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Recommended Citation
The Confusing Maryland Domestic Relations Procedures, 4 Md. L. Rev. 275 (1940)
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THE CONFUSING MARYLAND DOMESTIC RELATIONS PROCEDURES

The greatly over-worked visitor from another planet—whose consternation is so frequently invoked in order to pillory an established institution—should have his attention directed toward the confusing nature of the various procedures available for directly litigating domestic relations problems in Maryland law. For it would be hard to imagine a system of procedure more affected with the taints of paradox, anachronism, overlapping devices, and historical encrustations than the one under discussion.

Many domestic relations problems are but specific types of general legal matters which can probably be handled best by the procedural devices worked out for all such problems in general. Thus, suits for breach of promise to marry are, after all, but suits to enforce contracts and are best suited to be litigated along with all contract matters. Seduction, criminal conversation, alienation of affections, and wilful or negligent acts depriving the parent or husband of the services of the child or wife are, essentially, torts and are best litigated as items in the general tort procedure. The property rights of husband and wife, and of parent and child (including legitimacy),

Consider that, in a few other states, by recent statutory enactments, the actions for breach of promise, seduction, criminal conversation, and alienation of affections, or various of them, have been abolished. The idea back of this seems to be that the damages for these are incapable of accurate measurement and that such actions are likely to permit of legalized blackmail.


Concerning parent and child property matters, see Lentz, Revocation of a Will by Birth of a Child (1938) 1 Md. L. Rev. 32; and the subsequent statute, Md. Laws 1937, Ch. 303.

On legitimacy see the recent statutes collected in Comment, Domestic Relations Legislation at the 1937 Session (1937) 2 Md. L. Rev. 59; and Note, The "Lord Mansfield Rule" as to "Bastardizing the Issue" (1938) 3 Md. L. Rev. 79, noting Harward v. Harward, 173 Md. 339, 196 A. 318 (1938); and Hale v. State, 175 Md. 319, 2 A. (2d) 17 (1938).
can better be adjusted in the tribunals and according to the procedures available for handling all property matters. But there are four types of domestic relations problems which are peculiar to the field, which fit into no established niche of general procedure law, and for which procedures have to be worked out which serve no general function other than domestic relations ones. To these the attention of this comment is directed. In the best of all possible worlds there would be a single procedure for each, all administered by a single domestic relations court, one especially designated for the purpose. It would seem bad enough to distribute these four functions among separate tribunals. It is far worse to do not only this, but to set up different techniques for adjudicating the same problem, and to have the differences depend on formulae not related to the basic objective of an intelligent determination of domestic relations matters. And yet this latter is exactly what the Maryland domestic relations procedure now comes to.

The four types of domestic relations problems calling for specialized procedures are (1) directly declaring the validity or invalidity of marriage (annulment and declaratory judgment); (2) legally terminating marital relations (absolute and partial divorce, and separate maintenance); (3) adjudicating the custody of children; and, (4) compelling the support of dependents. Adoption might be regarded as a fifth and separate type of proceeding, although herein it will be grouped with other procedures for determining custody.

Examination of the Maryland scene discloses that there are four (perhaps five) procedures available for directly...
attacking (and perhaps one for asserting) the validity of a questionable marriage, which procedures are assigned indiscriminately to all three of the basic types of courts (law, equity and criminal) which exist in Maryland. Then, in addition to the inescapable distinction between absolute and partial divorce, there are two different procedures available for substantially achieving the latter result (divorce *a mensa et thoro*, and separate maintenance or alimony without divorce), not to mention the statutory recognition of separation agreements, which also achieve that substantial result by agreement of the parties. A count of the procedures and methods available for determining custody of children runs to as high as ten, depending on the classification used. Support of dependents is handled, as the case may arise, by the common law courts, the equity courts, the criminal courts, and by consent proceedings in the offices of the prosecuting attorneys. There are one type of common law procedure for support, four types of equity orders, and three types of criminal procedures which last are handled either by the criminal courts or in the prosecutors' offices. Let us now examine the picture in detail.

*Declaring the validity or invalidity of marriage.*

Annulment procedures serve a dual function, depending on the effect of the type of impediment to marriage which is asserted. For those impediments which render the marriage totally void, and which can be asserted collateralistically, an annulment is but a declaratory ruling of the invalidity of the marriage, not necessary to be had in order later to assert such invalidity, but desirable in that the matter can be settled while the evidence is relatively fresh. For those impediments which render the marriage merely voidable by proceeding, and which cannot, therefore, be asserted collateralistically, an annulment is a necessary step which must occur before the invalidity of the marriage can ever be relied on. The Maryland annulment procedures serve these two purposes interchangeably for, while various separate procedures are provided, yet the differences are not taken according to the distinctions between totally void and merely voidable marriages, but accidentally, according to the type of impediment, as has suited the fancies of the judicial and legislative architects of the scheme.

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8 On annulment in general, and on the difference between void and voidable marriages, see Strahorn, *Void and Voidable Marriages in Maryland and their Annulment* (1938) 2 Md. L. Rev. 211.
Two of the annulment techniques available in Maryland have been established by a single statute and are usable only for the impediments of bigamy and incest, the former of which makes the marriage totally void, and the latter of which makes it merely voidable by proceeding. This statute provides for the annulment of such marriages either upon a civil petition by one of the parties in the Superior Court of Baltimore City (a law court) or in the Circuit Courts in the counties; or upon indictment and conviction for the bigamy or incest in the Criminal Court of Baltimore City or on the criminal side of the Circuit Courts in the counties. These two methods could be dubbed "statutory methods".

