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FAMILY LAW 1981

by

Professor P.R.H. Webb M.A. LL.B. (Cambridge) LL.D. (Auckland)

and J.G. Adams LL.B.

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# CONTENTS

**Foreword — P.J. Trapski, Principal Family Court Judge** ......................................... 5

**Chapter One — Counselling and Conciliation** ......................................................... 7

**Chapter Two — Separation Orders** ............................................................................ 15

**Chapter Three — Disolution of Marriage Under The Family Proceedings Act 1980** .... 23

**Chapter Four — Maintenance of Spouses, Former Spouses and of Children** .............. 45

**Chapter Five — Paternity Orders Under The Family Proceedings Act 1980** ............ 75

**Chapter Six — Social Security Amendment Act 1980** ............................................. 87

**Chapter Seven — Guardianship Act 1968** ................................................................. 95

**Footnotes** .................................................................................................................. 109

Chapter One .................................................................................................................. 109

Chapter Two .................................................................................................................. 112

Chapter Three ............................................................................................................... 113

Chapter Four .................................................................................................................. 116

Chapter Five .................................................................................................................. 123

Chapter Six .................................................................................................................... 124

Chapter Seven ................................................................................................................. 125
CHAPTER ONE
COUNSELLING AND CONCILIATION

It is probably true to say that if spouses have reached the stage of seriously con­
templating court action for divorce there is little that can be done to save their mar­riage in the vast majority of cases. If, however, their situation has not deteriorated to that extent, they may well benefit from counselling which may lead to their becoming reconciled. Even where spouses cannot arrive at a reconciliation whether or not they have been counselled, counselling may nevertheless help them to arrive at an amicable solution to some or all of their matrimonial differences, with the result that there is little or no heat in the subsequent legal proceedings. Moreover they may be able to be guided to resolve some or all matters in dispute by an agreement out of Court.

Part II of the Family Proceedings Act 1980 is devoted to the matter of counselling and conciliation.

Legal Advisers’ Duties
Section 5(1) of the Act lays down that in all matters in issue between a husband
and wife that are, or may become, the subject of proceedings under the Family Pro­ceedings Act 1980 itself or the Guardianship Act 1968, every barrister or solicitor
acting for the husband or wife shall:
(a) Ensure that the husband or wife for whom the barrister or solicitor is acting is
aware of the facilities that exist for promoting reconciliation and conciliation, and;
(b) Take such further steps as in the opinion of the barrister or solicitor may assist
in promoting reconciliation or, if reconciliation is not possible, conciliation.

These duties are by no means light, though, it will be noticed, the barrister or
solicitor is not bound himself to act as a counsellor. Indeed few practitioners may be
qualified to do so and any who did so could well be restricted in such an undertaking
if it involved close dealings with the other spouse as well. Obviously where a barrister
is briefed by a spouse’s solicitor, there must be a satisfactory liaison between them
concerning the obligations imposed by the subsection.

In order to emphasise the importance placed by the legislature on these duties, it is
also provided that every barrister or solicitor who is acting for a husband or wife and
applies to the Court to have set down for hearing any matter in issue between the
husband and wife under the 1980 Act or the Guardianship Act 1968, must certify on
the application that he has carried out his responsibilities under the above sub­section.

It is a pity that the terms “conciliation” and “reconciliation” were not defined in
s.2 of the Act. Therefore it can be assumed that they possess their plain, ordinary
meanings. A reading of sections 8 and 12 gives a clear indication that they have dif­ferent meanings within the context of counselling. “Reconciliation” suggests the
bringing of the spouses into friendly relations again after an estrangement of some
kind; that there has been sufficient reduction of friction and tension to make
resumption of the marriage practicable. “Conciliation” on the other hand suggests
the inducing of friendly feelings; coming to common understanding on some of the
issues which a separating couple must face and a resultant reduction in the areas of
conflict. The content of the counsellor’s report required by s.11(2) is consistent with
this interpretation.

“Voluntary” Counselling
Section 9(1) permits either party to a marriage to request a Registrar of a Family
Court to arrange counselling in respect of the marriage. Where such a request is made,
the Registrar is bound, on the completion by the person making the request on the
prescribed form, to arrange for the matter to be referred to a counsellor.4
Wisely, no doubt, the services of the counsellor are free to the spouse seeking
them, for it is provided that any fees charged by the counsellor in respect of the
counselling are to be paid out of the Consolidated Account from money
appropriated by Parliament.6
It will be seen that only married people may utilise this procedure. Those in a de
facto relationship only7 cannot resort to it because they cannot claim to be within the
rubric of s.8(1) “Either party to a marriage. . . .”
There is no other precondition to the use of this procedure. The applicant need not
necessarily be thinking of seeking maintenance or a separation order or divorce at
all. He or she may simply hope that counselling may restore a marriage which is
showing signs of failing. Indeed, it is to be hoped that more spouses will be
encouraged to use this form of assistance than was the case under s.14 of the former
Domestic Proceedings Act 1968.8
There is, of course, nothing to prevent a spouse (or, indeed, a de facto husband or
wife) from going to a marriage guidance or other counsellor entirely off his or her
own bat with a view to seeking help.9 In the case of spouses, neither need necessarily
have had the provisions of s.9 of the Act in mind at all. What has happened is that
Parliament is now paying for a counselling facility, to be operated on formal request,
which will stand alongside the many other counselling services available within the
community.
It may be expected that the fact that the counsellor must file a written report on
s.9, counselling will give some direction and focus to that counselling. Experience
indicates that a formal requirement to attend counselling will often help a reluctant
or unwilling spouse over his or her threshold of reluctance or resentment to attending
counselling and that quite often (and contrary to the normal expectation of a
layman), useful advances are able to be made by the counsellor. It must be noted that
the counsellor’s legitimate interest is not only in the resolution of legal issues, but
also in helping clients deal with their emotions to enable them to cope more effective-
ly with their lives. Thus counselling may be considered relatively successful even on
some occasions when none of the legal issues are resolved. In such a case the parties
may be able to cope more effectively with the demands and decisions required of
them to resolve those issues at mediation or Court.10

“Compulsory” Counselling Where Proceedings have been commenced for a
Separation Order
On the filing of an application for a separation order,11 the Registrar12 must
arrange for the matter to be referred to a counsellor.13 However, this rule is inap-
plicable where (a) the Registrar is satisfied that, not more than 12 months before the
date of the application, either (i) the applicant or the respondent has requested
counselling in respect of the marriage under s.9, which has been explained above,14
or (ii) the applicant and the respondent have attended counselling before a
counsellor without a request under s.9 having been made; or (b) a Family Court
Judge gives a direction that the matter be not referred under s.10(1) or that a reference made by a Registrar be revoked. Such a direction may be given if the Judge is satisfied, on the Registrar’s application or that of either spouse, that:

(a) the respondent has used violence against, or caused bodily harm to, the applicant or a child of the marriage, or has threatened to do so; or
(b) delay in the hearing of the application for a separation order would be undesirable or unlikely to serve a useful purpose; or
(c) other reasonable cause exists to dispense with a reference to counselling. It is speculatively suggested, having regard to the policy of the Act’s tending to assume the usefulness of preparatory counselling, that dispensation will not be given lightly. Thus the requirement of an application to dispense. Allegations of violence and the like, raised in support of such an application, must be to the point that they suggest to a sufficient degree of proof, that counselling would be ineffective. There seems no reason why the Court could not require such an application to be dealt with on notice which could be a disincentive to exaggerated or misleading claims. It is dramatic to report that your spouse threatened to kill you but if, on inquiry, the surrounding circumstances showed that you did not believe it and they were but idle words, a different climate is revealed. Moreover many experienced practitioners have discovered that violence does not always indicate an unlikelihood of either reconciliation or some conciliation being achieved.

“Discretionary” Counselling in Other Types of Proceeding

Upon an application under s.67 of the Act for a maintenance order or on an application by a party to a marriage for an order under the Guardianship Act 1968 with respect to the custody of a child of the marriage, a Family Court Judge may, should he think it expedient, and without limiting his power to make an interim maintenance order, direct the Registrar to arrange for the matter to be referred to a counsellor. On receipt of such a direction, the Registrar must refer the matter accordingly.

Curiously (and almost inexplicably) the provisions of s.10 do not extend to custody applications involving ex-nuptial children, nor to custody applications between parties other than the parties to the marriage which produced the child; nor to applications for access or definition of access; nor to disputes between guardians: all of which cases seem admirably suited for reference to counselling with a view to conciliation resolving the issue, or at least reducing the scope of friction in the issue.

The proceedings cannot be blocked indefinitely by the procedures of reference to counselling described above, for it has been enacted that if, not less than 28 days after the date on which the Registrar has arranged for a matter to be referred to a counsellor under s.10(1) or (4), either party to the marriage requests that the hearing should proceed, the hearing must be commenced or resumed unless the Court otherwise orders. Further, nothing in this rule is to prevent the commencement or resumption of the hearing before the expiration of 28 days if the Court, upon application made to it, so directs.

