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Case Comments

Torts: Issue of Comparative Fault Cannot Be Retried Independently of Issue of Liability

In an action to recover damages for injuries sustained in an intersection collision, the issues of negligence, causation, comparative negligence and damages were submitted to the jury in the form of special verdicts, as authorized by Minnesota's recently adopted comparative negligence statute. The jury found both drivers negligent and that the negligence of each was a direct cause of the accident and injuries, but assigned 90% of the causal negligence to defendant driver and only 10% to plaintiff driver. Defendants moved for an order amending the apportionment of causal negligence to 50% each, or in the alternative, for a new trial limited solely to the apportionment of negligence between the two drivers. The trial court denied the first motion but granted the alternative motion for a new trial limited to the apportionment issue on the ground that the apportionment of negligence found by the jury was contrary to the overwhelming weight of the evidence. Plaintiff successfully petitioned the Minnesota Supreme Court for discretionary review of the trial court's order. The court, per Rogosheske, J., reversed and remanded for a retrial of the general issue of liability as well as the issue of comparative negligence, holding that it is neither feasible nor practical to grant a new trial limited to the single issue of the percentage of negligence attributable to each driver. *Juvland v. Mattson*, 289 Minn. 365, 184 N.W.2d 423 (1971).

A partial new trial or a new trial limited to a single issue was not generally available at common law where a verdict was thought to be single and indivisible. However, this rule was modified early in the United States, and at present such limited new trials are available in most jurisdictions.
In determining whether a new trial can be limited solely to the issues upon which there was error or whether the entire case must be retried, the rule most often cited is that it must clearly appear that the issue to be retried independently is so distinct and separable from the other issues in the case that a trial of it alone may be had without injustice. It also must appear that the other issues in the case were properly decided, and the court must be alert for evidence of passion or prejudice that is likely to have affected more than one issue.

The application of these rules leaves much to the discretion of the courts. The result is a lack of agreement on which issues in a negligence action can be retried independently. Where the error in the original trial goes only to the award of damages, most courts hold that it is permissible to grant a new trial on the amount of damages only, since the issue of damages is ordinarily distinct from the other issues in a negligence action. Where the error goes only to the issue of liability and it is clear that the award of damages is proper, some courts allow the verdict on damages to stand and will order a retrial limited solely to the question of liability. Some courts have allowed the issue of proximate cause to be split off from the issue of negligence for separate retrial, but this practice has been disapproved in Minnesota on the ground that negligence and proximate cause are too closely related to be tried independently. The question that arose in Juvland, whether the apportionment of negligence could be retried apart from the issue of liability, has been considered in Wisconsin, where the cases appear to hold that a new trial may be limited to the apportionment issue. In Minnesota,

6. Minn. R. Civ. P., Rule 59.01, provides that a new trial may be granted on all or part of the issues. See 14 Dun. Dig. § 7079 (3d ed. 1954) and cases cited therein.
7. See, e.g., Gasoline Products Co., Inc. v. Champlin Refining Co., 283 U.S. 494 (1931); Koenigs v. Werner, 263 Minn. 80, 116 N.W.2d 73 (1962).
10. See, e.g., Seydel v. Reuber, 254 Minn. 108, 94 N.W.2d 265 (1959); see also Annot., 29 A.L.R.2d 1198 (1953).
11. See, e.g., Alex v. Jozelich, 246 Minn. 27, 78 N.W.2d 440 (1956); Annot., 34 A.L.R.2d 988 (1954).
14. The Wisconsin cases, Caldwell v. Piggly Wiggly Madison Co.,
however, the case was one of first impression.16

The Juvland court denied a retrial limited to the apportionment issue because it doubted that such a retrial would conserve litigation time or expense and because of a concern that a limited retrial could prove prejudicial to plaintiff. Judicial economy would not be achieved, the court argued, because the question of the negligence of each driver is not separate and distinct from the apportionment issue16 and evidence bearing on both issues would have to be introduced in any retrial. On the other hand, the court felt that prejudice to the plaintiff could result if the court were required to instruct the jury that both drivers had been found negligent in an earlier trial. Such an instruction, the court argued, might create in the mind of the jury an impression that both drivers bore substantial responsibility for the accident regardless of what the evidence indicated.17

The court's argument that a limited retrial would not save time or expense is basically sound since much of the evidence on negligence would have to be presented to give the jury a basis for apportionment.18 However, trial time is not the only relevant consideration. Conceivably, limiting the retrial would simplify the jury's task and result in a savings of jury-deliberation time.