A third method is the statutory "divorce method". For impotence and for any ground making the marriage "void ab initio" (whatever that means) an absolute divorce may be granted. Establishment of these "pre-ventient" divorce grounds comes, in substance, to granting annulments, in the name of divorce, for the stated reasons. The fourth method, the "general equity method," has been judicially arrived at. Because of the inherent general power of courts of equity over the reformation and rescission of contracts for fraud, these courts (the two Circuit Courts of Baltimore City and the equity side of the county Circuit Courts) exercise (along with their divorce jurisdiction) the power to grant annulments (on original bill in equity) for lack of marital intention, insanity, intoxication, fraud, and duress.

Those four methods exist to attack the validity of a given marriage, and they apply only in favor of the one

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11 At the time this jurisdiction was conferred on the Superior Court, it had equity powers, since taken away without any change in the annulment statute. On this see the article cited, supra n. 8, 2 Md. L. Rev. 211, 250.
12 It is interesting to speculate whether, without the specific statutory declaration that a criminal conviction shall serve as an annulment, such a result would follow anyhow, either for totally void or merely voidable marriages. For a suggestion to the effect that the result would follow, see the article cited, supra n. 8, 2 Md. L. Rev. 211, 254, concerning the res adjudicata problem with reference to inter-racial marriages which are both totally void and have criminal consequences.
14 For speculation as to the content of the "void ab initio" ground, see the article cited, supra n. 8, 2 Md. L. Rev. 211, 213-214, 251.
15 See Ibid., 251-252.
16 See, concerning both fraud and duress, Note, Annulment of Marriage for Duress where Pre-Marital Relations have Occurred (1937) 1 Md. L. Rev. 348, noting Lurz v. Lurz, 170 Md. 428, 184 A. 906, 185 A. 676 (1936).
asserting invalidity. A possible\(^{17}\) fifth method for doing this\(^{18}\) and one also possibly available for asserting the validity of marriage, and running in favor of the one seeking to establish it,\(^{19}\) is the extensive declaratory judgment procedure adopted in Maryland in 1939 with the enactment of the Uniform Declaratory Judgments Act.\(^{20}\) Interpretation of the Act on this score by the Maryland courts is yet to come, but it, or similarly extensive declaratory judgment procedures, have been used in other jurisdictions both for attacking and establishing the validity of marriages.\(^{21}\) It is to be hoped that the Act will be held to cover this, as there has long been a need for some local direct procedure available to establish marriages.\(^{22}\)

There is more vice to the situation than the confusion resulting from duplication of function. There are substantial differences among the various impediments which result from their being assigned to the different procedures, and these differences ought not to be. Thus impotence, which probably\(^{23}\) can only be asserted by the divorce method, requires corroboration of the plaintiff\(^{24}\) and two years

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\(^{17}\) It will not be surprising if use of the Declaratory Judgment procedure is denied to the extent that existing procedures afford exactly the same relief. On this, with reference to another type of problem, see Pennsylvania Threshermen and Farmers Mutual Casualty Ins. Co. v. Gorsuch et al., Balto. Daily Record, March 15, 1940 (Sup. Ct. Balto. C. 1940).

\(^{18}\) Despite the suggestion in the preceding footnote, there are situations wherein the use of the Declaratory Judgment procedure to attack a marriage might be a solution, and where, at present, there is no clear procedure afforded. Thus there is doubt whether any procedure is already available for the impediments of lack of solemnization, non-age, and miscegenation, on which see the article cited, supra n. 8, 2 Md. L. Rev. 211, 224, 232, 253, 252. On the desirability of some Declaratory Judgment procedure, see Ibid., 252-256. Then, too there is clearly no present procedure for attacking the marriage, and so the Declaratory Judgment one should apply, in the following situation: A and B are validly married. One of them later obtains a divorce of that marriage in another State than Maryland under circumstances raising doubt as to whether Maryland will recognize the divorce (questionable residence of one or both in the granting State). Either A or B is desirous of marrying a third person in Maryland without running the risk of a bigamy prosecution. He or she is anxious for a declaratory ruling whether Maryland will recognize the foreign divorce so as to know whether the later marriage will be both non-criminal and civilly valid. In this situation it is clear that no present procedure is available, and yet it is one where a declaratory ruling is very desirable to attack the (first) marriage on the ground of its cessation.

\(^{19}\) On the proof necessary to establish a marriage, whether the question arises directly or collaterally, see Myerberg, Proof of Marriage in Maryland (1938) 2 Md. L. Rev. 120.

\(^{20}\) Md. Laws 1939, Ch. 294.

\(^{21}\) Borchard, Declaratory Judgments (1934) 391-395.

\(^{22}\) See the article cited, supra n. 8, 2 Md. L. Rev. 211, 252-256.

\(^{23}\) See Ibid., 253-256, 251, for speculation on this point.

residence of one spouse (if the ground occurred out of the state)\textsuperscript{25} under the applicable divorce rules, while fraud, which is litigated under the general equity method, is not subject to these requirements. On the other hand, those grounds to be litigated by the divorce method have favorable rules as to territorial jurisdiction (residence of either spouse)\textsuperscript{26} and service by publication,\textsuperscript{27} while both these points are in considerable doubt under the other methods.\textsuperscript{28} There seems no rhyme or reason for having these tactical distinctions between procedures which ought to be governed by the same rules. For some grounds (certain of those making "void ab initio") there seems a choice of procedures, while for others only one is provided\textsuperscript{29} and for some there is doubt whether any is available.\textsuperscript{30}

It would seem desirable to place all marriage impediments on the same plane with reference to jurisdictional and proof requirements. Merging all annulment procedures in the declaratory judgment one would be one way of accomplishing this. Another would be to extend the divorce ground of "void ab initio" specifically to include, also, "merely voidable", and thus all defective marriages could surely be attacked by the divorce method. The result of this would be, however, that all the encrusted rules peculiar to divorce for supervenient grounds would apply, although they should not, in all justice, be applied.