The Counsellor’s Position and Function

When a matter is referred as above-described to a counsellor under ss.9 or 10, he or she must, for the purposes of counselling, (a) arrange to meet the husband or wife, or both of them, at such times and places (including the home of either party) as the counsellor thinks fit; or (b) by letter sent by post request the husband or wife,
or both of them, to attend before the counsellor at a specified time and place.\textsuperscript{26} As soon as reasonably practicable after the matter has been referred to the counsellor, the counsellor is required to submit a written report to the Registrar stating (a) whether or not the husband and wife wish to resume or continue the marriage; and (b) if not, whether any understandings have been reached between them on matters in issue.\textsuperscript{27} A copy of the report is to be given by the Registrar to each party or to each party's barrister or solicitor.\textsuperscript{28}

The duty of the counsellor to whom a matter has been referred under ss.9 or 10 is plain and simple. He or she must explore the possibility of reconciliation between the spouses and, if reconciliation does not appear to be possible, it becomes the counsellor's duty to attempt to promote conciliation between the husband and the wife.\textsuperscript{29} How the counsellor approaches the task is a matter for him or her. The Act lays down no guidelines.\textsuperscript{30}

\textbf{The Court's Duty as regards Reconciliation and Conciliation}

In all proceedings under the Family Proceedings Act between a husband and wife,\textsuperscript{31} and in all proceedings under the Guardianship Act 1968 between a husband and wife for any order relating to custody or access, the Court is bound (a) to consider from time to time the possibility of a reconciliation between the spouses or of conciliation between them on any matter in issue and (b) to take such further steps as in its opinion may assist in promoting reconciliation or, if reconciliation is not possible, conciliation.\textsuperscript{32}

In all proceedings under the Act between a husband and wife for the dissolution of their marriage, where it appears to the Court from the nature of the case, the evidence, or the attitude of the husband and wife, that there is a reasonable possibility of a reconciliation between them, or of conciliation between them on any matter in issue, the Court has a discretion to (a) adjourn the proceedings to attend the spouses an opportunity for reconciliation, or for conciliation; and (b) nominate a counsellor, or, in special circumstances, any other suitable person, to explore the possibility of reconciliation or, if reconciliation does not appear to be possible, to attempt to promote conciliation.\textsuperscript{33} Where, not less than 28 days after any proceedings have been so adjourned, the husband or wife so requests, the hearing must be resumed unless the Court otherwise directs.\textsuperscript{34} Where the Court considers that special circumstances exist, it may, on the application of either spouse, resume the hearing before the 28-day period expires.\textsuperscript{35}

\textbf{Mediation Conferences}

Part II of the Family Proceedings Act 1980 also provides, as part of the counseling and conciliation procedure, for the holding of what is called a “Mediation Conference”. By virtue of s.13(1), where an application is made in a Family Court (a) by a husband or wife against the other spouse for a separation order or a maintenance order (including one in respect of a child); or (b) by one parent of a child against the other parent for an order for the custody, or access to, the child—either party to the proceedings or a Family Court Judge may ask the Registrar of the Court to arrange for the convening of a mediation conference.\textsuperscript{36} Upon receipt of such a request, the Registrar is then bound (a) to appoint a time, being as soon as reasonably practicable, and a place for the holding of the conference in accordance with s.14 of the Act;\textsuperscript{37} and (b) by letters sent by post to the husband and wife, or to the parents of the child to inform each of them of the time and place of the conference and request each of them to attend.
The objects of mediation conferences and the procedure thereat is detailed in s.14 of the 1980 Act. The Chairman of the conference is to be a Family Court Judge and the objectives of the conference are (a) to identify the matters in issue between the parties and (b) to try to obtain agreement between the parties on the resolution of those matters.

Any barrister or solicitor representing a party may, at that party’s request, be present at the conference to assist and advise that party and where custody of, or access to, a child is in issue at the conference, any barrister or solicitor appointed to represent that child may be present. Subject to these provisions, every mediation conference must be held in private unless the Chairman otherwise directs.

It is permissible for the Chairman from time to time to adjourn the conference to a time and place to be appointed by the Chairman. The Chairman must record in writing the matters in issue at the conference, showing separately (a) those matters on which agreement is reached between the parties; and (b) those on which no agreement is reached between them. The record must be filed in the District Court in which the relevant proceedings are filed.

The Chairman’s power to make consent orders
A counsellor has no powers beyond those of, to put it basically, seeing the spouses, exploring the possibilities of reconciliation or, if this fails, attempting to promote conciliation, hopefully assisting the parties to come to certain understandings and reporting to the Registrar. The Chairman of a mediation conference, however, is in a much stronger position as becomes clear from perusal of s.15. The Chairman presiding at a mediation conference may, by consent of the parties, make any orders that could have been made by a Family Court and that relate to an application by either party for:

(a) a separation order; or
(b) the custody of any child of the parties, whether or not the child is a child of the marriage, or any rights of access to that child; or
(c) the maintenance of (i) the husband or wife; or (ii) any child of the marriage; or
(d) the possession or disposition of property under the Matrimonial Property Act 1976.

The above rule is made subject to an important exception, viz, that where a party has no barrister or solicitor, or a party’s barrister or solicitor is not present at the conference, a consent order is not to be made unless that party states expressly that that party does not wish the conference to be adjourned to provide an opportunity for legal advice to be taken. An order made under s.14 is, for all purposes, to have the same effect as if it were made by the consent of the parties in proceedings before a Family Court.

The Form of the Mediation Conference
The form of the mediation conference is not prescribed in the Act but its part in the scheme of the Act demonstrates that its purpose is first to clear off the record (by consent orders) all issues over which there is no contest; second, to discuss informally around a table, those issues which may be capable of resolution without a formal Court hearing; and, third, to record those issues which require a formal adversary hearing for their resolution. The most creative business of the mediation conference must be within the second of those categories. To achieve satisfactory progress, parties will need to have done their homework. In custody and access cases, if all affidavits have not been filed then the Judge may adjourn the conference if the possibility of resolution at a conference can reasonably be sustained. Budgets should be available as a basis for discussing maintenance. Because it is essentially a
pre-trial conference most cards can be expected to be on the table but it would be unrealistic to expect or require complete disclosure of arguments or evidence in all cases.

It can be anticipated that the Judge chairing the mediation conference would be likely to contribute to the discussion, partly to reassure parties (or, in appropriate cases, their legal advisers!) as to what the law is, and also, in appropriate cases, to give an indication of his or her approach to a particular issue. For example, a young father seeking custody of his three-month old breast-fed daughter on the basis that his greater artistic appreciation would provide a better environment for the child than that provided by his wife, whose horizons were limited because she was so bound up in her role as a young mother, might find a suggestion from the Judge at a mediation conference helpful in bringing reality to bear on the situation.

The Chairman at the conference is not referred to in the Act as a mediator but clearly such is one of his roles—to try to lead the parties into a fair, just and workable solution, thereby avoiding a formal Court hearing. Subject to the expectation that people will be treated fairly at the conference, what actually occurs in any individual conference will depend on the dynamics created by the personalities involved. However, there is nothing in the Act to suggest that a party can be obliged to say anything or disclose anything at a mediation conference that would take away any proper tactical advantage. Neither party nor the Judge should be expected to attempt to resolve issues at any or even great cost. If the issues appear susceptible of resolution but the parties fail to resolve them, some straight talking may be in order but any substantiated suggestion that a party was “leaned on” by the other party or a lawyer or the Judge would only tend to limit the effectiveness of mediation conferences in the future. In the final distillation of the matter, a party who really wants his day in Court will be allowed to have it.

**Proceedings After a Mediation Conference**

It will be appreciated that, there having been a mediation conference over which a Family Court Judge has presided, a question arises as to whether he should hear any subsequent proceedings. The question is settled by s.16. The position is that the Family Court Judge who presides over a mediation conference between the parties to an application is to be entitled to hear any subsequent proceedings between those parties under that application unless in all the circumstances he decides, on his own motion or on the application of any party, (a) that it would be inappropriate for him to do so; or (b) that there is some other sufficient reason for the application to be heard by another Judge.

**Powers to require attendance for counselling or mediation**

It may happen that a person fails to comply with a request to attend before a counsellor at a specified time and place or a request to attend a mediation conference. This may be due to pressure from relatives, perhaps, or to a misplaced sense of pride, especially on the part of a husband, or to other reasons. In such an event a District Court Judge may, on the request of a counsellor or Registrar, issue a summons requiring the person to attend before the counsellor or to attend a mediation conference at a time and place to be specified in the summons.