The court's belief that plaintiff could be prejudiced by the trial court's instruction on negligence is less convincing. While an unqualified assertion by the trial judge that both parties have been found negligent conceivably could leave the jury with the impression that both have been found guilty of substantial carelessness contributing to the accident, the court is not powerless to correct this mistaken impression. The court

32 Wis. 2d 447, 145 N.W.2d 745 (1966); Firkus v. Rombalski, 25 Wis. 2d 352, 130 N.W.2d 835 (1964); Lund v. Thorne, 266 Wis. 239, 63 N.W.2d 317 (1954), contain language indicating that it is the practice in that state to allow retrials limited to the apportionment issue. However, in these cases the trial court is instructed to allow evidence on the issue of liability to be introduced in the retrial to aid the jury in the apportionment decision. Under this practice liability is not at issue in the retrial but it is, in a sense, relitigated. Thus it is rather misleading to state without qualification that Wisconsin permits retrials limited solely to the issue of apportionment of negligence.

16. Id. at 369, 184 N.W.2d at 425.
17. Id. at 370, 184 N.W.2d at 425.
18. Id. at 368, 184 N.W.2d at 425.
could warn the jury that no judgment regarding the relative fault of the drivers follows from the mere fact that both have been found negligent and could instruct that it would be consistent with these findings that one driver's negligence was very slight while the other's was substantial. On the other hand, as is the case with many precautionary jury instructions, there is a great risk that the judge's warning would go unheeded.

A more important argument against granting a retrial limited to the apportionment question is that error in a jury's findings on apportionment may reflect an erroneous evaluation of the evidence submitted on negligence. As stated above, the liability question and the apportionment question are determined on much the same evidence. In making its apportionment the jury is to view

the conduct of the parties as a whole and in doing so must consider the standard of care applicable to the acts or omissions constituting the tort-feasor's conduct, the nature and character of the conduct and its intensity, directness and remoteness, as a substantial factor in the chain of causation.19

Since most of these factors cited as relevant to the apportionment decision are relevant to the determination of liability or causal negligence, an erroneous decision on one of the issues could be taken as an indication that the related issue has not been properly decided.20 If the jury has misread or misused the evidence in determining one issue, that mistake is likely to be carried over in its determination of the other issue upon the same evidence. The limited retrial is needed to avoid the unfairness to the successful litigant of reopening an issue which has been fairly tried because another issue was improperly decided.21 However, this need obviously does not arise if, as is arguably the case in Juviand, the liability issue has been improperly decided.

In an intriguing dictum the court suggests that it is "conceivable"22 or at least "hypothetically possible"23 that a retrial

20. Although it is also possible that the erroneous determination of the apportionment issue was the result of misleading jury instructions with respect to that issue, it is more reasonable to assume a misinterpretation of evidence.
21. See Simmons v. Fish, 210 Mass. 563, 568, 97 N.E. 102, 104 (1912). The limited retrial is also necessary, or at least useful, for reasons of judicial economy.
22. 289 Minn. at 369, 184 N.W.2d at 425.
23. Id. at n.4.
could be limited to the issue of apportionment in a case where there were detailed findings of negligence from the first trial.\(^{24}\) The court suggests that findings similar to the following hypothetical examples may make a limited retrial in a case like *Juvland* more practical:\(^{25}\)

At or just prior to the collision, was plaintiff driver negligent with respect to:

(a) Lookout? Answer: No  
(b) Control? Answer: No  
(c) Speed? Answer: Yes

At or just prior to the collision, was defendant driver negligent with respect to:

(a) Lookout? Answer: Yes  
(b) Control? Answer: Yes  
(c) Speed? Answer: Yes

It seems likely that such specific findings on the negligence issue would save both the time and expense of unnecessary litigation by allowing the court on retrial to omit as irrelevant certain evidence as to plaintiff's lookout and control. Apparently the *Juvland* court was also of the opinion that on a retrial, jury instructions based on detailed findings such as these would be less misleading to the jury. That some prejudice could still result, however, seems clear since an instruction based upon these findings might leave the jury with the incorrect impression that it had been established that plaintiff's negligence was roughly one-third as great as that of the defendant, plaintiff having been found negligent in just one respect while defendant was found negligent in three.\(^{26}\) This would be prejudicial to

\(^{24}\) While the cautious and hypothetical language the court uses should be a warning that the court may not see the suggestion as a genuine possibility, nevertheless the dictum may be the source of future litigation. It is therefore useful to provide some analysis of the suggestion.

\(^{25}\) The hypothetical findings here are based on a form of question cited by the court as a permissible alternative to the general question on negligence that was used in *Juvland*. The general question was: "At and immediately prior to the accident was [the driver] negligent in the operation of his automobile." 289 Minn. at 367, 184 N.W.2d at 424. The court is careful to note that it does not recommend either form of question as preferable. *Id.* at 368 n.3, 184 N.W.2d at 424 n.3.

\(^{26}\) It is well established in Wisconsin, the leading jurisdiction in the development of the comparative negligence doctrine, that the number of respects in which a party is found negligent (causally negligent) need not govern the percentage of fault that is attributed to that party. *See, e.g.*, Horn v. Snow White Laundry & Dry Cleaning Co., 240 Wis. 312, 3 N.W.2d 380 (1942) (where jury finds defendant guilty of three negligent acts but plaintiff guilty of only one there is no requirement that negligence be apportioned in a three-to-one ratio); Van Wie v. Hill, 15 Wis. 2d 98, 112 N.W.2d 168 (1961) (jury could find plaintiff
the plaintiff in any case like *Juvland* where the plaintiff's fault was arguably minimal compared to defendant's.\textsuperscript{27} This risk of prejudice provides one reason for denying a retrial limited to the apportionment issue even where there were detailed findings of negligence. In addition to this objection to the court's suggestion, the fact remains that error on the apportionment issue suggests that the jury may not have properly decided the negligence or liability issue.\textsuperscript{28} This should be sufficient reason to deny a limited retrial in such a case, and therefore it is hoped that little reliance will be placed on the dictum in *Juvland* suggesting that it is an open question whether a retrial could be limited to the issue of apportionment if a more detailed special verdict were available from the first trial.

\textsuperscript{27} See text accompanying note 19 supra.

\textsuperscript{28} 289 Minn. at 370, 184 N.W.2d at 425.
Contingent Fee Contracts: Contract Related to Divorce Action Upheld

Plaintiff attorney was engaged by defendant to secure a divorce and a property settlement from defendant's husband who had deserted her and had taken all the securities purchased by them during the marriage. Defendant was unable to pay for extensive legal and investigative services to locate her husband in the attempt to recover this property. It was known that defendant's husband had attempted to obtain a Nevada divorce but there was uncertainty whether it had been concluded, or, if it had, whether it was valid. Plaintiff and defendant entered into two separate retainer agreements. The first contract provided for a fee of $400 for plaintiff's services in obtaining a Minnesota divorce against defendant's husband. Only the homestead and inconsequential personal property was to be involved in that action. The second contract provided for a fee equal to 25 per cent of the personal property defendant might recover from her husband in any state except Minnesota. Plaintiff commenced an action for divorce in defendant's behalf which resulted in a default judgment awarding defendant a divorce. Meanwhile plaintiff located defendant's husband in Los Angeles and retained a California law firm to aid in the recovery of defendant's property. After exhaustive research by plaintiff, the California firm brought suit against defendant's husband. Shortly thereafter defendant terminated the attorney-client relationship with plaintiff but retained the services of the California firm. Plaintiff brought an action against the administratrix of defendant's estate to recover the reasonable value of legal services rendered in defendant's behalf. The lower court entered an order of dismissal, holding the contingent fee arrangement void as contrary to public policy. The Minnesota Supreme Court reversed, holding that such a contingent fee arrangement is not void as against public policy. A lawyer who is dismissed by his client before recovery of property but after substantial legal services have been performed should not be precluded from recovering the reasonable value of his services. Burns v. Stewart, 188 N.W.2d 760 (Minn. 1971).