Another flaw in our annulment procedure is the lack of any statutory provision, found frequently in other states, preserving the legitimacy of the children of void, or voidable and avoided marriages. Extension of the "void ab initio" divorce ground more certainly to cover "merely voidable", plus express declaration of such intent, might accomplish this result. While that result might have been contemplated by the drafters of the original "void ab initio" ground, yet, as it stands, the result hardly followed.\textsuperscript{31}

\textsuperscript{25} Md. Code (1924) Art. 16, Sec. 40.
\textsuperscript{27} Ibid.
\textsuperscript{28} See the article cited, supra n. 8, 2 Md. L. Rev. 211, 250-259.
\textsuperscript{29} Ibid., 250-252.
\textsuperscript{30} Ibid., 224, 232, 235, 252, concerning lack of solemnization, miscegenation, and age. On the possible implications of the recent change in the age for marriage, see Comment, A Query About the New Marriage Age Law (1939) 3 Md. L. Rev. 340.
\textsuperscript{31} For speculation about this, see the article cited, supra n. 8, 2 Md. L. Rev. 211, 213-215.
Legally Terminating Marital Relations.

It has long been the policy of the State to afford two basically different procedures of this sort, having entirely separate objectives, although both serve to terminate marital relations. No criticism of the basic distinction is sought to be offered. The existence of the distinction is inescapable as a matter of present State policy and the instant discussion will only point out paradoxes, anachronisms, and duplications within each separate procedure. The basic distinction herein is between absolute divorce (a vinculo matrimonii) and partial divorce (a mensa et thoro) and other procedures similar to the latter. They differ in that the former is permanent, permits remarriage, and terminates property claims; while the latter is not permanent, does not permit remarriage, does not terminate property claims, and at best serves only to legalize the living apart of the spouses, determine who is at fault, and provide support for the wife if she is entitled to it.

One procedure only is provided for obtaining an absolute divorce, and so there is no duplication therein. One paradoxical provision, at least, exists within it. This is the provision for granting an absolute divorce for the two pre-venient grounds of impotence and anything making the marriage "void ab initio." Not only is the meaning of the latter phrase obscure, so that it is not completely understood what marriage impediments may be litigated under it, but the existence of the pre-venient grounds poses difficult (and as yet unanswered) questions in general concerning the right of a plaintiff wife to permanent alimony for these grounds, and the legitimacy of children where the divorce is granted for the second named one. It was pointed out earlier herein that setting up the pre-venient grounds for absolute divorce (in effect granting annulments therefor in the name of divorce) had unfortunate consequences. It is submitted that it would be better to make these into grounds for annulment instead, and to

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32 To be sure, some of the other states have no partial divorce, others grant it only for a limited period, and still others permit a defendant who is partially divorced later, and after the lapse of a stated period, to obtain an absolute divorce on the basis of a separation continued for the statutory period.
33 Md. Code (1924) Art. 16, Sec. 38, as amended Md. Laws 1937, Ch. 396, and Md. Laws 1939, Ch. 558.
34 Md. Code (1924) Art. 16, Sec. 39.
35 See the article cited, supra n. 8, 2 Md. L. Rev. 211, 213-215, 251.
36 There is obviously no problem when the divorce is granted for impotence.
grant absolute divorces only for the recognized supervenient grounds, which now include adultery, three years wilful desertion and abandonment, and five years voluntary separation.\textsuperscript{37}

It is with reference to the local procedures for legalized separation short of absolute divorce that the greatest paradoxes appear. For there are two different judicial procedures for attaining substantially that end, and also statutory recognition of separation agreements,\textsuperscript{38} which reach that same objective by agreement of the parties. All three have in common that the living apart is legalized, that the parties are not free to remarry, and that support for the wife can be provided for if it is necessary and proper. The two judicial procedures also have in common\textsuperscript{39} that fault is determined, property claims are not affected, and that the status may be terminated or modified for supervening circumstances. For that matter, separation agreements, by special provisions, may also deal with these three elements. Frequently some of the terms of separation agreements are, by consent, incorporated into divorce decrees.

The most paradoxical aspect of the situation is the phenomenon of having two judicial procedures accomplishing substantially the same end. These are divorce \textit{a mensa et thoro}\textsuperscript{40} and the separate equitable proceeding for separate maintenance or “alimony without divorce.”\textsuperscript{41} The former procedure was set up in 1841\textsuperscript{42} when, for the first time, judicial divorce so-called was established in Maryland, and both \textit{a vinculo} and \textit{a mensa} divorces were provided for. The later procedure is of much more ancient

\textsuperscript{37}This last-named ground was added in 1937, Md. Code (1924) Art. 16, Sec. 38, as amended Md. Laws 1937, Ch. 396, and Md. Laws 1939, Ch. 558. See, concerning it, Note, \textit{Five Years Voluntary Separation as New Ground for Absolute Divorce} (1938) 2 Md. L. Rev. 357, noting Campbell v. Campbell, 174 Md. 229, 198 A. 414 (1938). See also France v. Safe Deposit & Trust Co., 4 A. (2d) 717 (Md. 1939) ; and Miller v. Miller, 11 A. (2d) 630 (Md. 1940).

