legal counsel, which is at least as expensive as all the other costs put together, thus creating by itself a substantial financial barrier to the indigent.36

IV. AVAILABLE STRUCTURES TO ENABLE INDIGENTS TO AVOID DIVORCE COSTS

While the existence of the previously discussed cost factors bar the indigent from commencing divorce actions, there are structures currently existing which are designed to remove these cost barriers. Unfortunately, while these structures are theoretically available to the indigent, in reality, they are not accessible to an indigent seeking a divorce.

A. IN FORMA PAUPERIS PROCEEDINGS

The primary source of relief from the statutory and procedural costs accompanying a divorce action which could be available to the indigent is the proceeding in forma pauperis.37 The first comprehensive in forma pauperis legislation was an English statute popularly known as the Statute of Henry VII.38 This statute entitled “[a]n Act to admit such persons as are poor to sue in forma pauperis” provided that one who proved his poverty to the satisfaction of the chancellor could have an original writ, writs of subpoena for witnesses, and appointment of counsel without cost.39

36. The Pennsylvania Survey indicates that attorneys' fees in divorce proceedings amount to at least three hundred dollars plus costs. See note 21 supra.
37. While there is no precise definition of what constitutes proceeding in forma pauperis, for the purposes of this Comment it will be defined as a proceeding which relieves the indigent plaintiff of all court costs, fees, publication expenses but not counsel fees which arise from the legal proceeding. This definition more or less conforms to the definition of in forma pauperis propounded by BLACK'S LAW DICTIONARY 895 (4th ed. 1951) which defines the term as that which “describes permission given to a poor person to sue without liability for costs.”
38. 11 Hen. 7, c. 12 (1495).
39. The Statute of Henry VII dictates:
   That every poor person or persons, which have, or hereafter shall have cause of action or actions against any person or persons within this realm, shall have, by the discretion of the chancellor of this realm . . ., writ or writs original, and writs of subpoena, according to the nature of their causes, therefore nothing paying . . . for the seals of the same, nor to any person for the writing of the same writ and writs to be hereafter sued; and that the said chancellor . . . shall assign such of the clerks which shall do and use the making and writing of the same writs, to write the same ready to be sealed, and also learned counsel and attorneys for the same, without any reward taken therefor; and after the said writ or writs be returned, if it be stote the king in his bench, the justices there shall assign to the same poor person or persons, counsel learned, by their discretions, which shall give their counsels nothing taking for the same: And likewise the justices shall appoint attorney and attorneys for the same poor person or persons, and all other officers requisite and necessary to be had for the speed of the said suits to be had and made, which shall do their duties without any reward for their counsels, help and business in the same: And the same law and order shall be observed and kept of all such suits to be made afore the king's
While about one-half of the states and the federal government have enacted some form of in forma pauperis statute, Pennsylvania has not. However, in forma pauperis exists in the Commonwealth by virtue of Pennsylvania's adoption of English statutes and common law. This adoption is expressly authorized by a Pennsylvania statute, commonly known as the Reception Statute, entitled "Revival of Provincial Laws; English Common Law and Statutes." The Statute of Henry VII was explicitly incorporated into Pennsylvania law under this statute by the Judges of the Supreme Court of Pennsylvania who were commissioned by the legislature, pursuant to the Reception Statute, to report on all English laws which were being incorporated into the law of Pennsylvania. Pennsylvania case law has recognized this incorporation. In the case of Cowan v. City of Chester the court unequivocally stated that:

"[A]s early as 1496, in the eleventh year of the reign of Henry VII., a statute gave the Chancellor jurisdiction to decree poor plaintiffs to be entitled to sue in forma pauperis, and in that capacity command the services, not only of the officers of the court, and attendance of witnesses, without pay, but to require the court to assign them counsel gratis. This statute is in force in this State. The court in which the action is brought, exercises the power of chancellor, and when a plaintiff is proved too poor to pay costs or to give security for them, he has the right to prosecute his suit free from costs."

Thus, there is clear authority supporting in forma pauperis proceedings in Pennsylvania's civil actions as a matter of right.

Moreover, the proposition that proceedings in forma pauperis, as adopted by the common law of Pennsylvania, extend to divorce proceedings has recently found judicial support. In Cunha v. Cunha, the Court

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3 Freedman, supra note 18, at 1300-01, citing Roberts, Digest of British Statutes in Force in Pennsylvania 116-17 (2d ed. 1847).
40. See Silverstein, Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases, 2 Valparaiso U.L. Rev. 21, 33 (1967).
41. Pa. Stat. tit. 46, § 152 (1969), states that:
   - Each and every one of the laws or acts of general assembly, that were in force and binding on the inhabitants of the said province on the 14th day of May last, shall be in force and binding on the inhabitants of this state, from and after the 10th day of February next, as fully and effectually, to all intents and purposes, as if the said laws and each of them, had been made or enacted by this general assembly: ... and the common law and such of the statute laws of England, as have, heretofore been in force in the said province. ...

The Pennsylvania courts have recognized this general incorporation. E.g., Commonwealth v. Smith, 67 Pa. D. & C. 598, 602 (Dauphin County C.P. 1949), where the court stated: "[W]e might add that under the Act of January 28, 1777, 1 Sm. L., 429, § 2, 46 P.S. 152, the English common law became the law of this Commonwealth. ..."
42. 3 Binn. 593, 617 (Pa. 1808).
43. 2 Delaware County Rep. 234 (1884). This case involved a rule for an appeal in forma pauperis from an arbitration judgment in a negligence case.
44. Id. at 235 (emphasis added).
of Common Pleas of Lebanon County in allowing the plaintiff-wife to proceed in forma pauperis in divorce, stated that:

If our courts are to be open to all people regardless of their means, then the form of action should not be inquired into.

Certainly, plaintiff should have the right to enjoy companionship, now prohibited to her if she respects the vows she took, which could look toward a happy marriage. It appears that, through no fault of her own, her right of support is gone and her children have no father to guide them through the formative years. Should she then be deprived of the opportunity to change or correct the situation brought about by an absconding husband because she is impecunious? We do not think so.  

Another Pennsylvania common pleas court has gone further, holding that it was the responsibility of the court to appoint free counsel for the defendant in a divorce action where neither she nor the plaintiff could afford to provide her with counsel and where legal aid services were not available.

The court stated that elementary principles of justice dictate that the plaintiff have the right to be relieved from paying litigation expenses and held that in this situation it was the responsibility of the court and the bar to see that counsel is available for a wife unable to employ one. The court further added that "[t]here can be no equality before the law unless representation is afforded to those persons who are financially unable to afford a lawyer." 

Despite such lower court decisions supporting in forma pauperis divorce proceedings, there has been no declaration by the highest courts of Pennsylvania that the indigent have a constitutionally-guaranteed right in divorce actions to proceed in forma pauperis. Rather it appears that the allowance of such a proceeding is within the discretion of the court. In a recent divorce case, the Lancaster County Court of Common Pleas held that there was "no right in a civil action to proceed in forma pauperis or to have free counsel appointed . . ." The court

46. Id. at 232.
48. Id. at 303.
49. Id. at 304.
50. Id.
51. Id. In essence the courts consider leave to proceed in forma pauperis a privilege to be granted or denied in their discretion. This discretionary power of the court should be distinguished from the discretion exercised by the court in determining whether the party is, in fact, an indigent and thus qualifies to proceed in forma pauperis. See note 1 supra.
52. Shank v. Shank, 45 Pa. D. & C.2d 242, 244 (Lancaster County C.P. 1967) (emphasis added). While this case may be unique in that the plaintiff-wife was suing for divorce on the statutory grounds of the defendant-husband's conviction of rape for a term in excess of two years — to which no defense seems conceivable — the court plainly stated that there is no right to proceed in forma pauperis in civil actions. The view that in forma pauperis is a privilege and not a right is shared by the federal courts, which operate under their particular in forma pauperis statute — 28 U.S.C. § 1915 (1964). See Dunivay, The Poor Man in the Federal Courts, 18 Stan. L. Rev. 1270, 1279 (1966). See note 12 supra, where the statute is quoted in full and is discussed.
stated that the defendant was obviously confusing "his rights in this civil action with the extensive rights granted to those accused or convicted of a crime." Moreover, it would appear that the judges are reluctant to exercise their discretion to authorize proceedings in forma pauperis in divorce suits primarily because of court backlogs involving cases which they feel are of a higher priority than divorce actions. A second reason for the paucity of such judicial orders is that divorces are often considered a luxury and the judges feel that the state should not be required to subsidize the poor's luxuries when it is already financing and directing much effort toward preserving what are considered to be the more important rights of the poor in the areas of juvenile and criminal law.