The weight of authority holds contingent fee contracts to be valid and binding¹ provided there are no elements in such

¹ See generally Note, Contingent Fee Contracts: Validity, Con-
contracts which render them contrary to public policy. Contingent fee contracts in divorce-related actions are generally held to be against public policy and void. This strict rule of invalidity originated from situations where contingent fee contracts provided for payment to the attorney only if he procured the divorce. The attorney thus acquired a personal interest in preventing reconciliations. Therefore the courts view such contracts as contrary to the public policy against destruction of marriages. In the past Minnesota has not only followed this strict rule of invalidity, but has gone beyond it, taking the

2. See, e.g., McConnell v. McConnell, 98 Ark. 193, 136 S.W. 931 (1911); Ayres v. Lipschutz, 68 Cal. App. 134, 228 P. 720 (1924); Sobieski v. Marasco, 143 So. 2d 62 (Fla. App. 1962); Evans v. Hartley, 57 Ga. App. 598, 196 S.E. 273 (1938); In re Sylvester, 195 Iowa 1329, 192 N.W. 442 (1923); Overstreet v. Barr, 255 Ky. 82, 72 S.W.2d 1014 (1934); Jordan v. Westerman, 62 Mich. 170, 28 N.W. 826 (1886); Baskerville v. Baskerville, 246 Minn. 496, 75 N.W.2d 762 (1956); Van Vleck v. Van Vleck, 21 App. Div. 272, 47 N.Y. Supp. 470 (1897); Oppenrud v. Bussey, 172 Okla. 625, 46 P.2d 319 (1935). Texas appears to be the lone exception to the rule that these contracts are void in divorce cases. See also Archer v. Griffith, 390 S.W.2d 735 (Tex. 1965) (such contracts are void if the contingent fee is exorbitant and unreasonable); Coen v. Stout, 245 S.W.2d 971 (Tex. Civ. App. 1952); Kull v. Brown, 165 S.W.2d 1011 (Tex. Civ. App. 1942).

3. In addition to being contrary to the public policy against the destruction of marriages, a contingent fee arrangement in a domestic relations action may run afoul of at least two other policies neither of which was relevant in Burns. First, when the contingent fee is a sizeable percentage of alimony it may in effect deprive the wife of part of her support and maintenance for her future living expenses. Normally the courts allow a certain amount for attorney's fees and then establish the alimony such that the wife will not bear that expense. The assignment of a percentage of alimony in advance through a contingent fee contract thus amounts to an interference with the duties of the court to award alimony on the basis of what is required for maintenance and support of the wife. See In re Smith, 42 Wash. 2d 188, 254 P.2d 464 (1953). Second, if the attorney contracts for a high percentage of the alimony or property settlement, the fees generated by such provisions may prove unduly burdensome or oppressive to the parties. Klampe v. Klampe, 137 Minn. 227, 163 N.W. 285 (1917). However, the court may mitigate this problem by an upward adjustment of the alimony award.