\textsuperscript{38}Md. Code Supp. (1935) Art. 16, Sec. 39A.


\textsuperscript{40}Md. Code (1924) Art. 16, Sec. 39.

\textsuperscript{41}Md. Code (1924) Art. 16, Sec. 14.

\textsuperscript{42}Prior to 1841 the only divorce possible in Maryland was legislative. From 1841 to 1851 there were both legislative and judicial divorce. The Constitution of 1851 forbade further legislative divorces and so since that date all divorce is judicial. See the present Md. Const., Art. 3, Sec. 33, to the same effect.
CONFUSING PROCEDURES

origin and has its roots in provincial times. Apparently it did not occur to the drafters of the divorce laws in 1841 to abolish the pre-existing practice and so it is that for a century they have existed side by side.

The grounds for divorce a mensa, which may be sought by either wife or husband, are cruelty, excessively vicious conduct, and desertion or abandonment (of any duration). The grounds for “alimony without divorce”, which may be sought only by a wife, include those, and, as well, any of the grounds for absolute divorce alone, i. e., adultery, possibly five years voluntary separation, and (possibly) the pre-venient grounds. Thus it is that if a husband desires a legal separation, he has but one procedure to look to, and can obtain the relief only for cruelty, vicious conduct, or desertion; while the wife as plaintiff has two procedures to choose from if those be the grounds, and can also seek the relief by asking for separate maintenance for the absolute divorce grounds. For those last-named grounds the husband must take absolute divorce (permitting the wife to remarry) or nothing, while the wife is permitted to obtain alimony without permitting the husband to remarry, if she uses the older procedure. This should not be so.

In addition to the substantial unfairness of the situation, outlined above, there are other paradoxes implicit in the duplication. If the relief be sought by a mensa divorce, the case may be brought either where the plaintiff resides or where the defendant does. If the wife seeks it by separate maintenance, the action lies only in the

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43 See Marshall and May, The Divorce Court—Maryland (1932) 97 et seq., to the effect that Md. Code (1924) Art. 16, Sec. 14, first enacted by Md. Laws 1777, Ch. 12, Sec. 14, merely ratified the pre-existing practice before 1777 whereby the Chancellors granted alimony without divorce, although without authority of any statute.

44 Three years abandonment is also a ground for absolute divorce, but for it the wife has three choices, i. e., partial divorce (as for abandonment of any duration), absolute divorce, and alimony without divorce.

45 The question whether a wife may obtain permanent alimony for the five year voluntary separation ground is still an open one in Maryland. See Note, Five Years Voluntary Separation as New Ground for Absolute Divorce (1938) 2 Md. L. Rev. 357, 360, noting Campbell v. Campbell, 174 Md. 229, 198 A. 411 (1938).

46 See concerning this, the article cited, supra n. 8, 2 Md. L. Rev. 211, 251, n. 161.

47 To be sure, if the wife's misconduct consists of an abandonment of more than three years duration, the husband does have the election of taking a partial divorce (as for abandonment of any duration) and thus can prevent the wife from marrying another, although he also debars himself from ever obtaining an absolute divorce for such abandonment. Miller v. Miller, 153 Md. 213, 138 A. 22 (1927); Md. Code (1924) Art. 16, Sec. 41.

county of the husband's residence. There is considerable doubt whether the divorce requirement of corroboration of plaintiff, clearly applicable in a divorce suit so-called, also applies if "alimony without divorce" be sought instead for a divorce ground. All of this, of course, does not make for an intelligent administration of domestic relations litigation.

Separate maintenance is essentially a support procedure, and the status implications are incidental. A mensa divorce is primarily a status procedure, with the support aspect incidental. There is no need for continuing the paradoxical duplication, so long as all aspects can be provided for in a single action. The older procedure should be abolished, and merged in a mensa divorce, with or without the additional provision made that such a divorce can also be brought for any grounds for a vinculo divorce. Doing this with such provision would afford wives all the relief now available to them under the duplicate procedures, would put husbands and wives on an equal plane as regards the right to the relief, and would eliminate the paradoxes and uncertainties. It might be better to omit such an additional provision and thus lessen, rather than extend, the situations in which a vindictive spouse can obtain a legal separation without permitting the other to remarry.

Thought could also well be given to the idea of working out a statutory interrelation between the substantially similar a mensa divorce and the voluntary formal separation agreements executed by the spouses (now subject to statutory recognition). Provision might be made for entering an a mensa divorce decree upon a properly proved separation agreement, thus providing the same sanctions as are now available under the divorce for the enforce-

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50 As matters now stand, an a mensa divorce may not be secured for grounds which are stated in the statute to be grounds for a vinculo divorce alone, Stewart v. Stewart, 105 Md. 297, 66 A. 16 (1907). To be sure, as pointed out in the text, a wife, as plaintiff, may secure the substantial equivalent of an a mensa divorce for an a vinculo ground by seeking separate maintenance.
ment of the obligations of such agreements. This could be worked out by adding to the grounds for a mensa divorce that the parties had entered into an agreement.\textsuperscript{52} Thus integrating the agreement into a judicially decreed status would obviate many later disputes as to voluntariness, validity of execution, consideration, and the like. In the last analysis, why not stop using the name "divorce" for all this, and substitute "judicial separation"?