The above attitudes have made it difficult if not impossible for indigents to proceed in forma pauperis. In Philadelphia County, for example, although in forma pauperis proceedings are available through the discretion of the family court, the plaintiff is required when seeking an order to proceed in forma pauperis to submit evidence that he has made a good faith attempt to determine that the defendant's financial status is that of an indigent. The objective of this requirement is to determine if the defendant would be able to pay the costs and expenses of the divorce when ordered to do so by the court, thus relieving the state of the cost of litigating the suit at its own expense. However, the unfortunate effect of this order is that it places a substantial procedural burden upon the indigent in his attempt to obtain an order to proceed

53. 45 Pa. D. & C.2d at 244.
54. The Pennsylvania Survey indicated only two counties granted in forma pauperis proceedings in divorce cases where requested by the legal aid society (only eight handle divorces at all!) and these two organizations stated that the number of such divorces granted were "minute" and "negligible." See note 21 supra.
55. Such action by the judiciary cannot be condemned in light of their good faith motivation to keep the wheels of justice moving swiftly. If they were not selective in taking cases and discouraging trials the courts' backlogs would greatly increase. It is submitted, however, that the resolution of the backlog problem requires the appointment of more judges and setting up more courts, and not denying indigent's access to the court. Currently there has been considerable interest in appointing more judges. E.g., Station WFIL-TV in Philadelphia throughout September of 1970 campaigned through editorials and panel discussions to achieve the institution of thirty new judgeships in Philadelphia in order to reduce the backlog and to meet the mounting flow of new cases.
56. The Pennsylvania Common Pleas court of Lebanon County recognized this view and its superficiality in Cunha v. Cunha, 44 Pa. D. & C.2d 230, 231 (Lebanon County C.P. 1968). The court stated: "It may at first blush appear that the right to secure a divorce is a luxury which should not be permitted without the payment of all costs."
57. See the comments of Judge Montemuro, head of the family court in Philadelphia County, in denying a petition to reconsider his order requiring that all plaintiffs requesting in forma pauperis proceedings in divorce cases make a good faith effort to determine the indigency of the defendant in their case. The order accompanied Judge Montemuro's setting a date for hearing the petition requesting in forma pauperis divorce proceedings, in the cases of Robinson v. Robinson, No. 2924, Philadelphia County C.P. Dec. Term 1969; Jones v. Jones, No. 6235, Philadelphia County C.P. Dec. Term 1969. The original order was dated March 20, 1970, petition for reconsideration was argued April 20, 1970, and the order denying petition for reconsideration was issued May 1, 1970.
in forma pauperis. Not only is the "good faith investigation" require-
ment time-consuming, but, where the defendant has deserted the plaintiff,
it may be impossible to satisfy. 58

B. Legal Aid Societies

Another source which could be utilized to alleviate many of the costs
involved in divorce actions by providing the indigent with free legal
services are legal aid societies. Unfortunately, like proceedings in forma
pauperis, these societies have afforded the indigent divorce claimant
little assistance.

The reason for this failure lies in an examination of the hierarchy
of the supervisory organizations which control the scope of the legal
activities undertaken by the various legal aid organizations. The ultimate
authority governing formal policy is the Office of Economic Op-
portunity (OEO) which supplies all or most of the funds utilized by
the societies. Rather than setting down specific requirements which
must be met before a society may receive Federal aid, OEO has been
content to establish a generalized criteria for the qualification of legal
aid programs. 59 This present policy of OEO enables the local bar

58. As John Sturgis, the senior investigator of Community Legal Services, Inc.,
of Philadelphia indicated, where the defendant is uncooperative as is usually the case,
obtaining financial data about him would require considerable time and effort in
following him and making investigation pursuant thereto. Sworn affidavit constituting
Exhibit E in the petition to reconsider the judicial order in the Robinson, Hayes and
Jones cases (see note 57 supra). The investigators of legal aid societies are not able
to invest that sort of time for a mere qualification to proceed in forma pauperis since
these societies are so understaffed; thus the indigent is faced with the costly and
patently unfeasible alternative of hiring private detectives.

A national program to provide funds for legal service programs for the poor
has been established by the Economic Opportunity Act, 42 U.S.C. 2809(a)(3)
(Supp. V 1970). The Office of Economic Opportunity, established pursuant to that
Act, has the authority to provide financial aid to programs and projects which meet
its guidelines in providing legal services for the poor. 1 CCH Pov. L. Rep. ¶ 6010

The overall objectives of OEO's Legal Service Program are as follows:
First: To make funds available to implement efforts initiated and designed
by local communities to provide the advice and advocacy of lawyers for people
in poverty.
Second: To accumulate empirical knowledge to find the most effective method
to bring the aid of the law and the assistance of lawyers to the economically
disadvantaged people of this nation. OEO will encourage and support experiment
and innovation in legal services proposals to find the best method.
Third: To sponsor education and research in the areas of procedural and
substantive law which affect the causes and problems of poverty.
Fourth: To acquaint the whole practicing bar with its essential role in com-
bating poverty and provide the resources to meet the response of lawyers to be
involved in the War on Poverty.
Fifth: To finance programs to teach the poor and those who work with the
poor to recognize problems which can be resolved best by the law and lawyers.
The poor do not always know when their problems are legal problems and they
may be unable, reluctant, or unwilling to seek the aid of a lawyer.
1 CCH Pov. L. Rep. ¶ 6010 (1970) (Legal Services Program). These purposes are
also stated under the OEO Guidelines for Legal Services, 1 CCH Pov. L. Rep.
¶ 6700.10 (1970). OEO in an effort to be consistent with these objectives has estab-
association and the board of trustees of the particular society — the
supervisory bodies directly controlling the individual organizations —
to step into this void and set forth regulations preventing the societies
from taking divorce cases.

The bar association observes the activities of legal aid societies to
insure that they do not conflict with the services provided by the rest
of the profession. 60 Unfortunately, this power has led the local bar to
forbid legal aid societies from processing any divorce cases at all or
to severely restrict their authority in many counties in Pennsylvania.
The local bar associations, like many judges, consider divorce a luxury,
and take the attitude that if a person really wants a divorce he will
find the resources to pay for it. 61

In addition the boards of trustees which supervise the day-to-day
conduct of the legal aid offices are composed of members of the bar
who have an obligation to abide by the bar association's decisions as
well as to maintain a friendly relationship for the sake of efficient opera-
tions. These considerations tend to create reluctance on the part of the
boards to take a position that is antagonistic to the bar. To further
add to the complexity of this problem, there is a strong likelihood that
many of the boards of the Legal Aid societies do not want to take
divorce cases because their resources are limited and other civil prob-
lems are considered to have a higher priority than divorce litigation. 62

The effect of these considerations on actual practice is illustrated
by a recent national study of legal aid services where it was found that
only one office in three has an open policy toward divorce cases, 63 and
that many of those offices are unduly selective in determining which
cases are worthy of their services. 64 From the responses which we re-
ceived from the Pennsylvania Survey it appears that the practice in

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60. The Philadelphia Bar has established a subcommittee of its Public Service
Committee called the Community Legal Services Committee (previously the "Watch-
dog" committee) one of whose functions it is to observe the legal aid offices in
Philadelphia to determine if they are accepting cases which infringe on the practices
of the other members of the bar. If such infringement were discovered, the bar
would communicate with the particular office and lawyers involved to discuss the infringe-
ment. If an arrangement were not worked out to the satisfaction of the Bar Associa-
tion, the Association's Committee of Censures could take disciplinary action against
the lawyers involved by filing a complaint against them in the Court of Common
Pleas. PHILA. R. CIV. P. 200(d)(1).

61. E.g., the Dauphin County Bar Association does not permit the legal aid
societies in that county to handle divorces. Pennsylvania Survey, note 21 supra.

62. There is a tendency on the part of many lawyers to treat divorces as a luxury
and thus to treat them as low priority. See note 56 supra. See Pennsylvania Survey,
response from Cambria County Office of Legal Aid, Inc., note 21 supra. This attitude
would be likely to permeate the legal aid societies themselves especially when great
caseloads demand that priorities be set.

63. See 44 J. URBAN LAW 549, 581 (1967).

64. Id. at 574.
Pennsylvania is more liberal than that described above since three-fourths of the legal aid societies responding reported that they take divorce cases.65 However, most of those legal aid societies indicating that they process divorces have restrictions or requirements beyond the normal standard of indigency employed in other civil actions generally.66

V. THE CONSTITUTIONAL ARGUMENT — EQUAL PROTECTION OF THE LAW

Since discretionary in forma pauperis has seldom afforded indigents access to the divorce courts, a constitutionally-mandated right to such proceedings must be established if indigents are to be assured access to the divorce courts in every proceeding. Such mandate is supplied by the equal protection clause67 which has been the basis for recent Supreme Court decisions protecting indigents from deprivation of their fundamental rights because of economic barriers created by the state.

The United States Supreme Court has dealt with questions of economic discrimination in various contexts. In Edwards v. California68 the Supreme Court held a California statute prohibiting the importation of indigent persons to be unconstitutional. In a concurring opinion Mr. Justice Jackson stated that:

[A] man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United

65. The findings of a previous survey taken in 1967, concerning, in part, which Pennsylvania legal aid societies take divorce cases are listed below:
(1) Those offices which would handle no divorce cases: Erie, Harrisburg, Reading, Scranton, Williamsport.
(2) The Montgomery County legal aid office (in Norristown) will only handle a divorce case if the husband is in the military service and the commanding officer recommends a divorce. The only other type of divorce case it will handle is one in which the husband is in jail for some heinous crime.
(3) The Pittsburgh legal aid office will only handle divorce for a "good purpose," for example, the welfare of the children.
(4) The Chester office only handles divorce cases for defendants and not plaintiffs.

The Pennsylvania Survey indicated that only one-fourth of the societies replying did not take divorce cases at all. However, this high percentage of societies taking divorces may be explained by the fact that only thirteen of the twenty-one surveys were returned, thus leading to the conclusion that eight which did not respond might have done so thinking that a reply was not necessary since they did not handle divorces.

66. For example, the Community Legal Services, Inc., of Philadelphia, requires a fifty dollar deposit from the indigent to insure his payment of the preliminary costs (the initial complaint and service) which must be covered before leave to proceed in forma pauperis in a divorce case can be requested. Greater deposits to cover costs are required if the client is going to pay for all the costs himself, and not proceed in forma pauperis. In addition clients will be discouraged from receiving free counsel where the plaintiff's future spouse, assuming such person exist, could pay the costs and counsel fees. Indicated by the responses to the Pennsylvania Survey, see note 21 supra.


68. 314 U.S. 160 (1941).
States. "Indigence" in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact — constitutionally an irrelevance, like race, creed, or color.\textsuperscript{69}

Of more importance, however, is the case of Griffin v. Illinois,\textsuperscript{70} wherein the Supreme Court held that when state procedures require transcripts for criminal appellate review the state must provide the indigent prisoner with transcripts without cost. The Court stated:

Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. . . . There can be no equal justice where the kind of a trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.\textsuperscript{71}

From this specific holding the Court formulated the doctrine that "[w]hen a state acts to deny an individual basic civil rights, [as in the criminal area] it must take affirmative steps, beyond the uniform application of fee requirements to guarantee impoverished people equality before the law."\textsuperscript{72}

The Supreme Court recently applied the Griffin doctrine in the administration of criminal justice area in Williams v. Illinois.\textsuperscript{73} In Williams, the Court held that the imprisonment of an indigent was a violation of the equal protection clause where, after serving the maximum term provided by the penal statute, the indigent was forced to work off

\textsuperscript{69} Id. at 184-85 (concurring opinion of Justice Jackson). Consider also Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966), where it was held that the erection of financial barriers to voting violated the equal protection clause.