**Privilege**

One of the reasons that may cause a person to refuse to attend before a counsellor or to come to a mediation conference is that he or she fears that what may be said by him or her may come out in Court at a later stage. The fears of such a person may be
allayed if attention is drawn to what is to be found in s.18(1), viz, that no evidence is to be admissible in any Court, or before any person acting judicially, of any information, statement, or admission disclosed or made (a) to a counsellor exercising his functions under Part II of the Act; or (b) in the course of a mediation conference.\(^5\)

There is a criminal sanction in the event of a breach of privilege. Except to the extent that it is necessary for a counsellor to do so in the proper discharge of that counsellor’s functions, every counsellor commits an offence and is liable on summary conviction to a fine not exceeding $500 who discloses to any other person any information, statement, or admission received by or made to the counsellor in the exercise of the counsellor’s functions under Part II of the Act.\(^6\)

It would appear that the privilege is an absolute one affecting the counsellor or persons attending a mediation conference and the parties. The result therefore is that neither the parties nor the counsellor nor persons at a mediation conference can give evidence of any information, statement or admission disclosed or made. The section does not appear to permit the waiver of the privilege by the spouses or the counsellor. The public policy behind such a restriction is self-evident. Information gained by the counsellor from persons other than the spouses themselves, such as a doctor, the spouses’ parents or children, would also appear to be privileged. A question is raised as to whether or not a counsellor could testify as to matters seen and observed such as that a spouse was pale, highly-strung, nervous, black-eyed and with a stitched wound at the time of the interview. Probably such evidence would be admissible\(^7\) because such evidence would not be comprised of “any information, statement, or admission disclosed or made. . . .”

The very wide privilege is justified entirely by the fact that, without it, the procedures laid down in Part II would not function satisfactorily. If it were the case that the counsellor and those others present at a mediation conference could be called on to testify on those matters mentioned in s.18(1), the procedures would undoubtedly be prejudiced and public confidence in them would be undermined. This, coupled with the fact that there is a compulsory element about the procedures, more than justifies the width of the privilege.

However, suppose a wife were to inform a counsellor that her in-laws were causing trouble and that her husband was too weak to deal with them. The counsellor might decide to see the in-laws to try to ameliorate the trouble. This would necessitate the counsellor’s divulging to them information received in the course of exercising his functions. It is submitted that s.18(3) is not aimed at such disclosure, for it would be “in the proper discharge of” the counsellor’s functions.

**Conclusion**

The central theme of Part II is the highly laudable one of encouraging, so far as it is practicable and realistic, the reconciliation of spouses and, if the possibility comes to nothing, conciliation and the cool settlement of some, at least, of the matters in dispute. The importance attached to reconciliation and conciliation by Parliament is, indeed, readily apparent when one considers the duties it has imposed on legal advisers and the Courts as to the promotion of reconciliation and conciliation.\(^8\) No doubt a practitioner who fails in his duties imposed by s.8 must be regarded as being in breach of his statutory duty, but the requirement that he certify that he has carried out his responsibilities should serve to obviate this risk.\(^9\)

The possibility of making an ex parte application for counselling to be arranged by a Registrar\(^6\) is a provision which may justly be described as preventive justice at its very best—provided, of course, that it is not used to obtain some tactical advantage or as a delaying stratagem. A Registrar who feels that such an application was being made in bad faith ought to decline it.\(^6\)
CHAPTER TWO
SEPARATION ORDERS

Introduction

Section 20 of the Family Proceedings Act 1980 enables either party to a marriage to apply for a separation order. Persons who have merely entered in New Zealand, or, for that matter, elsewhere, into a de facto relationship cannot seek a separation order, as was held in Abbott-Gray v. Abbott-Gray. Every application for such an order must, by virtue of s.21, be heard and determined in a Family Court.

There is only one ground for a separation order, and it is laid down by s.22 This reads:-

"In proceedings for a separation order, a Family Court shall make the order if it is satisfied that there is a state of disharmony between the parties to the marriage of such a nature that it is unreasonable to require the parties to continue, or, as the case may be, to resume cohabitation with each other."

There would appear to be two constituent elements viz (i) a state of disharmony between the spouses and (ii) that it be of such a nature that it is not reasonable to require the parties to continue or resume cohabitation with each other, as the case may be. If these elements are not present, then no order should be made as was said in Myers v. Myers. In Walker v. Walker Richmond J. described the elements as constituting a "composite test" and went on to say that, given a state of [serious] disharmony between two spouses, it might be unreasonable to require them to live together if they have no children but reasonable to require them to do so if they have children and could, in all the circumstances, thereby better discharge their duties to those children despite the state of disharmony. He added that the rights of both spouses to enjoy the custody and society of their children might be an important factor to take into account. Likewise, he went on, the effects of a separation order on the financial or living conditions of one or both of the spouses might be sufficiently serious to make it reasonable to require them to tolerate a state of serious disharmony as the lesser of two evils.

It was the Chief Justice's view—and it still holds good—that the Court had to consider the individual and mutual obligations of both parties to each other and to the children and the influence that the children might have on family unity. "The Court is dealing," he concluded, "as Lord Reid said in Gollins v. Gollins, ([1964] A.C. 644; [1963] 2 All E.R. 966 (H.L.), at pp.664, 972 respectively) with this man and this woman". What is called for is the closest examination and assessment of character, personality, desires and emotions, and of all the family circumstances."

The Act makes no attempt to define the term "disharmony", no doubt for the same reasons that formerly led the Courts to decline to define cruelty and desertion. It is submitted that, in deciding whether a "state of disharmony" exists, the Family Court will be concerned to see whether the spouses' manner of living reveals discord (to use a musical term) or dissonance or want of harmony. Put another way, the function of the Court is to see whether there is an adverse state of affairs revealing that the matrimonial situation has reached that pitch where a reasonable person, knowing all the relevant factors, would be driven to consider that the persons involved continuing or resuming cohabitation as man and wife was a moral impossibility.
The decisions

One would suppose that, even after the removal of the requirements that the state of disharmony be “serious” and that the parties’ reconciliation be “unlikely”, there will have to be fairly substantial reasons for not continuing the marriage and which make it appear that there ought to be a separation order. In particular one would hope that Courts will continue to be watchful of the applicant who presents, as did the wife in Edwards v. Edwards⁵ a completely distorted view of the events as they actually happened”. She painted a highly exaggerated picture of a violent alcoholic husband who terrified both her and the children. In fact he was able to show her picture to be a very one sided one, that he was not an alcoholic, that he sincerely loved his family and that, given time and goodwill, and co-operation, reconciliation might be possible. The Magistrate held that it was not unreasonable to require the wife to resume cohabitation (s.19(1)(a) was so worded at that time) and he was upheld by Henry J. He remarked that, while the wife’s attitude was relevant, there was no reason why her attitude alone was to be weighed and it was now reasonable for her to have regard to her position and duties and the interests of her children in view of the wrong and baseless stand she had taken, apparently on wrong advice from some unspecified person, about her husband’s drinking habits.

An order was also refused in Maffey v. Maffey.⁶ The parties had married in 1957 and there were four young children. Prior to the marriage the wife had worked and she continued working until shortly before the eldest child’s birth. In March 1970 she left home with the children without warning but leaving a note. She alleged that her husband was selfish, overbearing, excessive in his demands for sexual intercourse, impatient over her claustrophobia, a failure as to his domestic duties about the house and the children, improvident, a borrower and a spender, which she, as a frugal person desirous of having something put by for a rainy day, disapproved of. She said her own nervous state and characteristics, which she could not hope to alter, had heightened the disharmony. Conciliation attempts had proved fruitless. Whereas the wife looked on the marriage as over, the husband did not. The Magistrate thought their main troubles lay in their sexual relations. He found the wife’s allegations to be without foundation and put down the sexual trouble to the wife’s personality and psychological make-up. Her leaving he put down to her infatuation with a mutual friend of the parties. He thought the strong bond of affection between the wife and this man threw doubt on the wife’s allegation that sex had been repugnant to her throughout the marriage. He further thought the husband had done his best to overcome the disharmony resulting from their sexual relationship. The Magistrate felt that this wife could not say it was unreasonable for her to be required to return to her husband (s.19(1)(a) still being worded in that way) and declined to make a separation order. In the course of the appeal it was put to Wild C.J. that long-standing disharmony on matters of sex was a symptom of disharmony in other spheres of life. In the course of upholding the decision of the lower Court, the Chief Justice said as to this: “That might be so in some cases, but I should think in others a sexual problem may stand alone. It is a case of the particular couple.”

In Eland v. Eland,⁷ the Court granted a separation order and was upheld on appeal to the Supreme Court. There had been constant arguments between the spouses and they had never been really happy. There had been occasional violence. There had been disagreements about the husband’s buying and running a racehorse on a wage which did not justify this, and over what he thought of as the influence of his mother-in-law on the marriage. There had been separate bedrooms for three months before the wife left. Their courtship had been short and the wife (then aged 32) had been doubtful down to the very wedding day whether she should marry the husband (then aged 27). The husband was Dutch and behaved in an authoritarian
manner, which he acknowledged. He considered his wife bad-tempered and in need of a good hiding, though he never gave her one. He refused to enter into a separation agreement after the wife had left. He then left for South Africa without notice, but he later returned to New Zealand. He said in Court that his wife’s evidence revealed no more than a few trivial incidents only and, even if it was found to be serious disharmony, then it had all arisen from her own intransigence and it was not unreasonable to expect her to resume cohabitation (s.19(i)(a) still being so worded). He also said he still loved his wife and bore her no ill-feeling, which the Court found hard to believe.