\textit{Adjudicating the Custody of Children.}

The annulment procedure is probably the most difficult to understand. The overlapping procedures for judicial separation are probably the most unfair. We shall later see that the support procedures are the most confusing in actual application. The present topic of the overlapping procedures for adjudicating the custody of children is outstanding for the quantity of different devices set up to do exactly one thing.

There are two independent procedures whereby the question of the proper custody of an infant may be directly laid before a court for adjudication. There are several others whereby that problem is determined as an incident of deciding litigation brought originally for some other purpose, but in which the matter of custody arises and can feasibly be decided. There is also statutory recognition of certain private acts capable of directing who shall have the custody of children, and there are two minor procedures which are more administrative than judicial.\textsuperscript{52a}

The two direct procedures for adjudicating custody are the ancient writ of habeas corpus\textsuperscript{53} and the more re-

\textsuperscript{52} Such a proposal would be analogous to the recently added ground for absolute divorce of five years voluntary separation. Of course it should be provided that, even after an a mensa divorce for voluntary separation of any duration, the a vinculo one could be obtained by either spouse when the period had run the full five years.

\textsuperscript{52a} These two minor procedures are under Md. Code Supp. (1935) Art. 4, Sec. 3 (jurisdiction of County Commissioners over pauper children); and Md. Code Supp. (1935) Art. 27, Sec. 694A (provisions for children born to women incarcerated in penal institutions). For that matter, any statutes concerned with institutions for the care of children relate to custody. Md. Code (1924) Art. 6, relating to apprentices was repealed by Md. Laws 1927, Ch. 186.

It is beyond the scope of this comment to deal with procedures for governing the custody of inebriates, drug addicts, and persons non compos mentis. A cursory glance over this field will disclose almost as much confusion as exists within the domestic relation procedures in Maryland.

\textsuperscript{53} On habeas corpus generally see Md. Code (1924) Art. 42, Secs. 1-18; and, in connection with the procedure in relation to minors, see Md. Code (1924) Art. 42, Secs. 19-21.
cent statutory procedure for determining custody upon original bill in equity which, while recent of enactment, merely implements the long-existent power of the Chancellor to exercise the prerogative of the English King as parens patriae. Even granting the propriety of having both direct and indirect procedures for adjudicating custody, the question arises: Why have two of the direct type?

Historical explanations aside, it would seem substantially sound to preserve the distinction. Habeas corpus at common law existed primarily to determine the legality of detention and was more appropriate for those cases of infant custody wherein it was alleged that the infant was detained either against his will or against that of the person naturally entitled to his custody. The general equity procedure, on the other hand, is better fitted to adjudicating custody when there is no question of violating the wishes of infant or proper custodian, but rather the inquiry is directed to whether the existing custody is for the best interests of the infant or, as between two or more possible custodians, which one is best suited to have it. Inasmuch as some cases of infant custody involve more of the legality of detention problem and others emphasize the welfare aspect, it would seem best to preserve the separate procedures, although, to be sure, the present habeas corpus statute is almost broad enough to serve all needful purposes. As matters now stand, with the same substantive statement of legal principle (best interest of the child) applicable in all procedures, there is no particular vice in the duplication, save for a slight difference in the rules concerning appeals, and the fact that support may be decreed in equity but not by habeas corpus.

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54 Md. Code (1924) Art. 16, Sec. 80.
55 The provisions of Md. Code (1924) Art. 42, Sec. 21, regulating the use of habeas corpus in determining the custody of minors, provide a very flexible procedure, analogous to that of the equity courts under Md. Code (1924) Art. 16, Sec. 80.
56 Md. Code (1924) Art. 16, Sec. 80, providing the general equity power over custody does not mention appeals, but apparently appeals from final decrees or orders under it, as in divorce cases where custody is adjudicated, are permitted freely. On the other hand, rulings on habeas corpus are not appealable, Annapolis v. Howard, 80 Md. 244, 30 A. 910 (1894); although under Md. Code (1924) Art. 42, Sec. 16, rulings which hold a statute unconstitutional are appealable, as would be, under Md. Code Supp. (1935) Art. 5, Sec. 31, any ruling the effect of which is to deprive any parent, grandparent, or natural guardian of the custody of a child.
57 Md. Code (1924) Art. 16, Sec. 80, specifically authorizes the equity court to order who shall be charged with support and maintenance. The habeas corpus statute, Md. Code (1924) Art. 42, Sec. 21, while broad and flexible, has no express mention of such a power and probably does not contain one by implication.
So too (remembering that the same standard guides the determination, whatsoever the type of procedure) it seems proper to preserve the additional procedures whereby custody may be adjudicated as an incident of procedures existent to accomplish other immediate objectives. These procedures are divorce,\(^5\) guardianship in the Orphans' Courts,\(^5\) adoption,\(^6\) and the Juvenile Court procedures.\(^6\) All of these involve the idea that it is appropriate to decide the proper custody of a child as an incident of adjudicating another issue which has been laid before the court and which, by its general nature, poses the problem of custody, which can thus be feasibly settled along with the major issue.

Thus there have been recognized four general types of situation wherein other matters themselves appropriate for judicial determination incidentally raise questions of directing who shall have the custody of a child who is involved. A justiciable issue of custody naturally arises when the parents of the child are litigating a divorce case, when the child has been left money or property which must be administered by some adult, when the natural parents have either abandoned the child or are agreeable to delegate its rearing to others who wish to adopt it, and when the child commits delinquent conduct which indicates that he has not been properly disciplined by his present custodians.