\textsuperscript{70} 351 U.S. 12 (1956).

\textsuperscript{71} Id. at 16, 19.

\textsuperscript{72} Id. at 19. In a concurring opinion Mr. Justice Frankfurter stated in reference to the indigent's inability to appeal in a criminal proceeding:

To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a State, would justify a latter-day Anatole France to add one more item to his ironic comments on the "majestic equality" of the law. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread."

\textsuperscript{73} Id. at 23 (Frankfurter, J. concurring).

The Griffin reasoning has been applied to other situations involving indigent criminal defendants being relieved from paying costs. See, e.g., Long v. District Court of Iowa, 385 U.S. 194 (1966) (held that the state was required to provide a transcript free of cost to indigent habeas corpus petitioners); Douglas v. California, 372 U.S. 353 (1963) (holding that the indigent has a right to court-appointed counsel on appeal); Lane v. Brown, 372 U.S. 477 (1963) (cost of transcript requirement for writ of error coram nobis is unconstitutional as to poor petitioners); Draper v. Washington, 372 U.S. 487 (1963) (indigent defendants have a right to free transcripts on appeal); Smith v. Bennett, 365 U.S. 708 (1961) (filing fee requirement for habeas corpus is unconstitutional as to poor petitioners); Burns v. Ohio, 360 U.S. 252 (1959) (filing fee requirement in criminal appeal was held unconstitutional insofar as it barred defendant from appealing his conviction). In Burns, the Court stated that:

There is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants. Indigents must, therefore, have the same opportunities to invoke the discretion of the Supreme Court of Ohio.


court costs and fines by remaining in prison. 74 As the Court pointed out, Williams is only one step in the general trend begun by Griffin “to mitigate the disparate treatment of indigents in the criminal process” through the use of the equal protection clause. 75 The language of the equal protection clause, however, does not restrict the scope of its protection to inequalities related to criminal proceedings, but, is broad enough to be readily applicable to the disparate treatment afforded the indigent in civil divorce proceedings. 76

The Griffin doctrine has been explicitly determined to be applicable to a divorce action in Jeffreys v. Jeffreys 77 where the New York

74. Id. at 4609. Although the Williams holding was limited to its particular facts the Court broadly stated that:

"[O]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency."

Id. at 4609.


76. At least two members of the Supreme Court have explicitly stated that there is no basis to limit the Griffin doctrine to criminal cases. Mr. Justice Douglas, joined by Mr. Chief Justice Warren, in dissenting from a denial of certiorari in Williams v. Shaffer, 385 U.S. 1037 (1967), stated:

"On numerous occasions this Court has struck down financial limitations on the ability to obtain judicial review . . . It is true that these cases have dealt with criminal proceedings. But the Equal Protection Clause of the Fourteenth Amendment is not limited to criminal prosecutions. Its protections extend as well to civil matters. I can see no more justification for denying an indigent a hearing in an eviction proceeding solely because of his poverty than for denying an indigent the right of appeal . . . the right to file a habeas corpus petition . . . or the right to obtain a transcript necessary for appeal."

Id. at 1039-40.

Even Mr. Justice Harlan, dissenting in Griffin, recognized that the equal protection clause could not be so limited:

"[I]f requiring defendants in felony cases to pay for a transcript [in criminal appeals] constitutes a discriminatory denial to indigents of the right of appeal available to others, why is it not a similar denial in misdemeanor cases or, for that matter, civil cases?"

It is no answer to say that equal protection is not an absolute and that in other than criminal cases the differentiation is "reasonable." The resulting classification would be invidious in all cases, and an invidious classification offends equal protection regardless of the seriousness of the consequences.

351 U.S. 12, at 35. See also In re Garland, 39 U.S.L.W. 2029 (1st Cir. July 8, 1970), where the court, in dicta, states that a substantial injury to a litigant due to court costs will not be permitted, and the court will have to suffer the financial loss in such cases rather than charge costs.

For a decision supporting the view that the doctrine of Griffin is inapplicable to divorce actions, see Dugger v. Dugger, No. M-7675-48, at 11 (Super. Ct. of N.J. Chancery Div., Jan. 30, 1970), discussed at note 134 infra.

77. 58 Misc. 2d 1043, 296 N.Y.S.2d 74 (Sup. Ct. 1968).
Supreme Court held that the statutory imposition of publication costs discriminated against indigents thus denying them equal access to the courts guaranteed under the equal protection clause. The Jeffreys Court carefully distinguished divorce litigation from other civil actions by noting the state's fundamental interest in the marital relationship. The court reasoned that the State had a "partnership interest" resulting from its relationship to the married couple which was evidenced by numerous statutes regulating the consummation and obligations of marriage and the state's constitutional mandate that divorce be granted by judicial proceeding only. Having emphasized this close relationship, the court concluded:

Marriage is clearly marked with the public interest. In this State, a marriage cannot be dissolved except by "due judicial proceedings" . . . We have erected by statute a money hurdle to such dissolution by requiring in many circumstances the service of a summons by publication . . . This hurdle is an effective barrier to Mrs. Jeffreys' access to the courts. The loss of access to the courts in an action for divorce is a right of substantial magnitude when only through the courts may redress or relief be obtained. Such a right is, it seems to me, as basic as Griffin's right to appeal and Mrs. Harper's right to vote. It is manifestly discriminatory under Griffin standards to deprive Mrs. Jeffreys of that right while affording it to others with money.

I hold that she has been denied the equal protection of the laws guaranteed to her by the State and Federal Constitutions.

It seems clear therefore, that the right to a divorce involves several substantial interrelated rights which should be equally protected regardless of wealth. In addition to the right of access to the courts, where they serve as the only avenue of relief as discussed in Jeffreys, other more basic human rights such as the right to select the marital partner of one's choice and the right to raise a family, are also infringed by the inability to obtain a divorce. A married individual, unable to obtain a divorce, is prohibited by law from marrying the partner of his choice, from

78. Id. at 1056. 296 N.Y.S.2d at 87.
79. [A]n action for divorce is fundamentally different from actions in contract or concerning real property. The latter may be brought or not brought; they may be settled out of court. But our State Constitution (Art. 1, § 9) mandates that divorces may be granted only by "due judicial proceedings." Furthermore, state statutes dictates who may marry; by whom the marriage may be performed; the obligations of the parties during marriage; the grounds for separation or divorce and the obligations of the parties after the termination of the marriage. For all purposes the State is very much a "partner" to a marriage and a "party" in a matrimonial action.
80. Id. at 82.
81. In Pennsylvania, bigamy is punishable by a maximum of two years of solitary confinement, at labor, and/or a $1,000 fine. Pa. Stat. tit. 18, § 4503 (1963). The same penalty exists for a single person marrying the spouse of another under section 4504.
procreating with the partner of his choice, and thus from living the normal family life to which he would otherwise be entitled if he were not barred from obtaining a divorce. These rights of man have long been recognized by the Supreme Court as “vital personal rights essential to the orderly pursuit of happiness by free men,” that should be afforded to all and not only to those individuals who can afford to pay for them. Furthermore, when an indigent is unable to obtain a divorce he is deprived of the right to take advantage of the numerous federal statutes which are designed to relieve indigents from poverty.

While it is evident that divorce costs discriminate against indigents, thus depriving them of fundamental rights, it is a well settled constitutional doctrine that the equal protection clause does not prohibit a state from making such distinctions among its citizens if the classification is rationally related to the attainment of a legitimate government objective. Recently, however, the Supreme Court has taken a more restrictive approach toward state classifications in holding that where a state classification is based on suspect criteria or affects fundamental rights, it will be judged unconstitutional “unless shown to be necessary

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83. This unfairness is illustrated by the case studies at p. 287 and note 15 supra.

84. Loving v. Virginia, 388 U.S. 1, 12 (1967) (state prohibitions of interracial marriages held unconstitutional). In Skinner v. Oklahoma, 316 U.S. 535 (1942), where state sterilization laws were held unconstitutional, the Court stated:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race, . . .

Id. at 541.

This right was also discussed by Mr. Justice Goldberg in his concurring opinion in Griswold v. Connecticut, 381 U.S. 479 (1965), where he argued the existence of fundamental rights protected by the Constitution which are not specifically enumerated in the bill of rights.

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the right to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

Id. at 495 (Goldberg, J., concurring).

In addition see Meyer v. Nebraska, 262 U.S. 390, 399 (1922).

85. The federal government provides widows and widowers with insurance benefits when they have lost their spouse. 42 U.S.C. § 402 (1964). Thus where an indigent couple is living together but cannot be married because one of them cannot obtain a divorce, where one of them dies the other will not qualify for these insurance benefits because he or she will not be a “widower” or a “widow.”

The federal government helps provide low-rent housing to low income families — this includes single persons only if they are elderly or displaced. Low-Rent Housing Act, 42 U.S.C. § 1402(2), 1409 (1969). Thus indigent “families” composed of a man and woman who are living together but not married because one cannot get a divorce, will not qualify or will have difficulty qualifying under these federal laws, since they are not husband and wife and are thus deprived of the legal sense.

For other examples, see the case studies at note 15 supra.

to promote a compelling governmental interest."\textsuperscript{87} In light of this expanding zone of equal protection, it is submitted that state cost requirements in divorce proceedings are not necessary to promote "compelling governmental interests," and, since fundamental rights are being infringed the cost requirements are unconstitutional. This position requires an evaluation of the rationality and reasonableness of the purpose underlying the enactment of the statutes which create the costs that accompany a divorce action.