He put it that reconciliation was a reasonable possibility but the view was taken that he really thought that there should be a home for the children and that, laudable though this sentiment might be, his view was not a sound one for resuming cohabitation, as the children of the marriage would be exposed to disharmony and bickering. The wife viewed reconciliation as out of the question. Even the husband eventually admitted that disharmony existed. The Magistrate had actually said when he granted the separation order that he had seldom seen serious disharmony more plainly written on a wife’s face. Clearly there was no life in this marriage and no hope for its future and therefore nothing to preserve. It is submitted that the Magistrate, and Quilliam J. on appeal, took the right course in decently interring it. There was clearly proof here of utter marital breakdown and the making of the order enabled this to be marked in a civilised manner. It is considered that the case would go the same way under the present legislation.

Hunt v. Hunt is a much later case in which an order was refused on the ground of serious disharmony. Chilwell J. was asked to hold that the Court below had been wrong in making an order. He made certain preliminary important points:-

1. The making of a separation order is a serious matter.
2. He sometimes wondered whether consent orders had been extracted through pressures exerted on the parties rather than on the basis of reflective and due consideration.
3. While parties are to be encouraged to resolve their difficulties, the Court should always be zealous to make its time available to determine this type of case.
4. The large number of consent orders might suggest an appearance of mere formality. (Now that a separation order can be made by consent at a mediation conference, this fear is lessened. See ss.13-19 of the Act on mediation conferences.)
5. The Court must consider the whole of the evidence on both sides.
6. In resolving the question of fact whether or not disharmony is present, questions of fault are not relevant.

The facts were that the marriage had lasted 28 years and there were four children, two of whom were still at home. A degree of unhappiness emerged. The wife said it had gone on for 10 years but never explained what it was. She said also it had come to a head two years ago and that she had talked to her husband to try and reach some understanding, but she did not specify upon what. She said she had continued to live with her husband because of the children. She added that he had suggested her staying on as housekeeper. She complained that they did not speak, that the husband liked to belittle people, that he did not move “with alacrity to visit her” when she was recently in hospital, that sexual relations had ceased 18 months ago, that she had no feelings for her husband and that they had nothing in common. She did not think a time would come when they might grow together again. She referred to the existence of childish behaviour between them after she filed her application. Her main aim seems to have been to evict her husband so that she could live a comfortable life without having him around in her family. These symptoms may or may not have been due to the wife’s menopausal change and the two elder children growing
up and leaving home. She denied it. The husband thought otherwise.

Chilwell J. considered there was a surprising lack of evidence of grounds for real criticism of the husband and that the disharmony lay in the wife's mind and attitude. The husband appeared to be a good provider, a good and devoted family man and a worthwhile husband. There was no question of excessive drinking, philandering, overspending or meanness or any other of the things that spouses commonly complained of. Chilwell J. did not see the falling off of sexual intercourse as necessarily serious between a man of 55 and a woman of 46, and found that neither spouse was "particularly fussed about the lack of it". He drew attention to the fact that there are always two sides to a story and when the second side is told the first can quite often take upon itself a fresh complexion. The Magistrate had been wrong to assess matters solely on the wife's evidence. Chilwell J. did not see the disharmony as being, overall, serious. He also thought it was not unreasonable for them to live under the same roof, even if the disharmony was serious. The husband clearly wanted a reconciliation. It is submitted that the same result could be arrived at under the new legislation.

In Asher v. Asher the marital problems arose out of the husband's drinking. The Magistrate concluded that the drinking was not of a sufficiently grave and weighty nature to end a 22-year-old marriage, of which there were four children, and that there was nothing else about the marriage which could not be resolved by good will on both sides and that whatever disharmony there was was of a comparatively minor nature fairly describable as part of the fair wear and tear of married life. The Magistrate refused to make a separation order and White J. upheld the refusal. The case clearly raises, now that the word "serious" has disappeared, the question: Where does a state of disharmony begin and fair wear and tear end?

Counselling and Conciliation

It may, at this stage, be wondered how the counselling and conciliation procedures laid down in Part II of the Act fit in. One might be tempted to legislate that all spouses in a separation order situation are in duty bound to make some sort of effort to reconcile and that an order must be withheld if no such attempt has been made. No doubt the absence of such an attempt would assist the Court in deciding that there was a state of disharmony and whether it was of such a nature that it was unreasonable to require the parties to continue or resume cohabitation with each other. There are no doubt many couples whose marriages still founder despite the fact that each spouse has been to a conciliator with every degree of conscientiousness, as indeed occurred in Myers v. Myers. The Court of Appeal made a separation order in that case despite the clearly positive steps the parties had taken to salvage their marriage. Under the present Act there is no statutory duty imposed on spouses to reconcile or even to allow themselves to be conciliated. They may be required to go through the counselling and/or mediation procedures laid down in the Act, but, if they are unwise enough, each spouse is ultimately left free to fight the other every inch of the way. One can only hope that the non-fault basis upon which separation orders are now to be granted will lead to the avoidance of fault-finding and mud-slinging and the hurling of recriminations. Instead, one trusts that the here and now effects of what has gone before can be considered and an order given or refused accordingly, according as the marriage has or has not utterly broken down.

"Unreasonable Behaviour"

Under the former Domestic Proceedings Act 1968, a separation order could be obtained under s.19(1)(c) on the ground that since the marriage any act or behaviour
of the defendant affecting the applicant had been such that, in all the circumstances, the applicant could not reasonably be required to continue, or, as the case might be, resume cohabitation with the defendant. Very often the applicant, who was usually the wife, would plead both serious disharmony and “unreasonable behaviour”, as it was often called. This latter ground was doubtless included in s.19 to placate those who, even in the 1960s, still wished to retain a “fault” ground and it is satisfactory that it has been eliminated from the present legislation. It much resembled the English rule that one of the ways of proving irretrievable breakdown of marriage for divorce purposes is that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. It would seem fair to say that behaviour of such a kind would certainly create a state of disharmony entitling an applicant in New Zealand for a separation order to be granted one. In Katz v. Katz,12 the spouses had been married in 1954; in 1967 the husband showed signs of manic depressive illness with schizoid features and in 1968 was hospitalised for a short period. After some improvement he again deteriorated and he constantly criticised his wife, then attempted suicide, made unpleasant remarks about her, frequently accused her about her supposed misdoings and called her a tramp and a slut. When served with the divorce petition, his reaction was to laugh at it and read it to their children. Making all due allowances for the husband’s disabilities and the temperament of both spouses, the character and gravity of the husband’s behaviour was clearly such that the wife could not reasonably be expected to live with him any more. The wife was granted a decree and it is submitted that had she sought a separation order in New Zealand on similar facts she would be granted one, for if they do not disclose a state of disharmony it is very hard to see what does.

Reference may also be made to Ash v. Ash,13 where the wife’s complaints were based on her husband’s general violence and intoxication amounting to alcoholism. The Court took into account that the wife had been prepared to take advantage of the good and to enjoy the prosperity while they lasted but was unable to tolerate the disadvantages of the bad and of adversity when they supervened. The husband put his behaviour down to his unemployment and his marital situation down to his health. Although the wife had shown a lack of understanding of his problems and although he asserted his marriage not to have irretrievably broken down, a divorce decree was granted. Clearly there was a state of disharmony here.

In Thurlow v. Thurlow14 at the date of the marriage the husband knew the wife to be epileptic but hoped her condition might improve. After the marriage her physical and mental state gradually deteriorated. The husband suffered the results of this for substantial periods until his powers of endurance were exhausted and his health endangered. Rees J. took it that “behaviour” could be negative, as with prolonged silences and total inactivity, as well as positive. He held that the respondent’s behaviour justified his conclusion that the petitioning husband could not be expected to endure cohabitation and granted a decree. Again there was obviously a state of disharmony, which, to use the words of Roper J. in Donaldson v. Donaldson,15 “in itself was so [serious] as to justify the wife not returning”.

In Bradley v. Bradley16 a unanimous Court of Appeal found that the wife had no alternative but to be in a bedroom with her husband and cook his meals etc. for she was too frightened to do anything else. The local body would not rehouse her while she was still married and the council house occupied by the spouses stood in their joint names. It was held that the mere fact of her living with the husband did not stop her petitioning and that she could have her allegations of unreasonable conduct investigated by the Judge and call evidence to show that, although she was living with him, the family situation and his behaviour was such that she could not reasonably be expected to live with him. This must be so also in New Zealand.
Sometimes a complaint of a spouse's personality may be made tardily, e.g., after about 20 years of marriage, as in *O'Neill v. O'Neill*. This was considered to be too late, but it was also found that the husband had made the matrimonial home most uncomfortable by doing extensive works upon it alone, which he was not really qualified to do since he took no advice whatever. The works were prolonged and involved there being no lavatory door for eight months, which was an embarrassment to the wife and daughter. The state of the home generally was that it was also embarrassing to have visitors to it. Two years after these works had begun (and while it was still continuing) the wife and two children left, and the husband then wrote to her solicitors in terms casting doubt on the paternity of the two children, which the Court thought was a wicked thing to do and very serious indeed. Having regard to the history of the marriage and to the particular spouses, there had been such conduct as could only lead to the conclusion that the husband had behaved in such a way that the wife could not reasonably be expected to live with the husband. A decree of divorce was granted. It is thought the wife would succeed in obtaining a separation order in New Zealand upon such facts.