Thus the divorce courts, whether the divorce be granted or denied,\(^6\) may determine custody if such determination formed part of the relief prayed for. The Orphans' Courts, primarily interested in handling the fiscal affairs of infants fortunate enough to have money or property, have the power to appoint guardians The decreeing of an adoption of a minor has the effect (among others) of depriving the natural parents of their presumptive claim to custody,

\(^5\) Md. Code (1924) Art. 16, Sec. 39.

\(^6\) See among others, for statutory material on guardianship in the Orphans' Courts, Md. Code (1924) and Md. Code Supp. (1935) Art. 93, Secs. 149 to 210A.

\(^6\) Md. Code (1924) Art. 16, Secs. 74 to 79; Md. Code Supp. (1935) Art. 16, Sec. 74A (extending adoption jurisdiction to residents of government reservations); and Md. Laws 1937, Ch. 172 (permitting the adoption of adults).


\(^6\) Prior to 1920 the divorce courts could only adjudicate custody if a divorce was granted.
and of conferring that status on the adopting ones.\textsuperscript{63} The jurisdiction of the Juvenile Courts over delinquent children gives them the power (by terminating the improper custody) to inquire into the propriety of present custody when the fact of delinquent conduct by the child raises a suspicion of its impropriety.

Statutory recognition has also been given to two methods whereby the custody of children may be presumptively determined by the private acts of the natural guardians, although, of course, such determination is always subject to judicial alteration by proper procedure if subsequent events indicate that the privately determined custody is not for the best interests of the child. These two methods are by separation agreements\textsuperscript{64} between the parents, and by testamentary appointment of guardian by the sole surviving parent.\textsuperscript{65} At one time the father had the power to appoint by his will a guardian to the exclusion of the mother, but by recent statute it is provided that only the sole surviving parent shall have such power.

Despite the apparent confusion implicit in having so many different devices for determining the single issue of custody of children, it seems substantially sound to preserve all of them. The task of adjudicating custody of children is a delicate judicial one and one not suited to be crammed into any inflexible mold. If it can be worked out by the private acts of those immediately concerned, as by separation agreements or testamentary appointment, so much the better. If not, then it would seem next best to make judicial determination of it at the same time when there has to be determined the immediate issue brought to the court's attention which incidentally raises the question of custody. And still there should be provided devices for directly calling the issue of custody to a court's attention if that seems necessary. In view of the fact that the same substantive rule guides the determination of the issue, whatsoever the procedure, no substantial injustice results from the fact of the overlapping devices for determining custody.

\textsuperscript{63} See supra n. 7, concerning the other implications of adoption.
\textsuperscript{64} Md. Code Supp. (1935) Art. 16, Sec. 39A.
\textsuperscript{65} Md. Code Supp. (1935) Art. 72A, Sec. 4. See also the earlier statute, Md. Code (1924) Art. 93, Sec. 153, which empowered a mother to appoint a testamentary guardian.
Compelling the Support of Dependents.

Most confusing of all the type procedures is that for compelling the support of dependents. For not only do we find that jurisdiction to do so is assigned to all three kinds of courts and, as well, to certain administrative officials, but we also note that (as for custody) certain procedures exist for directly compelling the support, and certain others compel it as an incident of determining some other issue concerning which litigation may be originally brought.

The legal devices for compelling the economically superior member of the family to support the dependent one divide themselves, first, into those compelling the overdue payment for specific necessary items and, then, those compelling the regular payment of stated sums in the future, which sums, when received, are to be expended by the recipient dependent or custodian thereof for necessaries for the dependent one.66

This first type of legal device (recovery for necessary goods, services, or money actually advanced) is, in Maryland law, implemented by the common law action (enforceable in a law court, with a jury) against the husband or parent66a for the reasonable value of the necessary goods, services, or money actually advanced to or on behalf of the dependent wife or child.67 This device, frequently referred to as the "agency of necessity", is obviously a less attractive method to the person seeking to enforce the duty to support than the other ones, which latter involve the ordering of regular stated payments in the future. In the first place, the only sanction available for the enforcement of it is by the usual methods for enforcement of money judgments, i. e., attachment and sale of assets, if any, while for most of the other types there is available the threat of either a contempt sentence or a jail sentence after revocation of probation if the payments are not regularly made.

Then, too, even in acquiring the judgment, if enforceable, there are risks to run which make this device an awk-

66 On the distinction between recovery for necessaries advanced and the ordering of future payments, see Note, Capacity of Child to Secure Court Order Against Father for Future Support in Excess of Amount Stipulated in Separation Agreement Between Parents (1937) 2 Md. L. Rev. 60, noting Yost v. Yost, 172 Md. 128, 190 A. 753 (1937).
66a See infra, notes 70 and 76, concerning the extent to which Md. Code Supp. (1935) Art. 72A, Sec. 1, subjects mothers to the various procedures for compelling support.
67 See Ibid., and cases cited.
ward one. The plaintiff takes the risk of proving that the goods or services were necessaries, that provision therefor had not already been made in other forms by the defendant, and that the recipient was not living apart from the husband or parent without consent. Let us now see under what circumstances, and in what other courts, the more workable judicial orders for regular, stated, future payments may be obtained. In Maryland, procedures are afforded for this in the equity courts, in the criminal courts, and, by consent, and as an adjunct to the criminal courts, by orders of the prosecuting attorneys. And confusion, of one sort or another, reigns within each one of these.