Some of the purposes which have been put forth as justifications for the cost requirements in divorce proceedings are: (1) they raise revenue; (2) discourage frivolous litigation; and (3) preserve the family unit.\textsuperscript{88} While the cost requirements have a rational basis as revenue raising devices — they undoubtedly generate revenue for the treasury from those divorce litigants who are able to pay the fees — this rational basis no longer exists when the cost requirements are imposed upon indigent persons who are unable to pay them. Thus, it becomes questionable whether the requirement that all persons seeking divorces must pay these costs is a reasonable means of achieving the legitimate end of fund raising. Even assuming, however, that procedural divorce costs are a functionally sound method of raising funds, it would seem to be a more reasonable approach to require only those who can afford to pay them to do so, and to excuse those indigent persons who are unable to pay the costs so that they may exercise their right of access to the divorce courts.

Similarly, the state's contention that procedural costs effectuate the purpose of deterring frivolous divorce claims — a legitimate state interest — is erroneous since these costs are an irrational means of achieving this purpose. The costs only deter indigents from obtaining divorces, and do not deter a substantial segment of the community, thus rendering the procedural rules under-inclusive.\textsuperscript{89} Moreover, if indigents are the only class sought to be deterred from bringing frivolous divorce claims the setting of costs is clearly over-inclusive, since any theory that all indigent divorce claims are \textit{per se} frivolous is clearly contrary to statistical evidence.\textsuperscript{90} Whichever contention is being advanced, the

\begin{footnotes}
\item 87. Shapiro v. Thompson, 394 U.S. 618 (1969). In \textit{Shapiro}, the Court ruled unconstitutional a one year state residency requirement for public welfare recipients. While the Court applied the "compelling interest" test to this classification affecting the constitutional right to interstate travel, it also stated that such a regulation would also fail under the less strict rational basis test. \textit{Id.} at 634. \textit{See also} McLaughlin v. Florida, 379 U.S. 184, 196 (1964), where the Court in dealing with a racial classification stated that such a classification "will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy."

\item 88. These hypothetical purposes for the state's establishing court costs were discussed in appellant's brief in \textit{Boddie}. The state of Connecticut, as appellee, did argue that divorce costs were reasonably related to the legitimate state interests of raising revenue, and reducing frivolous litigation. \textit{See note 3 supra.}

\item 89. \textit{See Comment, supra} note 72, at 537, for a discussion of the inclusiveness theory and court-imposed costs. \textit{See also} Perez v. Sharp, 32 Cal. 2d 711, 198 P.2d 17 (1948).

\item 90. \textit{See notes} 10, 11, 12 \textit{supra}. \textit{See also} the case studies in \textit{note} 15 \textit{supra}.\end{footnotes}
legitimate purpose for requiring these costs is being effectuated by an irrational means and therefore, the maintenance of these procedural costs is a violation of the equal protection clause. Furthermore, even if procedural costs were a rational means of uniformly discouraging frivolous divorce claims, there are many far more efficient means of accomplishing the same end without discriminatorily infringing upon the rights of the indigent. Some of the possible remedies that would be more likely to deter frivolous divorces are: (1) required marital counseling prior to filing a divorce petition (provided free to the indigent); (2) a more realistic and defined basis upon which a divorce could be granted; and (3) abuse of process prosecutions or perjury charges brought against those who make frivolous claims and baseless allegations.

If the purpose of procedural cost requirements is to preserve the family unit — a legitimate social concern — by deterring divorces, the use of procedural costs to achieve this end suffers from the same deficiency present in their use to discourage frivolous divorces. Aside from the fact that the costs only deter the indigent from divorce and leave wealthier persons free to break up their families at will, surveys indicate that where divorces are unavailable the discontented indigent spouse will, nevertheless, desert the family. What is further inconsistent with the realization of this purpose is that by denying divorce through prohibitive costs, both spouses are effectively prevented from remarrying and thus forming a stable family unit where none previously existed. Furthermore, some reasonable alternatives to the procedural cost requirement can be suggested that will also achieve the desired end of family preservation. For example, longer marital waiting periods might be required, and, free counselling and advisory service could be made available to the indigent before and during marriage.

It can therefore be concluded that the state’s use of divorce court costs to enhance its alleged interests are irrationally related thereto and an unreasonable means of achieving them in light of the available alternatives. Thus, there being no “compelling” government interest support-

91. See note 95 infra.
92. See note 6 supra.
93. See note 81 supra.
94. See Ploscowe, Sex and the Law, in The Family and the Sexual Revolution 183 (E. Schur ed. 1964). This author stated:
Legislators have overlooked the elementary fact, that lax marriage laws and procedures are one of the principal contributing factors in the demand for the dissolution of marriage through divorce and annulment. If husbands and wives were required to choose their mates more carefully, if the law made certain that the choice of a husband or wife was a free one, made after mature reflection, there would be . . . less need for the dissolution of marriages, through annulment and divorce.
Id. at 187.
95. Id. at 191. It is Mr. Ploscowe’s opinion that divorces should only be granted after the husband and wife have undergone examination by a panel of experts whose goal would be to adjust differences and save the marriage. Only if the differences were deemed irreconcilable would the divorce be granted. Id.
ing the employment of discriminatory court costs, it follows that they are an unconstitutional violation of the equal protection clause of the fourteenth amendment. It may also be argued that the present divorce structure constitutes a denial of due process by denying indigents, through the creation of insurmountable procedural cost requirements, full access to the courts for the redress of their grievances. 96

VI. THE PENNSYLVANIA STATE CONSTITUTIONAL ARGUMENT

In addition to the equal protection argument supporting a right to in forma pauperis proceedings in divorce litigation, further support is provided by the Pennsylvania Constitution. Article I, Section 11 of the Pennsylvania Constitution provides in part:

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. 97

Relying on this constitutional provision, Pennsylvania courts have invalidated court rules requiring indigent plaintiffs to provide security

96. It can be argued that the financial barriers to divorce result in a denial of due process with regard to the indigent. The Supreme Court in Chambers v. Baltimore & O. R.R., 207 U.S. 142, 148 (1907), made clear that:

The right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.

The Supreme Court has firmly established that the right to seek redress in the courts is a matter of due process. United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 221–22 (1967); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964); see also NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 357 U.S. 449 (1958). While these cases all dealt with group rights, it can be readily argued that the Constitution makes no such distinction, and, indeed, is primarily concerned with individual rights and liberties.

While this due process argument resembles the equal protection argument, as plaintiffs in Boddie pointed out, such an argument does not require a determination of unequal treatment which is necessary for a violation of equal protection.

The essential elements of due process of law are notice and an opportunity to be heard and to defend in an orderly proceeding adopted to the nature of the case before a tribunal having jurisdiction of the cause.

12 AM. JUR. Constitutional Law, § 573 (1938) (footnotes omitted).

It is submitted that the cost requirements of divorce effectively deprive the indigent of such an "opportunity to be heard and defend" and thereby amount to a violation of due process of law.

97. PA. Const. art. I, § 11.

This provision is a paraphrase of Chapter XXI of Magna Carta which stipulates:

To no one will we sell, to no one will we refuse, or delay, right or justice. . . .

No free man shall be taken or imprisoned or disseised, or outlawed, or exiled, or anywise destroyed: nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land.

The Magna Carta was quoted by the Supreme Court in Griffin v. Illinois, 351 U.S. 12, 16-17 (1956), when it required Illinois to provide transcripts without cost to poor persons appealing criminal convictions.
for costs as a precondition to proceeding with divorce actions. However, a complete implementation of the word and spirit of this provision would require the courts to invalidate all rulings, rules and statutes which place a price tag on justice through the imposition of court costs which force the indigent to forego his “remedy by due course of law” — a constitutional right to have justice administered by the courts.

VII. Sociological Considerations

In addition to the constitutional arguments in favor of a right to in forma pauperis divorce proceedings there are various sociological arguments supporting such a right. They are based on the adverse effects on the spouses, children and society in general which result from prohibiting indigents access to the divorce courts. As stated previously, the indigent who is barred from divorce is faced with two alternatives: (1) he can live at home discontented with his marital partner; or (2) desert his family. Either alternative leads to obvious difficulties. The first alternative inevitably leads to family discord, arguments, violence and other undesirable consequences. The children, of course, receive the brunt of such conditions. In fact, studies have indicated that such family discord has a considerably greater adverse effect on the children than when the family is broken through separation. However, where the couple continues to live together the family may be more economically stable since the wife and children may be supported by the husband even if that support must be obtained through a court order.

The second alternative — desertion — is similarly undesirable. While the children are spared the family discord at home, frequently the spouse remaining with the children is without support and is unable to obtain a support order due to the deserting spouse’s absence.

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98. In Schade v. Luppert, 17 Pa. County Ct. 460, 462 (Lycoming County C.P. 1896), the court so held, reasoning that:

To [the indigent] the courts of justice are not open, because the court has seen fit, by virtue of its ruling, to require of him something impossible for him to perform.

Clearly this would be a denial of justice to the man who was so unfortunate as to be too poor to comply with the order of the court.

See also Lutz v. Heasley, 12 Pa. Dist. 139 (Clarion County C.P. 1902); Jack v. Administrators of McClure, 26 Pa. County Ct. 59, 62 (Clarion County C.P. 1901).

99. It could be argued that costs for the indigent be removed from all judicial proceedings to enable the indigent to have equal access to the courts for all purposes, but to so argue is beyond the scope of this Comment.

100. A policy argument similar to that discussed in this section was utilized in the plaintiff’s brief filed with the Supreme Court in Boddie v. Connecticut, 286 F. Supp. 968 (D.C. Conn. 1968). See note 3 supra.


102. See Burchinal, Characteristics of Adolescents from Unbroken, Broken and Reconstituted Families, 26 J. MARR. & FAM. 44 (1964).