It would seem fair to say also that what would have constituted cruelty under the former law would amount to disharmony. In *Stanwick v. Stanwick* the wife's persistent dishonesty causing acute embarrassment and anxiety to the husband, with the result that his health suffered and rendered sedation necessary, coupled with her leaving him to earn his living and look after children aged 10, six and two, was held to be cruel conduct. A decree was granted to the husband on that ground.

The Discretion to Withhold an Order

It has already been remarked that, under the former law, the granting of a separation order was not as of right but at discretion. The removal of the discretion has simplified matters much, and there can now no longer be situations where an applicant makes out her case but obtains no order. One may take the facts of *Mitchell v. Mitchell*. The effective cause of the applicant wife's departure from home was a clandestine and improper association with another man, of which the husband knew nothing until after her departure. It had to be held that it would not be just to the husband to make an order against him because, if one were made, he would be disabled from petitioning on the ground of desertion after two years from the wife's departure and, if he petitioned on the ground of the separation order having been in force for two years, he would have to wait another year at least. Much less inconvenience would be caused to the wife if the order were refused, and less injustice too. Thus if the proved state of disharmony were brought about wholly or substantially by an applicant and the defendant resisted the application, the discretion might be exercised, as it was here, unfavourably. Today, this wife would be entitled to her order on proof of the disharmony and there would be no argument necessary about the exercise of the Court's discretion.

The Effect of a Separation Order

The effect of making a separation order is not inconsiderable. So long as it remains in force, neither party to the marriage is, by virtue of s.23, bound to cohabit with the other party. Otherwise, save as is provided by the Act itself or any other enactment, the marriage and the status, rights and obligations of the parties remain, by virtue of the same section, unaffected. Even more important are the various effects of an order on the spouses' property rights. Section 26(1) provides that if, while a separation order is in force, either the husband or wife dies intestate as to any property, that property is to devolve as if the survivor had predeceased the intestate.
In the light of this provision it may be wise for each spouse to consult their legal advisers about making a new will or, as the case may be, make a will for the first time. Furthermore, careful thought should also be given to the desirability of commencing proceedings under the Matrimonial Property Act 1976. Leaving these two matters aside, however, s.26(1) is of vital importance to the solicitor engaged in administering the estate of the first spouse to die. A solicitor acting for an applicant, especially an applicant wife, ought to warn his client about its existence and implications. It might well be that, upon further thought, the occasional client will decide not to proceed with the application for a separation order after all. It must be remembered, too, that the Wills Amendment Act 1977 does not refer to separation orders, so that prior wills are not affected by the fact that a separation order has been made. There is thus a very obvious temptation for a husband who has had a separation order made against him, or, indeed who has himself successfully applied for one, and who has disposed of some or all of his property to his wife by his will to revoke his will. If he does, then, (if he has not made a valid new will), he will ensure that he dies intestate and obtain the “benefit” (to him) of s.26(1). The subsection does not draw any distinction between property acquired before the date of the separation order and that acquired afterwards.

The surviving spouse is not, however, left entirely without remedy, since he or she may, despite s.26(1), still claim, within the proper time, against the deceased spouse’s estate as though under the Family Protection Act 1955. This protection is afforded by s.26(2) of the Act.

The Ending of Separation Orders

A separation order is to cease to have any force or effect, according to s.24(1), if (a) the husband and the wife, with the free consent of both parties, have resumed cohabitation as husband and wife or (b) the order is discharged by the Court under s.25 of the Act. This is made expressly subject to s.40 of the Act, which is concerned with resuming cohabitation with a view to reconciliation and is often referred to as the “kiss-and-make-up” rule. So far as (a) above is concerned, there is no need to obtain a Court order, but s.24(2) does, in fact, state that the husband or wife may apply to a Family Court for the discharge of the separation order on the ground that it has ceased to have effect under s.24(1)(a). On proof that the order has so ceased to have effect, the Court is bound to discharge the order. This procedure facilitates proof of the facts that the order was discharged and that the resuming of cohabitation was free.

It is also provided by s.25(1) that a Family Court may, on either party’s application, discharge any separation order if the Court is satisfied that the circumstances have so changed since the making of the order that it is reasonable that the order should be discharged. There is an important proviso to this in subs.(2): the Court is not to discharge the order if an application for dissolution of marriage has been filed by either party and is pending.

The Court might, for instance, take the view that the husband’s mental condition at the time of granting the separation order against him was not necessarily such that he and the wife could never reasonably be required to cohabit again, leaving it open to him to show at some future time that any fears she might have of cohabiting with him were no longer justifiable. When that time came he could conceivably apply under s.25.
CHAPTER THREE

DISSOLUTION OF MARRIAGE
UNDER THE FAMILY PROCEEDINGS ACT 1980

A. Introduction

It appears generally to be accepted today that the policy of a sound divorce law should be that, when a marriage has irretrievably broken down, it should be possible for the empty legal shell to be destroyed with as much fairness as possible and as little bitterness, hostility, humiliation and distress as may be. In the 1980s we shall have the opportunity to see whether the provisions of ss.37-43 of the Family Proceedings Act 1980 as to the "dissolution of marriage" achieve these laudable aims. The concept of "dissolution", it may be noted, is in no way changed: a final order dissolving a marriage dissolves, as was the case with a decree absolute of divorce before the 1980 Act came into effect, not the ceremony of marriage but the parties' married status. At the same time, we must forthwith rid ourselves of any lingering entrenched notions that the dissolution of marriage is "fault based". This may be a difficult process for those who were taught that adultery was to be regarded in all circumstances as a "matrimonial offence" and that the wife who, without justification, refused to join her husband when he was posted to Hokitika—because she preferred to remain in the former matrimonial home in Wellington—was in desertion and was thus "at fault". It should, indeed, be recollected that, even before the 1980 Act became law, there were grounds for dissolving a marriage that were a breakaway from the "matrimonial offence basis" of dissolution, namely, especially, separation by agreement for two years' and four years' living apart.

There may be some people who feel that some sort of time bar should have been included in the new legislation to prevent people from rushing in and out of marriage (or remarriage)—for instance a rule that an application for dissolution cannot be heard within three years of the marriage sought to be terminated. Nevertheless, there continues to be no such time bar in New Zealand law.

B. The Dissolution of Marriage

1. Who may apply?

Applications for the dissolution of marriages are now governed by s.37 of the 1980 Act. Section 37(1) permits either party to the marriage to apply for its dissolution. It also permits, by way of sensible and heat-removing innovation, both parties to the marriage to make a joint application. In the latter event, the proceedings are, by virtue of subs. (3), to be treated as undefended proceedings for the purposes of ss.42 and 174(3) (which deal respectively with the finality of orders for dissolution and appealing).

It is not everyone who has a mind to have his or her marriage terminated who can seek dissolution in New Zealand. Section 37(2) enacts that applications under s.37(1) may be made only where, at the time of the filing of the application, at least one party is domiciled in New Zealand. Accordingly if the French Ambassador to this country and his wife were domiciled in France and one or other—or both—of them were to apply for an order dissolving their marriage in a New Zealand Family Court, there would be no jurisdiction to entertain the application. Section 37(2) would not have been complied with.
2. The ground for dissolution

The single ground for dissolution of marriage is stated by s.39(1) to be that the marriage has broken down irreconcilably. Subsection (2) enacts that in proceedings for an order dissolving a marriage, the Court shall hold that the ground for the order has been established only where it is satisfied that the parties to the marriage are living apart, and have been living apart for the period of two years immediately proceeding the filing of the application for an order dissolving the marriage. It is thus useless to file an application on the ground, for instance, that the spouses have lived apart for the last three months because three months ago the wife returned unexpectedly to the matrimonial home to find the husband and his girlfriend committing adultery. If immediate matrimonial relief is sought, the wife should seek a separation order, with or without a non-molestation order, as already stated.

A very convenient way of proving the requisite period of living apart is to show that a separation order or separation agreement, whether made by deed or other writing or orally, has been in full force for the period of two years immediately preceding the filing of an application for an order for the dissolution of marriage. Realising this, the Legislature, by subs.(3), permits such evidence to be adduced.