4. Baskerville v. Baskerville, 246 Minn. 496, 75 N.W.2d 762 (1956); Klampe v. Klampe, 137 Minn. 227, 163 N.W. 285 (1917). In Klampe the court invalidated a contract under which an attorney was to receive 50 per cent of any properties or moneys obtained by settlement or by action for his client in a then pending divorce proceeding. However, it did allow recovery in quantum meruit. A similar result was reached in the Baskerville case, where the court stated:

[1] It is not fitting that it should be for the interest of an attorney
minority position that even a recovery of the reasonable value of the attorney's services in quantum meruit is barred.5

Recent decisions in other jurisdictions appear to presage a trend toward modification of the strict rule against contingent fee contracts in divorce-related actions.6 The primary justification for such a contract here, as in other areas of the law, is that it is a method of providing representation for impecunious persons.7 However, the relaxation of the strict rule of invalidity has stemmed not from this classic justification, but rather has resulted from a willingness of courts to determine on the particular facts of the case whether the contingent fee arrangement does, in fact, promote divorce and therefore violate the public policy against destruction of marriages.8

Following this trend the court held that the contingent fee arrangement in the instant case was not void as against public policy because the arrangement involved did not promote divorce. The court refused to apply the strict rule that every contingent fee arrangement involved in a divorce action is void on its face. Rather, the court stated that the arrangement must be carefully scrutinized to determine whether it actually promotes divorce before it will be declared void as against public policy. The court determined that no facts tending to promote

that there should be no reconciliation. If compensation for an attorney's services is contingent on the securing of a divorce, or if the amount to be paid for his services is proportioned to the amount of alimony to be received, the attorney is in such a position that his interest would be against a reconciliation of the parties . . . . A contract for the payment of a fee to an attorney contingent upon his procuring a divorce for his client . . . is void as against public policy.

246 Minn. at 504, 75 N.W.2d at 768.
5. Baskerville v. Baskerville, 246 Minn. 496, 75 N.W.2d 762 (1956).
6. Coons v. Kary, 263 Cal. App. 2d 650, 69 Cal. Rptr. 712 (1968); Krieger v. Bulpitt, 40 Cal. 2d 47, 251 P.2d 673 (1953). Based on these cases, the present California rule is to allow a contingent fee in divorce cases where the facts indicate that it will not promote divorce. In Salter v. St. Jean, 170 So. 2d 94 (Fla. App. 1964), a Florida court upheld a contingent fee contract relative to the recovery of the wife's separate property even though a divorce proceeding was taking place in a separate litigation.

7. Comment, Attorney and Client—Fees—Divorce Cases, 15 ALA. L. REV. 208, 210 (1962). At least with respect to wives this may not be a compelling reason. Since in a divorce case the attorney's fees can be charged to the husband, there may be little need to make provisions for a penurious wife through a contingent fee arrangement. Courts at their discretion have required husbands to pay both alimony and the costs for a wife to prosecute or defend the action. Eck v. Eck, 252 Minn. 290, 90 N.W.2d 211 (1958); Gerard v. Gerard, 216 Minn. 543, 13 N.W.2d 606 (1944).
8. See note 6 supra.
divorce were present since the contingent fee arrangement was limited to the recovery of property in which the wife had a right whether or not there was a divorce.\(^9\) The court stated that an action to recover the wife's share of joint property as well as an action for support or maintenance could be maintained independent of an action for divorce.\(^10\) The court concluded:

In neither an action based on contract nor in one relating to property [referring to an action for her share of joint property] would procurement of a divorce have been a prerequisite to the wife's maintenance of a suit against her husband.

\(^9\) 188 N.W.2d at 766. The court stated:

It is well established in this state that when a husband obtains property with funds belonging to his wife, such property is held in trust for the wife, and she may, regardless of whether a divorce is sought, maintain an action to recover the property. Thus here the contingent fee contract was for an action which was not dependant on or ancillary to a divorce proceeding.

\(^10\) 188 N.W.2d at 765. Certainly this is a correct assumption by the court. If joint property has been wrongfully taken by the husband, the wife should be able to recover her property at any time without a divorce. Where a husband absconds with joint property, the wife may maintain an action for the recovery of her share of the property just as she would be able to sue a third party for conversion.