The equity courts may make such orders against husbands for the support of wives, under the name of alimony, either in divorce cases (if the wife is a successful plaintiff) or in cases of alimony without divorce, where the wife could be, did she so wish, a successful divorce plaintiff. The equity courts may also make orders against parents for future support of children, although not under the name of alimony (which applies to wives alone) either in divorce cases (whether a divorce be granted or denied, so long as the support issue be raised in the pleadings), or in cases originally brought to determine the proper custody of children under the general equity practice.

An important distinction between the two types of equity orders for wives and the two for children is that, for the former, there is available the sanction of a jail sentence as for contempt of court for disobedience, while, for the latter, that is not permitted. For the Court of Appeals has held that equity orders for the support of children are "debts" and so within the State Constitutional protection against imprisonment for debt, while the sim-

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68 Md. Code (1924) Art. 16, Sec. 15.
69 See supra, notes 41, 49, and 50.
70 Prior to Md. Code Supp. (1935) Art. 72A, Sec. 1, the father alone was chargeable with the support of the children. This statute imposes the duty equally on the parents, and, presumptively, authorizes an equity court to order a mother, as well as a father, to contribute. The statute has not been construed with reference to this point, but was apparently overlooked by the Court of Appeals in the recent case of Boyd v. Boyd, 11 A. (2d) 461 (Md. 1940), where it was said, 11 A. (2d) 465: "Whether husband and wife do or do not continue to live apart, the responsibility for the support, maintenance and education of their infant child rests upon the father."
71 Md. Code (1924) Art. 16, Sec. 39.
72 Md. Code (1924) Art. 16, Sec. 80.
74 Md. Const., Art. 3, Sec. 38.
ilar orders for support of wives constitute "alimony" and not "debts" and so are not thus protected. This historical and unrealistic distinction between substantially similar things led to complications when, in a divorce case, the court imposed a single order for both wife and children. The question arose whether the disobedience was to an alimony order, permitting of a jail sentence, or to a mere support order, having only the sanction of attachment of property. The question was finally resolved in favor of allowing the contempt sentence to be imposed for disobedience to such orders mingling provisions for both wife and child.75

On the other hand, an order of an equity court, whether in a divorce or custody case, which directs payments for a child alone, may not be enforced with the aid of the sanction of the contempt sentence and is, at best, but a money judgment. In order to acquire the weapon of a threatened jail sentence to force a father6 to support a child, the criminal technique now about to be discussed must be followed out. For children, this is the only way a jail sentence may be threatened; for wives, on the other hand, such a sentence may be threatened either through the criminal technique or the equity one. Now we turn to the criminal techniques as such, remembering that there is a parallel in that the statutory rules are applied, in contested cases, by judicial sentence after petit jury conviction, or, in consent cases, after a hearing before the State's Attorney. The possibility of prosecution, conviction, and sentence in the older fashion no doubt may serve to motivate many accused persons to consent to the newer "streamlined" procedure before the State's Attorneys.

On the criminal side three different statutes apply to four different situations. For wives and legitimate children, for which as we have seen, the common law and equity procedures are also available with varying emphasis,


6 While, as pointed out supra n. 70, a mother can be subjected to an equity order, probably she cannot be subjected to the criminal procedure for non-support, in view of the wording of the applicable criminal statute, cited in the following footnote. The statute applies to "any person who shall . . . neglect to provide for . . . his wife or minor child . . ." This is susceptible of the interpretation that it applies only to fathers, and not to mothers.
a single statute\textsuperscript{77} sets up the separate crimes\textsuperscript{78} of desertion and non-support. The provisions for an alternative consent procedure before the State's Attorney, instead of in routine court procedure, apparently apply under this statute only to Baltimore City although the parallel provisions in the destitute parent and bastardy statutes are State-wide.

This procedure, which on the support side roughly parallels that for destitute parents and bastards, provides the sanction of a threatened jail sentence for not supporting wives and legitimate children by making the fact of non-support a crime for which the offender can be punished. In contested cases which go through the routine court procedure, the usual technique of presentment and indictment (or information, in Baltimore City), right to jury trial, verdict, and judgment of guilty are followed. Then, in the discretion of the court, in lieu of a sentence to the House of Correction, the accused husband or father may be released, under bond or on probation, upon condition of making regular stated payments in the future, and, for a violation of the condition, the suspension of sentence may be revoked and the offender forced to serve his sentence.

Whereas for wives and legitimate minor children there are available to compel support the common law, the equity, and the criminal methods, for destitute parents and illegitimate children only criminal techniques are provided. The procedure for destitute parents\textsuperscript{79} most closely approximates the criminal method for wives and legitimate children. There is the parallel procedure of routine court conviction, suspension of sentence, and probation to pay stated sums, and, as well, the consent procedure under the immediate supervision of the State's Attorney's office. Within this procedure there exists considerable doubt whether it may be applied to compel illegitimate children to contribute to the support of their mothers, or, for that matter, their fathers.\textsuperscript{70a}


\textsuperscript{78} Desertion and non-support are separate crimes under the statute, Pritchett v. State, 140 Md. 310, 117 A. 763 (1922).

\textsuperscript{79} Md. Code (1924) Art. 27, Secs. 91 to 93, as amended, Md. Laws 1939, Ch. 675.

\textsuperscript{70a} The statute, cited in the preceding footnote, punishes any "adult person" who shall fail to provide for a "parent or parents" and, in the procedural sections, refers to the accused as the "adult child." Md. Laws 1887, Ch. 74, adding a new Section 16 to Article 1 of the Md. Code (1924)
Slightly different from the other criminal techniques is that for compelling the father of a bastard child to support it. This procedure, the oldest of them all, is found in a separate article\(^8\) of the Code from the general criminal one and works out the social problem of support of illegitimates in terms of a penalty on the father for the crime of fornication with the mother—an odd approach to a social problem. Here, too, there is parallel provision for routine court procedure and for consent proceedings before the prosecutor, for bonds, for suspension of sentence as an inducement to make the required regular payments, and for imposition of punishment if they be not made.