103. The wife and children who have been deserted by their husband-father have numerous avenues through court action for obtaining financial relief from him. Unfortunately, where the husband is no longer within the jurisdiction, and the wife is indigent, it appears that these avenues are foreclosed. The Penal Code of Pennsylvania
thermore, there is the undesirable fact that separation may be ended and begun again at the whim of the deserting party without formality, thus adding further instability to the lives of the rest of the family.  

It therefore seems evident that regardless of which of the two alternatives is chosen by the indigent, the results of the choice are most likely to be considerably more undesirable to all concerned than the results of a divorce. To further support this conclusion, studies have indicated that divorce provides a favorable stability for both spouses and children, and that the children's adjustment in divorce family situations is no worse than the adjustment of children whose families are broken due to other causes. In addition to the above factors favoring divorce, there is the most important point that a divorce frees both spouses and gives them the opportunity to remarry. Where remarriage occurs, not only does the new husband afford a likelihood of economic stability to the family by supplying income which could take the family off public assistance and welfare rolls, but his presence in the household undisputably adds to the emotional and educational stability of the wife and children. Statistics have indicated that there is a strong likelihood

expressly conditions the initiation of a wife's or child's action for desertion and non-support — under which the court can order support payments by the husband and imprison him for failure to comply — upon the husband's being within the limits of the Commonwealth. Pa. Stat. tit. 18, § 4733 (1963). The wife and children can bring civil in personam actions for support where the husband has neglected or refused to support them. Pa. Stat. tit. 48, § 131 (1965); Pa. Stat. tit. 62, § 2043.31 et seq. (1968). The Civil Procedural Support Law has a broad provision for service of process upon the out of state husband: "Every complaint and order may be served by registered mail or by any adult person or by another manner provided by law." Pa. Stat. tit. 62, § 2043.36(d) (1968). Even under this statute the indigent wife who does not know where her husband lives and who cannot afford publication costs — assuming service by publication is both authorized by the statute and constitutional — is unable to maintain a civil action for support. The wife and children can bring an in rem action for nonsupport against any property of the husband remaining in the state. Pa. Stat. tit. 48, § 134 (1965).

104. R. CAVEN, THE AMERICAN FAMILY (3d ed. 1963), where the author states: The very fact that after a separation the marriage may be resumed without formality adds to the instability. One separation may follow another, often being in the nature of desertion by the father who moves out leaving the mother and children without support. With longer periods of separation, but no legal termination of the marriage through divorce, temporary alliances or more permanent common-law marriages may replace legal marriage.

105. See Burchinal, supra note 102.

Adolescents from broken [divorced or separated] families showed significantly better adjustment than those from unhappy, broken families in relation to psychosomatic illnesses, delinquency behavior, and parent-child adjustment. In general, children from families broken by divorce did not have poorer adjustment than children from families broken in other ways.

106. See Parker & Kleiner, Characteristics of Negro Mothers in Single-Headed Households, 28 J. MARR. & FAM. 507, 512, where the authors conclude that: [T]he mother's psychological adjustment and achievement related attitudes exert a depressing influence on the goal-striving behavior of her children. Thus, the
that such remarriage will occur and be successful, and have further indicated that there is little likelihood that a broken indigent family will be restored.

In addition to the more specific effects of denying divorces to the indigent, there is also the more general sociological impact of denying to the poor what the rich may easily obtain. As the late Robert F. Kennedy once remarked, "[t]he poor man looks upon the law as an enemy"; the practice of denying the indigent access to the courts in matters as fundamental as divorce will have the tendency of reinforcing their hatred of the "establishment." The inevitable result of the growth of such attitudes would seem to be a disrespect for the law and a refusal to abide by it in most areas of social behavior. This overall sociological problem and the more specific problems of the broken home, illicit relationships and illegitimate children can be solved, at least to some extent, by assuring the availability of divorces to indigent spouses.

VIII. Proposals

The best method of assuring that the indigent achieves equal access to divorce proceedings is to remove all the financial barriers which

female-headed household, so widespread in the Negro community, may have some serious consequences for children raised in these homes.


It is not hard to understand the cynicism of the people of the ghetto towards our legal system as an outlet for grievances and disputes. A person charged with a criminal offense is brought before the bar of justice expeditiously. He is given a free trial, free lawyer and, if necessary, free appeals. Yet a deserted woman, who feels as imprisoned as a convict and who may be able to free society of the burden of supporting her if she could remarry, is denied the relief of our courts. It is unjust to give better treatment to those who break society [sic] laws than to those who attempt to live by the rule of law and order.

*Id.* at 5 (emphasis added). See note 127 infra.

111. Judge Raymond Pace Alexander, elucidating the need for providing legal services to the poor when he granted a charter to Community Legal Services, Inc., of Philadelphia, *In re: Community Legal Services, Inc. (Philadelphia County C.P. 4, March Term 1966, No. 4968)*, stated:

Divorce for the poor is often impossible because of the legal costs involved. Divorce poverty style is plain common "separation" and the spouse soon after is taking up the burden. Result: broken families that remain broken; denial of opportunity for remarriage; illicit relationships and illegitimate children.
have been erected as part of the divorce procedure in Pennsylvania.\(^{112}\)

Due to the particular nature of the establishment of these procedures there are four levels upon which this step could be affected: (1) the State Legislature; (2) the State Supreme Court; (3) local courts; and (4) the individual lower court judge.\(^{118}\)

The State Legislature has authorized the Supreme Court of Pennsylvania to adopt rules of procedures to regulate divorce proceedings;\(^{114}\) these rules have the force of statute.\(^{115}\) The State Legislature has also authorized local common pleas courts to adopt certain procedural rules which do not conflict with the general rules prescribed by the Supreme Court.\(^{116}\) Thus, where the Pennsylvania Supreme Court has not provided procedural rules in divorce, or specifically authorized the local court to create divorce procedure, the common pleas courts control the imposition of costs.\(^{117}\)

Under the present state of the law, however, the granting of in forma pauperis proceedings in divorce litigation is not governed by formalized rules on any of these levels, but is merely a matter of common law governed by the discretion of the trial judge.\(^{118}\) Unfortunately, our Pennsylvania Survey has indicated that when such matters are left to the discretion of the judges, in forma pauperis proceedings are rarely, if ever granted.\(^{119}\) Since this approach has not proved to be an adequate solution to the indigent’s difficulty in obtaining divorces and is unlikely to be so in the future, it must be abandoned in favor of establishing in

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112. The authors wish to acknowledge the practical assistance and advice of Mr. Charles Platto, Esquire, University of Pennsylvania, B.A. 1966; University of Michigan, J.D. 1969; Member of the New York Bar; presently a Reginald Heber Smith Fellow with Community Legal Services, Inc., of Philadelphia, whose assistance has contributed greatly to the Proposal Section of this Comment.

113. See p. 288 supra.


[T]he Supreme Court of Pennsylvania shall have the power to prescribe by general rule the forms of actions, process, writs, pleadings, and motions, and the practice and procedure in civil cases at law and in equity for the courts of common pleas and for the courts of quarter sessions of every county, for the county court of Allegheny County, for the municipal court of Philadelphia, and for such other courts having jurisdiction in civil actions as the General Assembly shall hereafter establish: Provided that such rules shall be consistent with the Constitution of the Commonwealth and shall neither abridge, enlarge nor modify the substantive rights of any litigant nor the jurisdiction of any of the said courts, nor affect any statute of limitations, . . .


117. See, e.g., PHILA. C.P.R. 1133(a)2(b), involving masters’ fees being set by local court, quoted at note 33 supra.

118. See p. 294 supra.

119. E.g., Community Legal Services, Inc., of Philadelphia, so indicated in their response to the Pennsylvania Survey. See note 21 supra.
forma pauperis divorce as a matter of right through statute or rule of court with defined limitations and provisions.

A. Removal of Court Costs

1. Statutory Proposals

The most permanent and fundamental means of establishing a right to in forma pauperis proceedings in indigent divorce litigation is the adoption of a statute providing for the same. There are two principal methods of statutory construction which could be utilized to exempt the indigent from procedural costs in divorce actions. The first method is to amend the existing statutes which either assess fees or authorize the Supreme Court to adopt procedures or fees at its discretion, with an introductory clause which expressly exempts the indigent from paying the fee or fees covered by the statute. The other alternative is to adopt a broad general statute which exempts the indigent from all costs and fees resulting from his divorce litigation. An example of the latter statute is the following proposal of the Community Legal Services, Inc. of Philadelphia which could be enacted by the legislature of Pennsylvania:

Whenever any person by reason of indigency seeks relief from the payment of any fees, expenses and costs provided for by law which are payable to any court or clerk of court or sheriff in connection with an action in divorce, (including without limitation any master's fees, stenographer's fees, Bar Association fees), any court, upon verified petition, setting forth the financial condition of such person, which petition may be filed without fee, may in its discretion order the payment of such fees, expenses and costs waived, and allow such person to proceed in forma pauperis. Upon the entry of appearance of counsel employed by or associated with a non-profit organization which has established eligibility standards for representation of indigents, all such fees, expenses and costs shall be waived by the clerk of court without the necessity of petition or court order.

Over one-half of the states and the federal courts have statutes or rules of court providing for some type of in forma pauperis proceedings in civil actions generally. Unfortunately, not only do most of these states

120. An example of this type of statutory construction is the New Jersey statute which requires the payment of a reference fee before a matrimonial action may be approved for trial. N.J. Stat. tit. 2A, § 34-16 (1952), states:
   Except in actions in forma pauperis, before any matrimonial action is approved for trial the plaintiff or counterclaimant shall pay to the clerk of the superior court, for the use of the state, the sum of $50 and in litigated actions the additional sum of $10.

121. While Community Legal Services, Inc., of Philadelphia, would like this proposal to be enacted by the Pennsylvania legislature, it is presently part of a proposal to the Rules Committee of the Supreme Court of Pennsylvania to become a Rule of Court; i.e., Pa. R. Civ. P. 1137. This proposal, as well as the proposal found at p. 319 infra, is the subject of a memorandum on in forma pauperis divorces which is being submitted by Community Legal Services, Inc., of Philadelphia, to the Rules Committee of the Pennsylvania Supreme Court, on file at Villanova Law Review office.

expressly exclude divorce actions from the general provision for all civil actions, 123 but most of the statutes which cover divorces are riddled with exceptions and limitations which impair their effectiveness in divorce litigation. For example, some states set their indigency qualification standards so high as to make the effect of the statute nugatory. 124 In addition all of the existing statutes are only partially effective because the indigent is only relieved of some of the costs which are incurred during divorce litigation.