There is no discretion to refuse an order if the case has been made out, for subs.(4) states clearly that, in proceedings for an order dissolving a marriage, the Court is bound to dissolve the marriage. The one and only precondition is that s.45 must be complied with. The section enacts that a Family Court is not to make an order dissolving a marriage unless it is satisfied that (a) arrangements have been made for the custody, maintenance, and other aspects of the welfare of every child of the marriage who is under the age of 16 (or, in special circumstances, of or over that age) and those arrangements are satisfactory or are the best that can be devised in the circumstances; or (b) it is impracticable for the party or parties appearing before the Court to make any such arrangements; or (c) there are special circumstances justifying the making of an order dissolving the marriage, notwithstanding that the Court is not satisfied that any such arrangements have been made: s.45(1). In respect of the last matter, a Family Court is forbidden by subs.(2) from making an order dissolving a marriage unless it has first obtained a satisfactory undertaking from either or both the parties to the proceedings to bring before the Court within a specified time the question of the arrangements for every child of the marriage.

The value of the very sound provisions in subss.(1) and (2) of s.45. is somewhat discounted when one looks at the provisions of subs.(3). This says that no order dissolving a marriage shall be invalid solely on the ground that (a) any provisions of subss.(1) and (2) have not been complied with; or (b) any information that is relevant for the purposes of those subsections has not been supplied to the Court; or (c) any information that has been supplied is incomplete, incorrect or misleading; or (d) any undertaking that is given under subs.(2) has not been carried out. One cannot help regretting that, given that Parliament appreciates that married couples with children should not be permitted to regard the dissolution of their marriage as the main purpose of the proceedings and must regard the fate of the children of the family on a par with their own relief, it was not seen fit to make a tighter provision in this context.

Obviously, s.45 does not trouble childless couples at all.

3. Orders Dissolving Marriage and Remarriage

By virtue of s.42 an order dissolving a marriage takes effect as a final order on being made if the proceedings are not defended: s.42(1)(a). If made in defended proceedings, the order will, subject to what is said below, take effect as a final order at the expiration of one month from the date on which it is made: s.42(1)(b). Subsection (2) states that, where a party to any defended proceedings for an order dissolv-
ing a marriage appeals to the High Court within the time provided by s.174, against the making of an order dissolving that marriage, then the following provisions are to apply:

(a) the order is not to take effect as a final order while the appeal is pending;
(b) if, before the expiration of one month from the date on which the order was made, the appeal is withdrawn, abandoned, or dismissed or the order is confirmed by the High Court, the order is to take effect as a final order at the expiration of one month from the date on which it was made;
(c) if, after the expiration of one month from the date on which the order was made, the appeal is withdrawn, abandoned, or dismissed or the order is confirmed by the High Court, the order is to take effect as a final order on the withdrawal, abandonment or dismissal of the appeal or on the confirmation of the order by the High Court, as the case may be;
(d) if the order is set aside or quashed by the High Court, the order shall not take effect as a final order.

It is also provided by subs.(3) that where an order dissolving a marriage is made in defended proceedings and either of the parties to the marriage dies, the order is not to take effect as a final order.

Once an order dissolving a marriage has taken effect as a final order, the parties to the marriage are free to marry again: s.43. It follows from the above that if a person who is a party to defended proceedings remarries prematurely, i.e. in contravention of s.42(2), the second marriage will be bigamous and void. The situation was the same under the former law if a party entered into a second marriage between the decree nisi and decree absolute of divorce: see Wiggins v. Wiggins.¹¹

It is apparent from s.39 that there is one ground, and one ground only, for the dissolution of a marriage. It will no doubt be the case that a petitioner will prove the necessary period of “living apart” and that the respondent who wishes to do so will put forward in reply that the marriage has not irretrievably broken down. In England it seems to be the position that a petitioner’s assertions of breakdown are highly relevant as to this matter but not conclusive.¹²

It seems clear that the marriage must be irretrievably broken down at the date of the hearing: see Pheasant v. Pheasant¹³ where it is also pointed out that if this were not the rule it would make nonsense of the reconciliation provisions in England.

Mere conviction by the Court that the marriage is at an end does not entitle it to dissolve the marriage if the necessary period of living apart has not been found to exist. Richards v. Richards¹⁴ provides a warning. The parties were married in 1963; early in 1970 the husband’s mental illness brought about a change in his behaviour and he became moody, silent and often sat staring into space. Later in 1970 the husband, while attempting to discuss their marital difficulties, lost his temper and struck the wife several times with his hands. They then realised that it was a mental illness that the husband was suffering from. Later still in 1970 the husband brutally struck his wife and early in 1971 the wife left. Later in 1971 she sought a dissolution on the ground of irretrievable breakdown as evidenced by her husband’s behaviour being such that she could not reasonably be expected to live with him. It is fair to say that a wife may reasonably be expected to nurse a sick husband and to put up with some degree of abnormal behaviour from him and that the question in each case is whether that particular husband’s conduct has become so abnormal that she can no longer be expected to live with him. Having duly evaluated these circumstances, Rees. J. found that the marriage had plainly broken down irretrievably but nevertheless held that a decree must be refused because the wife had failed to satisfy him that she could not reasonably be expected to live with him.
C. The Concept of "Living Apart" as seen in Divorce Cases

1. "Living Apart" decisions and assistance given by them

One may safely say that, if both spouses consider that their marital relationship is a continuing one even though they are physically separated, they do not "live apart". Thus if a man has to go away for business or professional reasons, or for health reasons, then the separation may be said to be the result of the pressure of external circumstances. Possibly, even, if he goes away for his own pleasure he is not "living apart". Of course many factors may assist in determining whether there is a "living apart", e.g. whether sexual intercourse is taking place, whether the spouses are living under the same roof, whether or not they enjoy each other's society and protection; whether they recognise one another in public and in private as spouses; do they correspond during separation? The weight of such elements as these will, of course, vary with the health, position in life and all the circumstances of the particular spouses.

The Court will look for a distinct termination of the consortium before being prepared to say that the physical fact of being apart amounts to a separation for the present purposes. The above is clear from Santos v. Santos, a decision of the English Court of Appeal. K.M. Gresson, J. had earlier realised in Crewes v. Crewes, when granting a decree on the ground of seven years' living apart to a husband who had disobeyed an order for restitution of conjugal rights, that various reasons might exist for separating.

He said that the legislature must be deemed to have recognised that there would be widely varying cases, some where the separation had no more been occasioned than by mere incompatibility of temperaments and others where one of the parties had offended. He said it must also have been recognised that where there had been misconduct by one spouse causing, or contributing to cause, the separation, there would be variations in character and degree. Further, he stated that this ground was a legislative recognition of the principle long ago laid down in Mason v. Mason that it was not conducive to the public interest that men and women should remain bound together in permanence by the bonds of a marriage which has irremediably failed. He regarded as "primary" the principle that where a marriage has in fact irremediably come to an end and its purposes have permanently failed, its further continuance is in general not merely useless but mischievous.

A very important New Zealand case on the meaning of "living apart" is one more recently decided by the Court of Appeal, viz. Sullivan v. Sullivan. It was taken there that the term meant the opposite of cohabitation, so that living apart and cohabitation were mutually exclusive opposites. On some eight to 10 occasions between 1946 and 1950 the husband visited the wife, whom he had left in 1942, to see the children. On about half of these occasions he stayed the night. On three or four of such nights he had sexual intercourse with the wife. He undertook household repairs for the wife during these visits but denied that the visits were paid for the purposes of reconciliation. Between 1951 and 1954 there were at least two more overnight stays and sexual intercourse took place with the wife. The question arose whether cohabitation had been resumed.

Many views were put. It is clear that Finlay J. thought that, just as in desertion cases, so in the seven years' living apart cases, the question whether cohabitation has been resumed or not was a question of fact and degree to be determined according to common sense principles. Equally it seemed right to him that in determining whether or not spouses have been living apart an act, or two or three acts, of intercourse without more could not seriously be regarded as necessarily determining the question. This was not by reason of any association between desertion and a state of living apart but merely because they shared a common characteristic in that each is
brought to an end by the same means.\textsuperscript{21} He went on to say\textsuperscript{22} not only that one single act of intercourse, taken alone, would not terminate a state of living apart, but also that several such acts would not do so, and that the significance of every such act must be determined in the light of the circumstances in which the act or acts took place. Eloquent as these acts were as an indication of the resumption of cohabitation, they must, in the light of their circumstances, be considered from the point of view whether there was, at any point of time, some reality of resumed cohabitation, and that this was a question of fact. Turner, J. noted\textsuperscript{23} that mere physical separation could not constitute living apart even if long continued. There must also be demonstrated, on the part of one or both spouses, a mental attitude averse to cohabitation. It might be, in some cases, that the state of living apart came about from mere indifference—that the spouses drifted apart, and that, by a process of which mere apathy was the main constituent, they ultimately began to live apart. In his view, once the parties were physically apart, the actual state of living apart did not begin to exist until that date at which, if the spouse in question were compellingly asked to define his or her attitude to cohabitation, he or she would express an attitude adverse to it and, until this state was reached, cohabitation was not broken. When it was reached, living apart began. But perhaps the most important statement in his judgment is to be found where he indicates that there could be "no possible intermediate stage" between cohabiting and living apart.\textsuperscript{24}

Henry, J. noted that the prescribed statutory state of affairs was not "being apart" but "living apart".\textsuperscript{25}

