

## OPINION

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# Is the SJC ready to authorize the bifurcation of divorce proceedings?



By C. Peter R. Gossels

More and more states now allow the bifurcation of divorce proceedings in order to allow the parties to remarry before the issues of custody, child support, alimony and the division of the marital estate can be adjudicated.

Among the states that routinely allow such bifurcation are Alaska (Alaska statutes, Section 25.24), California (California Family Code Section 2337), Kansas (*Marriage of Wade*, 20 Kan. App. 2d 159, 884 P.2d 736 (1994)), North Carolina (*Sharp v. Sharp*, 84 N.C. App. 128, 351 S.E.2d 799 (1987)), and Utah (*Parker v. Parker*, 2000 UT App. 30, 996 P.2d 565 (2000)).

Although the Supreme Judicial Court authorized the imposition of summary judgment for the first time in 1997 when it amended the rules governing Domestic Relations Procedures, added Rule 27B to the General Rules of the Probate Court two years later, and amended Rule 56 on three occasions, it did not permit the entry of even a partial summary judgment in "actions for divorce or in actions for custody or visitation or for criminal contempt." Dom R. of Proc. R. 56(a).

We do not know why the SJC will not permit the imposition of summary judgment in divorce matters, but the following case illustrates that its failure to do so has already inflicted unnecessary harm on an abused spouse residing in Massachusetts. (I have changed the names of the parties and their residence to preserve their privacy.)

Vicky and Conrad, a childless couple, had lived in Massachusetts for many years, enjoying an estate that looked out over the Berkshire Hills.

During the course of their marriage, they had accumulated a substantial marital estate, but Conrad had so abused Vicky that she was forced to obtain several restraining orders against him. Then, one day, Conrad tried to kill Vicky. Vicky recovered from her wounds, but she could not bring herself to testify against Conrad at his trial. As a result, Conrad was convicted only of assault and battery.

Vicky filed a complaint for divorce in Probate & Family Court, hoping and expecting that the court would grant her alimony and the larger part of the marital estate pursuant to the provisions of G.L.c. 208, §34, because of Conrad's criminal conduct toward her during their marriage.

When he was released on probation, Conrad fled to California and filed his own petition to dissolve the marriage in order to take advantage of Section 2550 of the California Family Code, which provides that the court shall divide the marital estate of the parties (referred to as "community estate" there) equally in its judgment of dissolution of the marriage.

Vicky hired a California attorney, who filed a special appearance on her behalf and moved to dismiss Conrad's petition for dissolution of their marriage. But the California court denied Vicky's motion because Conrad had satisfied its six-month residence requirement.

Vicky was then confronted with an insoluble dilemma: If she were to appeal from the court's decision, she would be submitting voluntarily to the jurisdiction of the California court; if she were not to file such an appeal, the California court's decision would stand.

Vicky's dilemma was soon compounded by Conrad, who moved the California court for a bifurcated divorce. Unlike the laws governing divorces in Massachusetts, Section 2337 of the California Family Code provides that its courts may sever and grant a separate trial to dissolve a marriage at any time upon its finding that irreconcilable differences had arisen between the parties; that an irreparable breakdown of the marriage had occurred; and that counseling, the passage of time and the assistance of the court would not restore the marriage.

In its order dissolving such a marriage, the court normally reserves its jurisdiction over all other matters concerning the marriage it has dissolved, including alimony, the division of the marital estate and custody of the children, where applicable, and imposes conditions described in Section 2337.

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To make matters worse for Vicky, the California Family Code, §2335, also provides that "evidence of specific acts of misconduct is improper and inadmissible" in any proceeding for dissolution of a marriage in California.

The California court entered a judgment dissolving Vicky's marriage after a perfunctory hearing and reserved the issues of alimony and the division of the marital estate for future determination. As a result, Vicky became entitled to no more than half of her marital estate under the laws of California, rather than a larger share of that estate, which a Massachusetts court can award to abused spouses.

Conrad then filed a motion in Massachusetts to dismiss Vicky's complaint for divorce, which had been filed before Conrad's petition for dissolution, based on Section 1 of Article IV of the U.S. Constitution, which provides that each state shall give "Full Faith and Credit ... to the judicial proceedings of every other State."

Vicky responded by pointing out that (1) the court had jurisdiction over the parties, their marriage and much of their property located in Massachusetts; (2) that G.L.c. 208, §39 provides that a divorce obtained by a Massachusetts inhabitant, who had gone to another jurisdiction to obtain a divorce for a

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cause that had occurred in Massachusetts, is of no force and effect in Massachusetts; (3) that the court could, and should, adjudicate her right to alimony, attorneys' fees and the division of the marital estate pursuant to the provisions of G.L.c. 208, §34, because the California court's failure to act on those issues was not entitled to full faith and credit; and (4) that her convict husband should not be allowed to deprive her of her rights under G.L.c. 208, §34, by fleeing to California in order to obtain a larger portion of the marital estate.

In support of her position, Vicky also cited G.L.c. 208, §§4 and 5, *Estin v. Estin*, 334 U.S. 541 (1948), *Cannistraro v. Cannistraro*, 352 Mass. 65 (1965), and *Divisible Divorce*, 76 Harv. L. Rev. 1233, 1237-1242 and 1247-1250 (1963).

Unfortunately for Vicky, the Massachusetts judge ignored the provisions of G.L.c. 208, §39, and dismissed her complaint for divorce, saying that Vicky's failure to appeal from the decision of the California court denying her motion to dismiss Conrad's petition for divorce and the California court's decision to dissolve her marriage and reserve the issues of alimony and division of the marital estate required him to yield jurisdiction over Vicky's marriage and her marital estate.

By doing so, the judge allowed a convicted spouse abuser to choose a forum that will grant him a larger portion of the marital estate than he would have received in Massachusetts, and may force Vicky, his victim, to become a public charge on the commonwealth.

Conrad's success in the Massachusetts court was due largely to his decision to establish his new residence in California and to move for a bifurcated divorce there before Vicky could obtain her divorce in Massachusetts.

If Massachusetts had allowed for the entry of bifurcated judgments of divorce, Vicky might have been able to persuade the California court that it should give her divorce proceedings the full faith and credit that California owes Massachusetts under Article IV, Section 1 of the U.S. Constitution. As a result, Vicky, like other abused spouses in Massachusetts, has been denied the justice that our courts should dispense, because their abusers took advantage of the laws of California to deprive them of their property.

In the light of the injustice that our courts have been forced to inflict on abused spouses like Vicky, I respectfully submit that the SJC should authorize an amendment of Mass. R. Dom. Rel. 56 so that divorce cases in Massachusetts may be resolved in a more efficient and less costly manner. cf. *O'Rourke v. Hunter*, 446 Mass. 814, 820 (2006).

Such an amendment would give parties to a Massachusetts divorce an opportunity to obtain a judgment of divorce much earlier than at present so that they can proceed to rebuild their lives, instead of having to wait for many months, and often years, before their divorce becomes final.

Are there any good reasons, after all, to deny residents of Massachusetts the kind of bifurcated divorce available to residents of California? **DAW**