A distinction must be made between the recovery of a wife's separate property and a property settlement connected with a divorce. Bride v. Walker, 206 Ark. 498, 500, 176 S.W.2d 148, 149 (1943) (separate property means property that the wife owns in her individual right as distinguished from those rights growing out of the marital relation); Salter v. St. Jean, 170 So. 2d 94, 95 (Fla. App. 1964) (court distinguished between a property settlement and the recovery of a wife's separate property); Bost v. Bost, 234 N.C. 554, 557, 67 S.E.2d 745, 747 (1951) (property settlement agreement means the full and final settlement of all property rights of every kind and character as well as the cessation of marital relations). A property settlement agreement is tied to a divorce proceeding and involves the distribution of property and is often awarded to a wife in lieu of alimony. The facts of the instant case involved both types of actions. The first contract was for representation in divorce proceedings with a property settlement as to the homestead and personal property contained therein. The second contract was a contingent fee arrangement for the recovery of the wife's share of stocks, securities and cash taken by the husband. While the first contract involved property obtainable only if there was a divorce, the second contract was for the recovery of the wife's property and did not depend on whether a divorce was obtained. Since the divorce was a prerequisite to a property recovery under the first contract, had there been a contingent fee contract regarding the recovery of that property it would clearly have been promotive of divorce and thus invalid. Since divorce was not a prerequisite to a property recovery under the second contract, a contingent fee contract would not promote divorce. Thus, the Burns case itself emphasizes that a distinction should be made between the recovery of a share of joint property and a property settlement connected with a divorce; thus when the underlying action in a contingent fee contract may be maintained independent of a divorce action, the contract itself may not promote divorce.
Hence, on the facts presented, it cannot be said that the contingent fee arrangement here involved was one necessarily promotive of divorce.\textsuperscript{11} Thus the underlying rationale for the decision of the court was that where the contingent fee contract is for an action independent of divorce it does not promote divorce.\textsuperscript{12}

Logically and analytically there is little doubt that the independent action rationale makes sense. Since the fee is not contingent on the procurement of a divorce, the basic policy objection—that the contingent fee contract allows payment only if the attorney procures the divorce—is no longer present. This would seem to be particularly true with a support and maintenance action, which is dependent on the continuance of the marriage relation.\textsuperscript{13} The court wholeheartedly embraced this logic.

It may be argued, however, that from a more practical and realistic viewpoint, the independent action rationale may be superficial. Particularly when there is a concurrent divorce action being handled by the same attorney,\textsuperscript{14} a contingent fee contract to recover the wife's equitable share of property taken by her husband (e.g., \textit{Burns}) may promote divorce even though that action is not dependent on the procurement of divorce. The attorney would have a strong financial inducement to recover the property rather than to reconcile the parties. By investigating one spouse on behalf of the other, the attorney could easily create an atmosphere of antagonism and unjustifiable harassment between them. Furthermore, the attorney might

\textsuperscript{11}. 188 N.W.2d at 766.
\textsuperscript{12}. The \textit{Burns} court placed primary emphasis on the fact that the contingent fee contract was for an action independent of divorce, not the mere fact that there were two separate contracts. The danger in relying on separate contracts, without examining the relationship between the actions underlying those contracts, is the possible subterfuge that could be employed by an attorney. He could execute a contract for a sum certain for divorce representation and at the same time execute a contingent fee contract for the recovery of property with no serious intention of recovering property except as part of the divorce action.
\textsuperscript{13}. See \textit{Donigan v. Donigan}, 236 Minn. 516, 53 N.W.2d 635 (1952); \textit{Waller v. Waller}, 160 Minn. 431, 200 N.W. 480 (1924). A suit for maintenance and support is an affirmation of the marriage relationship. Maintenance and support refers to the wife's allowance in an action where the marriage relation is continued but the spouses are apart. The necessity of the continuance of the marriage relationship in a support or maintenance action illustrates that it is independent of a divorce action which is a dissolution of that relationship. Thus it is most difficult to see how a contingent fee contract for support and maintenance action will promote divorce.
\textsuperscript{14}. This situation existed in the \textit{Burns} case.
then have a pecuniary interest in preventing reconciliation because a reconciliation would often make it unnecessary to recover property for his client. Assumedly the action would be dropped and the attorney would be left without a fee except for what he could recover in an action for the reasonable value of his services.15