The statutory proposal advised here should be directed at divorce proceedings exclusively and must avoid the above pitfalls. The coverage must eliminate all costs emanating from divorce litigation. The exemption from costs must be extended to all those individuals who will realistically be unable to pay for them. It is submitted that the best approach is to allow an individual to proceed in forma pauperis whenever a legal aid society is conducting the divorce action since it has already investigated and determined the indigent's financial status to determine if he is qualified for their service. 125 Where such services are not available some income range guidelines — at least as high as the poverty income level set by OEO for the state of Pennsylvania — should be established for determining qualification for costs exemptions. 126

123. Id. at 35. E.g., Georgia and Louisiana.

124. Id. at 34. In Arkansas, a poor person is one whose family and himself is not worth more than ten dollars over and above necessary wearing apparel and exempting the subject matter of the action. Id.

125. For an example of the standards used in making such a determination, see note 1 supra.

126. This approach was taken by the New Jersey Supreme Court in formulating rule 1: 13-2 of the New Jersey Rules of Civil Practice. See note 134 infra. The Office of Economic Opportunity's Guidelines for legal service programs indicate that the Economic Opportunity Act of 1964 was directed at providing equal opportunity and equal justice for our country's poor. Some 35,000,000 persons are deemed to be poor; i.e., having a family annual income under $3,000.00. This figure will vary with each state as the eligibility figure is determined on a state-by-state basis by examining the census figures for that state. In addition the income standard set will vary with each organization and the demand for those services. Once the standard is set the local organization may be more lenient than is required; in fact, it is required to be flexible in its application of qualification standards. Guidelines for Legal Service Programs, 1 CCH Pov. L. Rep. ¶¶ 6700.10, .35 (1970).

For the indigency standard applied by the Legal Aid Society of Philadelphia, see note 1 supra.

The federal courts have their own in forma pauperis statute which, because of its ambiguity, creates some difficulty in determining whether a particular poor person qualifies under it. 28 U.S.C. § 1915 (1964), states that:

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) In any civil or criminal case the court may, upon filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall
Whichever type of statutory construction is utilized the indigent will be relieved from the procedural expenses in divorce proceedings if the above pitfalls are avoided. Unfortunately, due to the time consuming nature of the legislative process, especially in controversial areas such as aid to the poor the desired statutory enactment may not reach fruition in the near future, if at all. Therefore, it seems far better for the judiciary to act now than for progress in this area to be lost in a legislative quagmire.\footnote{Villanova Law Review, Vol. 16, Iss. 2 [1970], Art. 2}

2. \textit{Pennsylvania Supreme Court And Local County Court Rules of Procedure Proposals}

The Supreme Court not only has the authority to promulgate rules of procedure which will have the force of statute,\footnote{PA. R. Civ. P. 1121-36.} but it also has the authority to alter and/or suspend existing statutes which deal with pro-

be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

The federal courts have held that "while permission [to proceed in forma pauperis] should be freely granted where the affidavits are in the language of the statute, the petition may thereafter be successfully challenged . . ." by establishing that the petitioner can pay for the costs. Gift Stars, Inc. v. Alexander, 245 F. Supp. 697, 699 (S.D.N.Y. 1965). However, the federal courts do not require the petitioner to be absolutely penniless to invoke the statute. See, e.g., Gift Stars, Inc. v. Alexander, 245 F. Supp. 697 (S.D.N.Y. 1965); Thiel v. Southern Pac. Co., 159 F.2d 61 (9th Cir. 1946). The Supreme Court has so held in the case of Adkins v. E.I. du Pont de Nemours & Co., 335 U.S. 331 (1948), where it was stated:

[W]e think an affidavit is sufficient which states that one cannot because of his poverty "pay or give security for the costs . . . and still be able to provide himself and dependents "with the necessities of life." To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. . . .\footnote{See generally Silverstein, \textit{Eligibility for Free Legal Services in Civil Cases}, 44 J. Urban L. 549 (1967).} Id. at 339, quoted \textit{in part} in Gift Stars, Inc. v. Alexander, 245 F. Supp. 697, 699 (S.D.N.Y. 1965).


\footnote{The quoted proposal is presently proposed as a rule for the Pennsylvania Supreme Court's adoption. Judicial action must at times be resorted to in the absence of legislative action which is characterized by delay and ineffectiveness. See \textit{Freedman}, note 18 \textit{supra}. As the Court pointed out when it took judicial action in \textit{Suber} v. \textit{Suber}, No. M-2366-68, at 5 (Super. Ct. of N.J., Chancery Div., Aug. 25, 1969) (presently on appeal): "this court would welcome legislative action in this area [in reducing publication costs to the indigent]. But, in the absence of such action, this Court sees an injustice which must be remedied." \textit{Contrary}, Boddie v. State of Connecticut, 286 F. Supp. 968 (D.C. Conn. 1968), \textit{see} note 3 \textit{supra}.}

\footnote{127. The quoted proposal is presently proposed as a rule for the Pennsylvania Supreme Court's adoption. Judicial action must at times be resorted to in the absence of legislative action which is characterized by delay and ineffectiveness. See \textit{Freedman}, note 18 \textit{supra}. As the Court pointed out when it took judicial action in \textit{Suber} v. \textit{Suber}, No. M-2366-68, at 5 (Super. Ct. of N.J., Chancery Div., Aug. 25, 1969) (presently on appeal): "this court would welcome legislative action in this area [in reducing publication costs to the indigent]. But, in the absence of such action, this Court sees an injustice which must be remedied." \textit{Contrary}, Boddie v. State of Connecticut, 286 F. Supp. 968 (D.C. Conn. 1968), \textit{see} note 3 \textit{supra}.}

\footnote{128. PA. R. Civ. P. 1121-36.}
cedural matters. Thus, the Supreme Court would have the authority to suspend those rules and statutes which set filing fees, cost of service through sheriff or publication, and master's fees, and also alter or replace them with provisions providing for a right of in forma pauperis proceeding in indigent divorce actions. The two alternative methods of construction discussed in the statutory section are also applicable to procedural rules, i.e., the Supreme Court can either amend the existing rules or adopt a general rule waiving fees and publication costs as a matter of right. Either method is an adequate solution if all costs and publication expenses are removed and the standard of indigency is sufficiently broad. Thus, the quoted proposal by Community Legal Services, Inc., could well be adopted by the Supreme Court as a rule of court.

A similar approach might be undertaken through adoption of procedural rules in the local county courts. This change is easiest to accomplish and has the advantage of flexibility because it could be easily altered by the local courts if it became cumbersome. However, since it is unlikely that all the counties would adopt the same rule, this approach suffers from one fatal defect — there would be a lack of uniformity in the right to such proceedings throughout Pennsylvania. This lack of uniformity would be at variance with the equal protection requirement that indigents be afforded the same access to the courts as wealthier persons wherever they reside in Pennsylvania.

129. PA. STAT. tit. 17, § 61 (1962). For the court's use of this power, see the Acts of Assembly Suspended, PA. R. CIV. P. 1451 et seq. Significantly, the Court has suspended a number of statutes in the divorce area dealing with masters, process and publication, etc., PA. R. CIV. P. 1459, and replaced these with procedural rules of court. PA. R. CIV. P. 1121.


132. PA. R. CIV. P. 1124(b) (service by publication).

133. PA. R. CIV. P. 1133(a) (2) (appointment of master and fees).

134. An example of a broad general rule of court establishing in forma pauperis proceedings is that adopted by New Jersey which states:

Except when otherwise specifically provided by these rules, whenever any person by reason of poverty seeks relief from the payment of any fees provided for by law which are payable to any court or clerk of court, any court upon the verified application of such person, which application may be filed without fee, may in its discretion order the payment of such fees waived. In any case in which a person is represented by a legal aid society, an Office of Economic Opportunity legal services project, the Office of Public Defender, or counsel assigned in accordance with these rules, all filing fees shall be waived by the clerk without the necessity of a court order.


The language of this rule has been interpreted as providing state payment of costs only for fees which are payable to the court or clerk of court and thus publication charges set by and payable to newspapers are not payable by the state. Duggar v. Duggar, No. M-7377–78, at 5 (Super. Ct. of N.J., Chancery Div., Jan. 30, 1970). The result of this omission was to burden the plaintiffs in divorce actions whose spouses had left the jurisdiction with fees for service (newspaper charges) while plaintiffs whose spouses lived in the jurisdiction would be able to serve them through sheriff's service without charge. This discrimination was held to violate the equal protection clause of the Constitution resulting in a New Jersey Superior Court's order that the state is to pay the publication costs charged to the indigent plaintiff in a divorce action. Suber v. Suber, No. M-2360–68 (Super. Ct. of N.J., Chancery Div., Aug. 25, 1969). See p. 316 infra.
B. Allocation of the Indigent's Divorce Costs

Regardless of which of the above three approaches is pursued in order to effectuate a general right to an in forma pauperis divorce proceeding without cost, some consideration, based upon the assumption that the structure of divorce proceedings will remain relatively unchanged, must be given to the allocation of the procedural costs incurred by the indigents' divorce litigation.\textsuperscript{135} Filing fees and sheriffs' service fees will have to be absorbed by the state,\textsuperscript{136} but since they are a relatively minor expense the financial burden would be insignificant. Masters' and stenographers' fees, on the other hand, are a major cost of divorce proceedings and several alternatives are available to meet such costs. The masters themselves could be required to take a certain percentage of indigent cases without charge. Another alternative would be to have lawyers volunteer their services as masters. Unfortunately, this is impractical since most attorneys are inexperienced in handling divorce proceedings. One method which has been used in several counties is to have the judge take the case himself and not appoint a master.\textsuperscript{137} While this solves the cost problem, it requires a greater time commitment by the judge who, in many counties, is already burdened by a serious backlog of cases. Finally, a last alternative is that the entire cost be absorbed by the state. While this alternative would result in higher taxes to meet the considerable additional expense to the state, the burden of this expense is more appropriately placed on the public than on the masters or the practicing members of the bar.