In the end, the majority of the Court of Appeal, which consisted of five judges, somewhat reservedly affirmed the grant of a decree by the Court below, despite the husband's conduct in staying the night as he had done and having sexual intercourse on some of those occasions. It has to be borne in mind that there were no "kiss and make up" rules at the time of this decision.\textsuperscript{26}

Parties can be cohabiting even though they are not living under the same roof. Thus in Wilson v. Wilson,\textsuperscript{27} up to the date of the admission to hospital of the husband, the spouses had been cohabiting as husband and wife, though it was not clear how the husband had had to be admitted to hospital. After the husband's discharge from hospital the spouses never lived together again. The wife evidently visited the husband, while he was in hospital, on one occasion only. Her purpose was to get him to sign a separation agreement, and this he refused to do. McGregor, J. thought that, at least during the initial stay in hospital, the home occupied by the wife was still the common home of both the spouses and they were both acting from the same base. He considered that the husband had entered hospital by force of circumstance and that, had the stay there been short, then in the absence of contrary intention shown by the evidence, the husband would have gone back to the matrimonial home. Accordingly he concluded that an end had not been put to the consortium by the husband's admission to hospital and that the wife had not made out her case of seven years' living apart. (She presumably had changed her attitude after the husband's discharge and thus too late).\textsuperscript{28}

By way of contrast, in McRostie v. McRostie,\textsuperscript{29} the husband had been in a mental institution for many years. The wife had a child by another man. There was nothing to show that the husband knew of, or could even become conscious of, the wife's desertion of him. F.B. Adams, J. held that a spouse could be deserted without knowing it and that the wife, who had lived with this other man for several years and was known by his name, could set up her own desertion for more than seven years as establishing that she had lived apart from her husband. The Judge explained (at p.637) that there was no anomaly in this because the purpose of the ground of divorce was that even guilty spouses might get relief when their marriages were no
longer real unions. He therefore granted a decree.

It is thus apparent from the above cases that if spouses are separated in the physical sense but not living apart in the legal sense, one of them can decide to live apart thereafter and that decision does not have to be communicated by word or by conduct to the other spouse. Put another way, an uncommunicated ending of the recognition that a marriage subsists can denote the point at which the living apart begins.

An explanation of the fact that spouses are “living apart” may lie in their having had a difference as to where the matrimonial home should be. It used to be said, in the days when desertion was a ground for divorce, that a husband’s first duty was to provide a home for his wife according to his circumstances. It was said the matter should be settled by agreement, by a process of give and take, and by reasonable accommodation and that there was no absolute rule whereunder one spouse could dictate to the other where their home should be. It also used to be stated that the parties might properly agree before marrying on what was to be the home. Unless the reasons on which that agreement rested ceased to exist the agreement was said to stand. Of course changed circumstances might give good reason for a change. The situation of the home might depend on the husband’s work or the wife’s but neither, it used to be said, had a casting vote and the spouses should arrange their affairs in such a way that they spent their time together rather than apart. If there was a difference, then reason must govern. in Jackson v. Jackson, a husband took a house next door to his mother’s without consulting his wife. Obviously this course was likely to irritate his wife. But he did not put his wife under his mother’s domination. The wife left, and it was held that the husband had not abused his marital duties. On the other hand, in Dunn v. Dunn, an inconsiderate chief petty officer returned from long service overseas. He asked his wife to leave their home and join him where he was stationed, not all that far away. The wife was deaf, had some difficulty in making herself understood, and had hardly ever left the district where she had lived. The parties’ elder boy had just started work there. A considerate husband would not have insisted on his wife’s coming to join him and a considerate wife would have put up with the difficulties and gone to her husband. No doubt the husband thought he was being reasonable from his own point of view, but, equally, was he not being unreasonable in not giving proper weight to his wife’s? The marriage foundered because each spouse stuck to the view each had taken. The husband was held to be the deserter.

It would seem that in both cases the spouses could be said to be “living apart” and that either could now apply for dissolution of the marriage accordingly.

One would suppose that the New Zealand courts would agree with the English decision in Fuller v. Fuller. The wife was quite clearly living with another man in that man’s household and her estranged husband was also in that household as a paying guest and it was held that the husband and wife were not “living with each other in the same household” for the purposes of the English statute law. It is submitted that, the consortium having been broken off by the wife, it could properly be said for New Zealand purposes that those spouses were “living apart”.

No doubt also the Family Court would accept the proposition that a mere rejection by a wife of a normal physical relationship coupled with an absence of affection and no more cannot amount to “living apart”. In Mouncer v. Mouncer, the husband and wife were on very bad terms and slept in separate rooms at the wife’s insistence. They continued, however, to take their meals, cooked by the wife, together. Often one or both of their children were present, too. The spouses shared the cleaning of the house, no distinction being drawn between one or other part of the house. The wife no longer did any washing for the husband, who arranged for it
to be done elsewhere. The husband’s sole reason for staying at home at all was that he wanted to live with, and help look after, the children. Obviously this family were all sharing the same household and the spouses could not be said to be “living apart”. To all outside appearances, the parties would be Mr & Mrs Mouncer and family living in the home.

One thing is very clear, however, and that is that an applicant must not only have been living apart from the respondent in the sense that there is a physical separation but also must have formed the intention of deserting and abandoning the respondent and held it for the necessary period. This is shown by M. v. M. In 1949 the wife was admitted to hospital and had remained there for 17 years. The husband had also suffered from ill-health and could not have cared for his wife at home. He visited her in hospital and treated her with sympathy. Early in 1966 he petitioned on the ground of seven years’ living apart. T.A. Gresson J. found as a fact that, up until 1962, the husband had merely been accepting the fact that his wife’s failing health meant that she would never be likely to return home, and that only in 1962 had he consciously formulated an intention to finally abandon or desert her and thus end the consortium. Therefore the husband’s petition had to fail, the consortium not yet having been intentionally ended for the necessary seven year period. No doubt the result would have been the same had the wife petitioned.

2. Is there any Assistance from cases on desertion?

It would seem that an applicant for dissolution could satisfactorily show that he or she had been deserted in the strict legal sense of the term as used in the former Matrimonial Proceedings Act 1963, s.21(1) and obtain an order under the new legislation. Under the old legislation the Courts took the view that desertion could not be precisely defined. Essentially it meant the separation of one spouse from the other one, with an intention on the deserter’s part of bringing cohabitation permanently or indefinitely to an end without reasonable excuse and without the consent of the deserted spouse. In short it was a total breaking off of conjugal relations. Lord Merrivale P. put it nicely when he said that desertion was not a withdrawal from a place but from a state of things, for what the law sought to enforce was the recognition and discharge of the common obligations of the married state: Pulford v. Pulford. His “state of things” could usually be termed the “home” but it was quite possible for there to be desertion where there had not been any prior cohabitation as where a husband leaves his wife at the church door after the marriage ceremony. Even if he makes some sort of monetary allowance to her, this would not excuse the leaving of her.

W. v. W. neatly illustrates a state of desertion. A public servant was posted to Hokitika whereupon his wife decided to remain in the family home in Wellington. The husband took up his new duties and at the end of 1951 obtained a flat there as a home. His wife visited him there early in 1952 and stayed for a week. She then returned to Wellington where she stayed for the whole of the husband’s service in Hokitika. He retired from the public service in May 1955. He claimed that he had been deserted by his wife from the end of January 1952. F.B. Adams, J. upheld his contention as the wife had clearly forsaken the husband for an indefinite time. She had left it to him to choose to repair the broken bond by resuming cohabitation in Wellington. She had no reason at all for not going to Hokitika, so that it could not be said that there was just cause for her remaining in Wellington. No doubt she hoped, believed or intended that cohabitation would be resumed at some later time. But, having abandoned her husband with the intention that that abandonment should continue indefinitely, her hopes, beliefs or intentions availed her nothing. The
husband did not have to show that he was at all times during the Hokitika period ready, able and willing to have his wife back. It was up to the wife to bring the desertion to an end. Until she did this, the husband could properly assume that her intention to desert continued.

It is considered that, were this set of facts to be appropriately updated, the husband could easily prove that there had been two years' living apart. That that living apart was caused by the wife's "fault" is undeniable, but this is not relevant. For that matter, the wife could herself apply, relying on her own desertion, under the new law.

Where desertion is to be relied on as satisfying the ground, it is necessary still to remember that two elements had to co-exist, viz. the factum of physical separation and the animus deserendi, i.e., the intent to bring cohabitation to an end. Furthermore, the abandoned spouse must not have consented to the separation, and there must not have been any conduct reasonably causing the allegedly deserting spouse to form an intention to bring cohabitation to an end.

There may well be a de facto separation without any animus and, therefore, no desertion, as where spouses mutually agree to go their separate ways or a husband goes overseas on a business trip or away from home to recover from an operation. There may be a compulsory separation, as where a husband has to go overseas on military, naval or air force service or a spouse is sent to prison. But if the animus deserendi supervenes, then desertion will begin to run from that point unless consented to: Bodell v. Bodell.38

Conversely, there may be an animus deserendi without any separation, as where the husband and wife live under the same roof at arm's length as one household and not two.

