



No-fault divorce in Canada: Its cause and effect

Douglas W. Allen

Department of Economics, Simon Fraser University, Burnaby, BC, Canada, V5A 1S6

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Abstract

The rise of no-fault divorce laws throughout the western world in the early 1970s is argued to be the result of a rise in the number of inefficient marriages during the 1940s–1960s. These marriages resulted in part from changes in the work force patterns of women that were unanticipated by men. The hypothesis is tested with Canadian data. In addition to this, further evidence is brought to bear on the effect of no-fault divorce on the divorce rate. © 1998 Elsevier Science B.V. All rights reserved.

1. Introduction

The United States and Canada introduced no-fault divorce laws in the late 1960s, and it is now common in many western countries.¹ To date much of the academic debate over the law has centered on what its effect has been on the divorce rate in the United States. The result of this debate is still inconclusive, partly because creating a clean U.S. test is so difficult, but also because differences in other features of divorce law have often been ignored – particularly differences in rules for allocating property at divorce. What has yet to be seriously considered by economists, however, is why such a law became so popular in the first place. Jacob (1988) has called the change in divorce law the ‘silent revolution,’

¹ Most European countries reformed during the early 1970s. For example, England became no-fault in 1969, the Netherlands in 1971, Sweden in 1973, and France in 1975. On the other side of the world, Australia introduced no-fault divorce in 1974. Not only is no-fault divorce common, but it appears to have been adopted practically simultaneously. No-fault divorce generally eliminates all traditional grounds for divorce or adds some notion of ‘incompatibility’ to existing grounds. The economic consequence of no-fault divorce is to create a unilateral law where either partner can terminate the marriage without the other spouse’s consent. Fault divorce law, though not the same as a mutual consent law, often amounts to as much since collusion and agreement between the parties was often required to reach a divorce. According to Freed and Foster (1979):

Under the traditional nineteenth and early twentieth century grounds for divorce, over 90 percent of divorces were uncontested and hence there was divorce by mutual agreement. (p.107)

and holds that no-fault divorce virtually came about by accident, or at least as an unconsidered consequence of efforts to make the divorce process more honest and open. Posner (1992, p. 252) provides a similar explanation, stating that “confining divorce to grounds... [leads to investing]... resources in manufacturing them. . . . At this point internal goals of the legal system – the goals of economizing on judicial resources and of reducing perjury – become decisive in favor of allowing either consensual divorce or divorce at will.”

As a historical fact, efforts to reduce judicial resources and perjury may well have been the grounds by which some countries arrived at no-fault divorce law. However, this cannot explain why no-fault divorce laws have survived. If it were the case, as many have claimed (see, e.g. Parkman, 1992a), that no-fault divorce imposed unexpected costs on third parties (e.g. spouses and children) that were greater than any benefits, then it would not matter if that law was arrived at willy-nilly, as a matter of patch-work routine, as a method of reducing perjury, or as the result of local special interests. Efficiency within the legal process would lead to such a law being revoked, not enforced or modified, and certainly not adopted by other jurisdictions.

Yet no-fault divorce is common place. Indeed, even the character of the law remains unchanged: the 1985 no-fault divorce law of South Dakota is in the same spirit as the 1970 law of California; the U.S. law is similar in spirit to the law in Canada. In those U.S. states where marital property was divided based on legal title, and where most of the non-voluntary wealth transfers from wives to husbands took place after the introduction of no-fault divorce due to the tendency of husbands holding legal title, the law was not repealed.² Rather, changes were made in the other areas of the divorce law, most notably property division, and the no-fault process was retained. Hence, despite the silent or accidental appearance given the acquisition of these laws, their rapid spread and resistance to repeal suggests, or at least is consistent with, their being efficient.³

In this paper I argue that no-fault divorce laws *were* motivated by efficiency. In particular, I argue that due to social changes after the second World War, there were increases in the number of inefficient marriages,⁴ and that the change in the divorce law reduced the cost of being married by making it easier to escape a past mistake. Unfortunately, no law is perfect, and the elimination of fault grounds for divorce solved some problems, but created others. Just as there are inefficient marriages under fault law, there are also inefficient divorces under no-fault law.⁵ In both cases, transaction costs

² In the US there have been several court challenges on the ground that no-fault deprived women of some type of property right. However, these have all been unsuccessful. For example, *In re Walton's Marriage*, 28 Cal. App. 3d 108, 104 Cal. Rptr. 472 (1972), considers this issue. I am grateful to Margaret Brinig for pointing this out. See Allen (1990) for a detailed explanation of how the wealth transfers took place and empirical evidence to support it.

³ Some may argue that this fact speaks more to entrenched interests and ratchet effects in legislation. There is a growing literature which argues that governments are capable of reaching efficient outcomes (e.g. see Wittman, 1989). Ultimately the answer over which view can better explain actual practices is an empirical one.

⁴ By this I mean a marriage where total wealth is higher when the couple is separated than when together. Of course, wealth here refers to the dollar equivalent of the present value of the stream of utility generated by marriage. As such it reflects anything that individuals value in the marriage. It is not a myopic measure of mere cash flows.

⁵ An inefficient divorce is the opposite of an inefficient marriage. Total wealth is higher when the couple is together than when they are separated.

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