1. Publication — A Special Problem

Most costs arising from divorce actions are directly controlled by the courts and can be waived by statute or rule without the expenditure of funds from the state treasury. Publication costs, however, are unique in that while they are required by the courts they are assessed by the newspapers and will require an "out of pocket" expenditure by the state to pay publication costs if the divorce courts are to be opened to indigent divorce plaintiffs whose spouses are not subject to direct service. Due to the uniqueness of this procedural cost a closer examination of publi-

\textsuperscript{135} While it is not the purpose of the Comment to expound upon procedural changes which would reduce the cost to the state in processing indigent divorces, it is important to note that procedural changes would reduce the ultimate burden on the taxpayer. Costs could be greatly reduced by providing for summary divorce proceedings for indigents where the divorce is uncontested or where the defendant spouse has deserted his family.

\textsuperscript{136} There is some question whether the state or county should absorb the additional cost of indigent divorce litigation. The traditional argument that the county should pay the cost since its citizens are causing the expenditure and that it is unfair to pass the burden of one county over to another through state taxation could undoubtedly be raised. However, since the procedural rules are ultimately created on a state level, the taxation to pay for this procedure should be administered at the state level.

\textsuperscript{137} See Pennsylvania Survey, note 21 supra.
cification as a procedure is necessary before a proposal can be offered to alleviate this expense.

The importance of notice to all parties in a judicial proceeding has received considerable emphasis by the Supreme Court. In Mullane v. Central Hanover B.&T. Co., the Court stated:

An elementary fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.138

However, the Supreme Court has done little more than set down general guidelines as to what constitutes proper notice,138 and as long as the method of giving notice chosen by the individual state meets these guidelines and is just and reasonable considering the proceeding for which it is used,140 it will meet the requirements of due process. Thus, the procedural aspects of notice are completely within the states’ jurisdiction, and, so long as the method of notifying all parties has due regard for the practicalities and peculiarities of a given case it will not be condemned.141 Pennsylvania, along with many other jurisdictions,142 has chosen newspaper publication as the method of notifying defendant spouses who have left the jurisdiction, or who are otherwise unable to be served personally.143

In New Jersey, a state which utilizes the publication method of giving notice, the courts were recently faced with the problem of preventing publication costs from overburdening the indigent divorce plain-

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139. In Mullane, the Court stated two specific guidelines:

The notice must be of such nature as reasonably to convey the required information, Grannis v. Ordean, 234 U.S. 385 ... and it must afford a reasonable time for those interested to make their appearance, Roller v. Holly, 176 U.S. 398 ... and cf. Goodrich v. Ferris, 214 U.S. 71 ... .


"No fool-proof system of giving notice exists. Since perfection is unattainable, the best one can hope for is the creation of methods reasonably calculated to produce the desired result without imposing unrealistically heavy burdens on the party charged with the duty of notification." Gelhorn and Bye, Administrative Law 832 (4th ed. 1960). There is always a risk that notice may not reach the intended person, but this is not the test for legal sufficiency. The test, is rather, whether the notice was reasonably calculated to reach the intended parties.


141. 339 U.S. at 314, 315.

142. E.g., Connecticut, see note 3 supra; New Jersey, see p. 316 infra; New York, see note 77 supra.

The court utilized the equal protection clause to declare unconstitutional publication charges to indigent divorce plaintiffs, which resulted from New Jersey's requirement of notice by publication. New Jersey, being one of the most liberal states in this field, also provides for indigent in forma pauperis proceedings in divorce actions by rule of court which waives all court costs. However, prior to the Suber case the indigent was required to publish notice of a divorce action in order that the plaintiff, who was out of the jurisdiction, would be given the notice required by due process.

The Suber court, in applying the Griffin doctrine, ruled that where the state provides for in forma pauperis divorces, it must provide all indigent's with the same opportunity to obtain a divorce. To force some indigents — those whose spouse is not subject to direct service — to pay publication charges while the others receive free service provided by the state, is an unreasonable distinction which restricts basic human rights and is thus violative of the equal protection clause of the Constitution. It is submitted that an unconstitutional discrimination also occurs in those states where court fees, as well as publication costs, are assessed against the indigent, since the indigent alone is denied access to the court while the more affluent are not. The discrimination complained of in Suber is more subtle due to the fact that New Jersey has taken action to relieve the indigent from court fees and costs.

If the premise is adopted that indigent relief from publication costs is constitutionally mandated and that the state must pay the cost of publication, some discussion of alternative notice requirements which would relieve the state of the burden of publication cost seems warranted. Since it is most unlikely that newspapers will undertake a voluntary reduction of publication charges, there are two available alternatives.

145. Id. at 5.
146. See note 134 supra.
147. See p. 299 supra.
149. Id. at 4-5. The case of Dugger v. Dugger, No. M-7377-68 (Super. Ct. of N.J., Chancery Div., Jan. 30, 1970), explicitly rejected the application of the Griffin doctrine in a divorce proceeding. In Dugger, the court rejected the indigent wife's motion for an order forcing the clerk of the Superior Court, the State of New Jersey, or the Essex County Welfare Board to pay newspaper publication costs resulting from her in forma pauperis divorce proceeding on the grounds that the allegation of indigency was conclusionary and lacked the requisite specificity to qualify her for such relief even if the state was constitutionally required to pay publication costs. See pp. 298-306 supra.
150. Generally this Comment is not concerned with the adequacy or inadequacies of the divorce procedures currently in force in Pennsylvania.
The meaning of this opinion should not, however, be misconstrued. It is not intended as a condonation of the hypocrisy of the fourth estate. This entire
The easiest alternative is to reduce the number of publications currently required under Pennsylvania's Rules of Civil Procedure from three to one.\(^{153}\) This will directly reduce the costs to the state by two-thirds. The second alternative is to altogether abandon the use of publication as a means of meeting the notice requirements of due process.

The legislative and judicial reasoning in support of publication appears to be that the newspapers afford a medium of communication to thousands of persons, thus the legal notice is likely to come to the attention of the defendant, and, in addition, the cost to the plaintiff is comparatively inexpensive. The position that publication, as a means of notifying the defendant, is comparatively inexpensive is irrelevant to the indigent who cannot afford to pay this fee.

The position that legal notices are likely to be read by the defendant also seems doubtful. The Supreme Court in \textit{Mullane} refused to sanction publication as a reliable means of notifying the beneficiaries of a trust where the trustees were conducting a hearing concerning the pooling of the trust.

Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.\(^{154}\)

It is only common sense which makes one realize that only a miniscule percentage of a newspaper's readers will read or even browse through the fine print of the classified section — the section where the legal notices are most often located — unless they are looking for something in particular.\(^{155}\) The Supreme Court in \textit{Mullane} espoused this view in

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question [that of the court's forcing the indigent to pay publication costs] would be moot if the same newspaper which screams with selfrighteous indignation at the injustices practiced on the poor was to waive publication costs on certification of indigency by the Legal Services Corporation.

Newspapers make a large portion of their profits on legal advertising. In comparison with that large amount of business, the number of in \textit{forma pauperis} divorces is miniscule. The number of those cases requiring publication is still smaller. This cost could easily be absorbed.

\textit{Id.} at 5.

If the newspapers refused to provide free space, as is most likely, they might be induced to give a percentage discount to indigents taking out legal notice ads as they do for church advertisements.
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\(^{153}\) As was noted in Dugger v. Dugger, No. M-7377-68, at 2, 5 (Super. Ct. of N.J., Chancery Div., Jan. 30, 1970), New Jersey has recently reduced the number of required publications from four to two publications currently required by N.J.R. Civ. P. 1:13-2. See note 135 supra.

\(^{154}\) 339 U.S. at 315.

\(^{155}\) The results of a survey conducted by Carl J. Nelson, Research Inc., of Chicago, Illinois, to determine the percent of readers of the Philadelphia Bulletin newspaper who read the "Divorce Suits Begun" section of the Bulletin's Sunday edition are the following: 2% of the men reading the paper read that section; 15% of the women reading the paper read that section; 1% of the boys reading the paper read that section; less than 1% of the girls reading the paper read that section. The survey was taken of seven hundred Bulletin readers \textit{in the Bulletin's circulation area} on Sunday, April 29, 1970. While this percentage seems to be fairly high, it must be considered that it is likely that a deserting spouse will not be in the same
its concern for protecting the property rights of the beneficiaries. The Court stated:

Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests.168

Having discredited publication as a means of notifying defendants who are not subject to direct service, the question arises as to what alternatives can be adopted without violating due process. The Supreme Court has indicated that as long as the alternative means of notifying the defendant is a method which would be utilized by a person who wanted to notify the defendant, due process will not be violated.157 All the Court requires when using such an alternative means is that:

Where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.168 Thus an alternative to publication could be adopted by state statute or court rule so long as the new procedure was not substantially less likely to notify the defendant of the pending suit.159 An example of such a procedure would be to allow indigents who are unable to locate their spouse to post notices at the city hall and other central locations, and send letters of such notice to the relatives or friends of the defendant spouse, if their addresses are known.160 The Community Legal Services, newspaper circulation area as the spouse he has deserted, and thus the likelihood of the deserting spouses reading the notice is not measured by this survey.

156. 339 U.S. at 320.

157. Id. Note that in cases of indigents’ divorce proceedings the plaintiff spouse would usually like nothing better than to notify the defendant in the hopes that he would attend the proceedings and subject himself to a court order requiring him to pay the costs of the proceedings or child support. See notes 35 & 103 supra.