Nevertheless, there are rebuttals to the preceding assertions. Encouraging, or at least not discouraging, reconciliation16 insofar as the attorney’s role is concerned is not necessarily inconsistent with bringing an action to recover an equitable share of joint property. Any antagonism would result from the existence of the suit to recover the property and will not be affected by the arrangement under which the suit is conducted.17 The attorney would not necessarily lose his fee if the parties were reconciled since the action might be maintained even though the parties were reconciled. Criticisms of the independent action rationale outlined above disregard the fact that the action is independent of divorce, since they emphasize the inconsistency of maintaining the action and reconciliation. However, because the action is totally independent of the procurement of a divorce, no such inconsistency exists. Reconciliation of the parties may

15. Furthermore, if the contingent fee contract promotes divorce then under the Baskerville rule the attorney may not even recover in quantum meruit. This would not be true as to a set fee because a statute provides that the court may award attorney’s fees if a divorce action is abandoned. Minn. Stat. § 518.14 (1969). Thus it would appear that a contingent fee arrangement would give the attorney a stronger pecuniary interest in preventing reconciliation than a set fee.

However, there are two countervailing considerations to such reasoning. First, if the contingent fee arrangement promotes divorce then it is void and the attorney can recover nothing even though he is successful and the parties remain unreconciled. Second, if the action is independent of divorce and the independent rationale test is applied, the contingent fee arrangement does not promote divorce and the Baskerville rule does not apply to prevent recovery in quantum meruit.

16. The policy behind prohibiting contingent fees in divorce cases is that no obstacle should be placed in the way of reconciliation where differences have arisen. The policy is concerned with the attorney’s interest in preventing reconciliation by reason of the contingent fee rather than the duty to bring the parties to a reconciliation. Therefore, the policies underlying the rule certainly do not require the attorney to attempt to reconcile the parties. Cf., Newman v. Freitas, 129 Cal. 283, 61 P. 907 (1900); Dannenberg v. Dannenberg, 151 Kan. 600, 100 P.2d 667 (1940); Annot., 30 A.L.R. 188 (1924). See 28 Notre Dame Lawyer 259, 262 (1953) (recent decision); Comment, supra note 1, at 122.

17. This is not completely true because the presence of a contingent fee rather than a set fee may cause the attorney to prosecute the action more vigorously, thus resulting in greater antagonism and unjustifiable harassment.
not be inconsistent with the pecuniary interest of the attorney if the contingent fee contract is for an independent action.

Nevertheless, the court's failure to engage in further factual inquiry and analysis after it established that the contingent fee contract was for an action independent of divorce is regrettable. It should have carefully analyzed the facts to determine whether the attorney had, in fact, a pecuniary interest in preventing reconciliation. After having chosen a flexible analysis, the court should not have arbitrarily employed the independent action rationale without qualification.

The court also relied on a second factor to bolster its conclusion that there was no promotion of divorce.\(^{18}\) It stated that under the facts and circumstances of this case successful recovery of the property was at best speculative and that the prospects for reconciliation were improbable.\(^ {19}\) The court pointed out that the husband had initiated two divorce actions in Nevada, that the desertion was of some years duration and that the whereabouts of the husband were unknown. Thus the court appears to have held that where there is virtually no possibility of reconciliation a contingent fee contract will not promote divorce and therefore is not contrary to public policy. This result would obtain whether or not the contract was for an action independent of divorce proceedings. Although on the facts of the instant case the parties were clearly beyond reconciliation, whether this factor can be a useful guideline for future cases is questionable. The factual determination of the probability of reconciliation is a difficult one. Certainly a desertion of several years duration meets the test, but future courts will have difficulty in determining whether a desertion for a short period of time will qualify, or whether many other factual situations involving unstable marriages are to be considered beyond reconciliation. For example, it is conceivable, though doubtful, that a couple separated for several years may intend to reconcile. However, to employ this factor effectively courts would have to engage in comprehensive collateral inquiries regarding the relationship between the husband and wife in order to determine whether they could be reconciled. Such inquiries would place a great burden of factual investigation on both the court and the attorneys. Thus the utility of this factor is questionable because at best it is an uncertain and obscure aid in determining whether a contingent fee arrangement promotes divorce.