There are many paradoxes, even among the criminal techniques themselves. One is the territorial jurisdiction problem. When the one entitled to receive the support and the one required to give it live in different Maryland counties, there is grave doubt as to which, if either of the counties is the proper one to entertain the prosecution. When one lives without the state and one within it is more difficult. The statute for wives and legitimate children is silent on the matter, the destitute parent one requires both parent and child to be residents, and the bastardy one apparently applies only if the fornication occurred in Maryland, and will not apply otherwise, even though birth of child, residence of mother, and residence of father are all here.\(^8\)


Then, too, a certain amount of confusion results from having three different criminal statutes for the four different kinds of support problems. It would improve matters to consolidate them into one, with due allowance for inescapable differences in detail. As between the criminal techniques, on the one hand, and the non-criminal ones, on the other, there is also much duplication and paradox. Wives have two equitable and one criminal methods for putting recalcitrant husbands in jail. Fathers may be put in jail for not supporting children only by the criminal technique, although equitable orders not carrying the jail sentence sanction may also be imposed on them. Mothers, on the other hand, are subject to the equitable orders (without contempt sentence) but not to the threat of criminal prosecution.  

The confusion of these overlapping devices has created a difficult problem arising frequently either in the Criminal Court or the Domestic Relations Department of the State's Attorney's office of Baltimore City. When a father who has been ordered to contribute support by an Equity Court disobeys this order and is prosecuted by the criminal method, the threat of criminal punishment is available only as to instalments ordered by the Criminal Court to be paid in the future. For the instalments in arrears under the Equity order, the prosecuting witness has only the dubious asset of a money judgment.

Within the limits of the equity technique itself, the overlapping and confusion raises the same problem as for divorce and custody. Having both divorce and alimony without divorce for the same grounds is, of course, an historical accident. Appending jurisdiction to order support for children to divorce and custody cases creates the same problems as appending custody jurisdiction itself to cases originally brought for other purposes. It may be wise to permit all matters appertaining to a focal one to be solved at once.

Most paradoxical is the distinction between the common law jurisdiction to award reimbursement for items already expended and the other types of procedure which order future and regular payments. Perhaps it would simplify matters to abolish the former and merge it in the latter, although this would raise constitutional questions of the right to jury trial.

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82 See supra, notes 70 and 76.
Then, as between the equity and criminal techniques, there are differences in the fact situations bringing into play the respective methods. A wife may not obtain an equity order for future support unless the husband has committed recognized divorce grounds, but parents may be subjected to such orders for children (given proper jurisdiction) merely because it is necessary. The criminal techniques, on the other hand, cannot be called into play until after the husband or father has already once neglected his duty.

Conclusion.

Throughout the text of this comment the emphasis has been more on sketching a picture of the existing defects in the various procedures, rather than on advocacy of specific reforms, although occasional mention of such possibilities was made. It is believed that a mere visualization of the existing procedures, when viewed in the whole, will make the point that something needs to be done about the Maryland domestic relations procedure.

Common to all the four types of procedure is duplication of function, i. e., the provision of two or more devices for accomplishing the same thing. This, while somewhat of a defect, is not the worst aspect of the matter. It would not be particularly troublesome to have duplicate procedures accomplishing the same thing, if the substantive rights of the parties concerned were the same within each. This is so, for instance, for the Baltimore City courts, which include three different common law courts, all doing the same thing, with only minor differences in jurisdiction, and two equity courts with no differences. This duplication is tolerable because no substantial injustice results.

But it is not so clear that injustice is avoided with respect to the differences in the annulment procedures with their vagaries of territorial jurisdiction, service of process, and proof; nor as between the separate techniques for judicial separation, which give the wife more privileges than the husband.

Duplication of function, particularly in the custody and support areas, is probably justified in that it is wise to permit such latter matters to be decided as incidents of determining other matters originally laid before the particular court. The support devices are the most complicated, both with reference to quantity of procedures, as to substantial differences in application of sanctions, and in the
chances of the support money being collected. There are also substantial differences in the operative facts calling into play the respective procedures. Probably the most pressing need for reform lies in the support area.

Most drastic and, of course, most Utopian of possible reforms, is the setting up of a separate Domestic Relations Court in Baltimore City. Many urban areas have set up these specialized courts to handle within one tribunal all domestic relations litigation. While, no doubt, many constitutional and other obstacles would have to be surmounted to establish one for Baltimore City, yet it would not be unfeasible, in view of the fact that the City already has eleven judges who rotate among six named courts, which six exercise three basic functions.

But, short of that, and more possible of immediate provision, reform is desirable within each of the four basic categories of domestic relations procedure. A house-cleaning of each within the limits of our present constitutional and judicial set-up would accomplish much. Thought should be given to simplifying and clarifying the annulment procedure; to straightening out the paradox of two separate judicial separation procedures; to equalizing the powers of the various tribunals allowed to handle custody, even if it be desirable to preserve the duplications; and to lessening the confusion within the support procedures. Duplications should be abolished wherever feasible, equal powers in all respects should be given to tribunals which do duplicate work, and there should be carefully avoided any substantial differences in the rights of the parties dependent on the nature of the particular procedure which may be assigned to or chosen for a given problem.