158. Id.

159. The Supreme Court in Mullane was attacking publication as an ineffective means of notifying interested beneficiaries of a trust that there would be a judicial settlement of accounts for the purpose of pooling their trust with other small trust estates. The Court ruled that due process was not violated as to those beneficiaries whose names and addresses were not known and therefore not used in the newspaper ad, but that due process was violated as to those beneficiaries whose names and addresses were known but not listed. The Court stated:

This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that in the case of persons missing or unknown employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.

Id. at 317. Thus the court impliedly recognizes that where the defendant’s location is unknown notice is futile and that publication is merely a “stab in the dark” at notifying the defendant.

160. A means of notice less thorough than that suggested in the text has been deemed satisfactory by the Supreme Court. In Anderson National Bank v. Luckett, 321 U.S. 233, 244 (1944), a Kentucky statute authorizing the posting of a notice at
Inc., of Philadelphia has put forth the following proposal as a substitute for publication:

If service cannot be made under subdivision (a)(1) or (a)(2) of this rule and has not been made under subdivision (a)(3) of this rule, and the sheriff has made a return or affidavit of "Not Found," the plaintiff, without reinstatement of the complaint, shall have the right to substitute service by public posting and registered mail. The prothonotary, upon the filing of a praecipe for substitute service, shall write on the complaint "Substitute Service Directed." Substitute service shall be made by the sheriff posting a notice on a bulletin board at the county court house set aside for such purpose. Such notice shall remain posted for a period of not less than three weeks. In addition, the sheriff shall send the defendant a notice of the pendency of the action by registered mail to his last known residence set forth in the complaint.161

C. Removal of Counsel Fees

Assuming the indigent was relieved of all costs which flow from his divorce proceeding and that these costs were absorbed by the state, all of this is to no avail unless he receives adequate legal counsel. Since the indigent needs counsel to litigate his divorce and he cannot afford the normal legal fees 162 — which are usually higher than the total amount of other costs — he must be provided with free legal counsel. A ready means of providing for free counsel is to use the existing services of the legal aid societies.163 However, certain policy changes must be made to allow legal aid societies to take divorce cases and to require

the county court house to notify inactive depositors that their bank accounts would escheat to the state was upheld. The Court stated:

We cannot say that the posting of a notice on the door of the court house in a Kentucky county is a less efficacious means of giving notice to depositors in banks of the county than publication in a local newspaper.

Another example of an inexpensive means of publicizing divorce actions through a means other than the traditional public newspaper is that used for all litigation in Nashville, Tennessee. In that state the supreme court has approved publication of notice in a private weekly newspaper called the Nashville Record. The approximate cost for any divorce litigant is $7.50 for publishing proper notice. While many business and law firms receive this paper on a subscription basis, it is very difficult to imagine that an indigent defendant would even obtain a copy of the paper (which costs thirty cents), much less read through the notices.

161. This is the first section of a two part proposal for adoption as a rule of court by the Pennsylvania Supreme Court (see p. 310 supra for the second part of the proposal). It is proposed that the present rule 1124(b) of the Pennsylvania Rules of Civil Procedure be suspended and that it be replaced with the quoted provision. The text of the first portion of the existing publication procedural rule is set forth at note 27 supra. Both of these proposals are the subject of a memorandum on in forma pauperis divorces which is being submitted by Community Legal Services, Inc., of Philadelphia, to the Rules Committee of the Pennsylvania Supreme Court, on file at Villanova Law Review Office.

162. See the Pennsylvania Survey, note 21 supra, which indicates that counsel fees can run upwards of three hundred dollars in addition to costs.

163. Where there are no legal aid societies, counsel can be provided through the court's appointment of private attorneys. Appointment in divorce cases is currently being utilized in Lehigh County despite the existence of legal aid societies. Such a procedure results in a lower quality representation to indigents in divorce litigation because most of the appointed attorneys are not as experienced in divorce practice as legal aid attorneys would be if they were taking divorce cases regularly.
them to do so without any charge to, or security deposits for costs being demanded of, the indigent client. In addition, more funds must be made available to the societies to enable them to meet the increased costs generated by this divorce litigation.

The first step toward the participation of legal aid societies in indigent divorce litigation could be accomplished through the authority of the Office of Economic Opportunity which supplies all or most of the funds given to the various legal aid societies. While OEO has the ultimate authority over the policies and programs of legal aid societies, their present standards merely establish generalized criteria for legal aid programs.164 However, OEO could tighten up its standards and require the legal aid societies of Pennsylvania and other states, on a local society basis, to take divorce cases under the penalty of withholding federal funds from their programs.165 This would enable the societies to take divorce actions, because the bar associations and boards of trustees would be economically compelled to comply with this OEO requirement.

In addition the bar association could be encouraged to change their position of discouraging legal aid societies from taking indigent divorce cases. This can most easily be accomplished by reminding these associations that to place the financial interests of its members over the interests of justice is contrary to the canons of ethics which have been promulgated by the American Bar Association and entrusted to the local bar associations for enforcement.166 The Code of Professional Responsibility has expressly established certain ethical considerations concerning the duty of lawyers to support programs providing legal aid to the underprivileged. It states that:

Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of the legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices . . . and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.167

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164. See note 54 supra.

165. Most of the legal aid societies have developed independently, frequently through action by the local bar association. Thus, OEO, in addition to setting down a general uniform policy (see note 59 supra) requires the local legal aid society, when applying for federal funds, to design a program suitable to the needs of the community. 1 CCH Fed. L. Rep. ¶ 6705.05 (1970). Most legal aid societies have some sort of governing body to make these policy decisions. In Philadelphia the charter of Community Legal Services, Inc., requires the board of trustees to perform this function.

166. See the preliminary statement to the ABA Code of Professional Responsibility 1 (1970), which went into effect on January 1, 1970. Rule 205 of the Pennsylvania Rules of Civil Procedure automatically adopts as rules of court the canons of ethics as they are approved by the American Bar Association.

If OEO sets down specific guidelines concerning the participation of legal aid societies in indigent divorces, the cooperation of local bar associations would not be absolutely essential to obtaining indigent divorce counsel, but their approval would greatly facilitate matters. Thus it is hoped that local bar associations will alter their position and encourage legal aid societies to provide counsel for indigents who desire to obtain a divorce.

The second step which might be taken to provide for legal aid society participation in indigent divorce litigation is to increase the legal aid societies' resources — funds, facilities and personnel — so that they are adequately equipped to take divorce cases without creating undue pressure upon other community demands for legal services. More federal, state and local aid must be provided for these societies to enable them to undertake the new influx of divorce cases. A failure to provide these resources will cause the societies to discourage indigents from proceeding with their divorce claims.

D. Summary and Conclusions

It is the thesis of this comment that the following proposals be adopted by the bodies to which they are addressed in order to effectuate the goal of providing divorce proceedings without cost to the indigent.

I. Pennsylvania must establish in forma pauperis proceedings in divorce actions and make them available to the indigent as a matter of right.

A. The proceedings must relieve the indigent from all costs and fees arising from the divorce action.

1. The State of Pennsylvania must absorb the costs entailed in affording the indigent divorces without costs.

2. The State of Pennsylvania should reduce its costs by revising the divorce procedures in Pennsylvania. E.g., Publication should be abolished as a required method of notifying defendants who cannot be served directly.

B. The State of Pennsylvania must expressly provide that an indigent will qualify for a free divorce if he is represented by a legal

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168. One of the functions of the Office of Economic Opportunity is to supply funds for research projects which will increase legal service to the poor at a lower cost. One such project, entitled the Computer Assisted Legal Service Project has been experimenting — quite successfully — with using computers to interview clients. The computers supply information and answer the client's basic questions through a television screen; the client's responses are received through a key-punch board. Immediately after the interview the computer automatically files the client's record and prints the initial documents necessary for proceeding with the divorce. Such documents include a summary of the case for the attorney, a letter to the client giving him relevant instructions and legal pleadings (affidavits and orders). GRADUATE SCHOOL OF BUSINESS, THE UNIVERSITY OF WISCONSIN, A PROGRESS REPORT: COMPUTER ASSISTED LEGAL SERVICES PROJECT (December 1969). Such programs may provide the ultimate solution to legal aid societies being under-staffed and under-financed.
aid society or if he earns less than a predetermined poverty level income.

II. Free legal counsel must be provided to indigents seeking divorces through in forma pauperis proceedings.

A. The Office of Economic Opportunity must require all legal aid societies receiving federal funds to handle the divorce cases of indigents who would otherwise qualify for free counsel.

B. The local bar associations must do all in their power to support and encourage the legal aid societies to take indigent divorce cases.

C. The legal aid societies must give equal priority to divorce litigation services.

D. Local, state and federal aid and cooperation must be increased to enable the legal aid societies to realistically function with the increased case load that will result from divorce litigation.

Hopefully, these proposals will be adopted by those to whom they are directed, thus eliminating costs and counsel fees from indigent divorce proceedings. The effect of these reforms will be to remove all financial barriers from the indigent’s path to obtaining a divorce, thus affording him the same opportunity to utilize our courts as the more affluent citizen and to live, consistent with the law, either singly or with the spouse of his choice.169

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169. This conclusion is supported by the principles behind the Economic Opportunity Act, which is based on the following findings and statement of purpose:

Although the economic well-being and prosperity of the United States have progressed to a level surpassing any achieved in world history, and although these benefits are widely shared throughout the Nation, poverty continues to be the lot of a substantial number of our people. The United States can achieve its full economic and social potential as a nation only if every individual has the opportunity to contribute to the full extent of his capabilities and to participate in the workings of our society. It is, therefore, the policy of the United States to eliminate the paradox of poverty in the midst of plenty in this Nation by opening to everyone the opportunity for education and training, the opportunity to work, and the opportunity to live in decency and dignity. It is the purpose of this Act to strengthen, supplement, and coordinate efforts in furtherance of that policy. It is the sense of the Congress that it is highly desirable to employ the resources of the private sector of the economy of the United States in all such efforts to further the policy of this Act.