\(^{18}\) 188 N.W.2d at 766.

\(^{19}\) Id.
Furthermore, this factor might encourage an attorney to accept contingent fee arrangements in divorce-related actions based solely on his belief that the parties could not be reconciled. This is objectionable for two reasons. First, once the contingent fee contract is executed the attorney has a pecuniary interest in discouraging reconciliation. This is undesirable and certainly contrary to the public policy against the destruction of marriages. Second, the attorney is ill-equipped professionally to determine when marital discord is so great that the possibility of reconciliation is remote. He should not be forced to make this judgment at the risk of being denied his fee should the court determine otherwise. No other court has considered the unlikelihood of reconciliation in upholding a contingent fee contract in a divorce proceeding.\textsuperscript{20} The Minnesota courts certainly should not accept it as the controlling factor in future cases.

The preferable rule is one which not only maintains the basic policy of keeping the marriage together by not discouraging reconciliation of the parties, but also does not discourage a contingent fee contract where it is to the benefit of a party. The independent action rationale is logical and justifiable but should not be dispositive without further inquiry into the facts and circumstances of the case. The attorney should not be encouraged to negotiate contingent fee contracts where a divorce is connected unless there is no promotion of divorce and the client could not maintain an action financially without the contingent fee arrangement.

Although there are some weaknesses in its logic, the general approach of the \textit{Burns} court in abandoning the strict rule in favor of a more flexible approach in determining whether a contract promotes divorce is commendable. Such an approach is necessary if impecunious persons are to be able to use con-

\textsuperscript{20} Krieger v. Bulpitt, 40 Cal. 2d 97, 101, 251 P.2d 673, 675 (1953). The \textit{Krieger} court in \textit{dictum} talked about the considerations of public policy appropriate to contingent fee contracts and stated that

where a marriage's legitimate ends have been frustrated and the parties cannot derive from it the benefits for which it was instituted, the best policy is to permit dissolution of the marriage.

40 Cal. 2d at 101, 251 P.2d at 675.

\textit{See} Hay v. Erwin, 244 Or. 488, 419 P.2d 32 (1966) (court refused to enforce a contingent fee contract as to a property settlement entered nearly one year and three months after a divorce suit was filed). The filing of a divorce would indicate that the parties were beyond reconciliation, but the \textit{Hay} court declined the opportunity to use this factor in upholding a contingent fee contract.
tingent fee contracts in domestic relations actions. Furthermore, the public policy against the destruction of marriages and the promotion of divorce is not totally pervasive. In some situations the legislature has affirmatively indicated that divorce may be necessary if not desirable. Although neither criterion relied upon by the court is directly related to these situations, the court's willingness to abandon the strict rule perhaps evinces a recognition that in some situations the policy against promotion of divorce is not controlling. The future of the general rule in Minnesota may be largely unaffected by Burns, however, in view of its unique facts.

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21. The legislature has by statute allowed spouses to obtain divorces where certain grounds exist indicating that the public policy of prohibiting contingent fees in divorce-related cases may not stretch to the point of preserving bad marriages. MINN. STAT. § 518.06 (1969) enumerates the causes that may allow for a divorce. Some of these are: adultery; impotency; willful desertion for one year; drunkenness (habitual and at least for a year); continuous separation for more than five years; mental illness commitment; and imprisonment. Many of these grounds could present a good case that reconciliation is improbable and that promotion of divorce in these circumstances may not be harmful to the public policy.

22. Id. Some of these situations may be instances where reconciliation is improbable.

23. Because of the presence of desertion as well as a separate contract for a set fee for a divorce in the instant case, courts will have some problems in applying the rule.