Certain cases are of some little difficulty, however, and it is worth discussing them.

In Nutley v. Nutley,39 by agreement between the husband and wife, the wife left the matrimonial home in Oxford to look after her ailing parents, who lived in another part of that city. This agreement was made in the early 1960s and it may well have been thought that certainly the father, who had had a heart attack, and possibly the mother, would not live for long. In fact they lived until November 1967. In July 1968, the husband petitioned for divorce on the ground of three years' desertion by the wife and he accordingly had to prove to the court's satisfaction that the wife had been in desertion since July 1965. It was part of the husband's case that, not long after going to her parents' home, the wife had decided not to return to the husband. This decision was not, however, at any material time communicated to the husband. Dismissing the husband's appeal against the trial judge's finding that desertion had not been made out, a unanimous Court of Appeal held that, on the above facts, the husband must be taken to have consented to the wife's going to look after her parents for their lifetime. Hence, in July 1965 the purpose of her going to her parents had not been fulfilled, whatever decision she may already have reached about not going back to her husband. Accordingly, at that date, her husband's consent was still in existence and had not been withdrawn—in other words, the separation was not against his will. Indeed, it continued in force until the parents' deaths.

Had the wife told the husband, having gone to her parents, that she was never going to return, that might have been a very different state of affairs, since it would probably have put an end to the husband's consent to her being temporarily with her parents.

In Tickle v. Tickle,40 on the other hand, the spouses were married in 1958. Not long after marriage, they got into financial troubles and the husband, whose personality was inadequate, began to suffer in his nervous health and could not main-
tain a consistent working record. In 1966 he entered a mental hospital as an in-patient. His original intention on discharge was to return to his wife but, towards the end of his period of treatment, he was given advice by his doctor as a result of which he told his wife he proposed instead to live permanently with his mother when he was discharged—a suggestion the wife refused to accept.

On discharge the husband in fact went home and, on the doctor's further and final advice, suggested to his wife that he should live with his mother for three months and take the children with him—which the wife again rejected. The husband left for a short time, and then returned and told the wife he was going to live with his mother. He in fact went to live with his mother and never took any steps to provide any money for his wife's support, though he obtained, and kept, quite well-paid employment. In evidence the husband said he would never go back to his wife and the doctor testified that if the husband were to return to his wife, he would have to be hospitalised again and that no end to that position could be seen. Prima facie, one might think there was justification here for a temporary separation and that there was no intention to bring cohabitation permanently to an end and thus that there was no desertion by the husband. It was held, properly it is thought, that the evidence as a whole—particularly the lack of provision of maintenance—did manifest the factum and animus deserendi necessary to find the husband in desertion.

In Drew v. Drew,41 the wife applied for dissolution on the ground of adultery coupled with desertion by her husband, a solicitor. At that date, wives, to get a divorce, had to show adultery plus desertion by their husbands for two years. The husband had left in January 1886 by telling his wife that he was going for a week's shooting in Ireland, but in fact he went to Australia to escape a charge of embezzling funds entrusted to his care. Adultery had taken place in England and Australia. The husband was caught and brought back to England, tried and sentenced to ten years' penal servitude, being sentenced in November 1886. Sir James Hannen, P., held that the circumstances under which the husband left his wife amounted to desertion and that the desertion continued even though he had been brought back in custody to England, and, owing to his sentence, was prevented from returning to her even if he had wanted to.

Two households under the same roof, or one?

A rather special type of case is exemplified in Baker v. Baker.42 On an undefended petition for divorce brought by the husband on the ground of desertion, it was proved that, for more than the three years required by English law, the parties had been living in the same house, which they owned jointly. Each occupied a separate bedroom, the husband sharing his with a lodger, and sitting-room. The spouses had to share the one kitchen, but each cooked his or her own food separately, each did their own cleaning and, whenever possible, took care not to meet on the stairs and passages. The husband paid no allowance whatever to the wife and she clearly did nothing for him. Indeed she had utterly renounced the obligations of the marital life without cause. A unanimous court held that there were two separate households on these facts and, since it was clear that it had been the wife's fault that the one household had been broken into two households, the husband was granted a decree.43 No doubt, on these facts, the wife would now be able to apply successfully for the dissolution of the marriage.

There is no doubt that these cases of spouses allegedly living apart under the same roof require special watching. If all the obligations of matrimony have been abandoned by the respondent, as in the Baker case, and if all cohabitation has ceased and
no wifely services are performed, it is easy enough to say there are two households. On the other hand, it may appear that there is separation of bedrooms, separation of hearts and speaking, yet one household is carried on, one kitchen where the cooking is done; that the meals are had from the same supply, the husband providing money and the wife buying the food—in which case there cannot be any desertion. So, too, if it appears that isolated and intermittent services are performed, or that, while one spouse takes refuge in one room for a little peace, but shares the common dining table and some part, at least, of the family life, there cannot be two households; Hopes v. Hopes.\(^44\)

**Defences to desertion**

Since desertion is no longer per se a ground to dissolve, one should not talk about "defences" thereto. However, the former defences are still, to some extent, relevant. A period of "living apart" may, on the facts, prove to be something other than desertion. In Fisher v. Fisher\(^45\) it was held that desertion had been terminated by a subsequent deed assenting to the separation or by each spouse making it clear to the other that on no consideration could they ever live together again. While desertion may explain the previous "living apart", it does not explain the later "living apart". The later "living apart" is consensual. Before the law was reformed one had to be careful not to seek the wrong relief by, e.g., pleading desertion for two years when the case was really one of a separation agreement having been in full force and effect for two years. It would now seem to be in order to add say 18 months' desertion to 6 months' immediately subsequent "living apart" by agreement to make one's necessary 2 years' "living apart".

It was also a defence to desertion to say that there was no *de facto* separation. The classic case would be that of a married couple living at arm's length under the same roof but still as one household. Such a couple, it is thought, could not be said to be "living apart" for the purposes of the present law. It has long been said that, while there may be cause for complaint, some matters could not per se amount to desertion e.g., neglecting opportunities to consort with one's spouse; showing indifference, want of proper solicitude; illiberality or denial of means. Such matters cannot, it is submitted, constitute "living apart". Similarly if parties are living together, a persistent refusal of sexual intercourse by one of them without any other conduct on the part of either spouse making for disruption of the marriage is not simple desertion because it has not led to their living apart: see Weatherley v. Weatherley;\(^46\) Barker v. Barker.\(^47\)

It used to be said also that if the respondent had "just cause" for leaving, he or she was not a deserter. For instance, if a wife persisted in making charges of homosexual conduct against her husband after ceasing to believe in their truth and the husband left in consequence, he would have been held to have had "just cause" for leaving her. On the other hand, it was said that mere ill-health of the other spouse, or temperamental incompatibility would be no "cause" for leaving. Yet again, the health and safety of the children of the marriage might demand that the wife leave her husband and take them with her away from his terrorising of them. It is considered that, whether or not there are circumstances present which would have amounted to "just cause", now all that matters is the question: are the spouses "living apart"? While the just cause may *explain* the "living apart", it no longer has to *excuse* it, for no defence is called for. The same may be said of those cases where a spouse honestly and reasonably, but mistakenly, believed that he or she had been wronged by the other and had left in consequence. The departing spouse was said to have "just cause". On the other hand, it used to be said that if the belief was only induced by extraneous cricumstances and not by the other spouse's conduct, then
there was no "just cause". It would not now matter that there was no "just cause".

Is there assistance from the cases on constructive desertion?

When desertion was a ground for divorce one did not test it simply by asking who was the first to leave the home. The position might have been that one spouse had been forced by the other's conduct to leave home. There was said to be no substantial difference between the case of a man who means to cease cohabitation and leaves his wife and the case of a man who, with the same intention, compelled his wife to leave him. Put another way, if a man persisted in treating his wife in a way which he knew she probably would not tolerate and which no ordinary woman would put up with, and she left him in consequence, the man was said to be in "constructive desertion". There still had to be animus and factum, the latter being the expulsive conduct. To succeed, a petitioner had to show conduct which was of such grave and weighty character as to make cohabitation virtually no longer possible and which the Court could properly regard as equivalent to expulsion in fact. If the conduct complained of did not pass this test relief was not to be had. Obviously some cases "proved themselves", e.g. if a husband committed incest with his own daughter, and his wife left. Equally obviously, conduct which was merely the reasonable wear and tear of married life did not pass the test. In the middle there was a "no-mans-land", where the question of whether or not there was constructive desertion was one of fact, as where a wife left because her husband continually drank, though he was not violent and not an habitual drunkard; the wife's health never suffered, but the drinking was constant, the husband stayed out late at night; he woke the family on his return and used to cause a disturbance in the street before being let in. The wife left. On the other hand, if a wife left simply because her husband was neurotic she could not claim that she had been constructively deserted. On the other hand again, an unreasonable refusal of sexual intercourse resulting in the refused spouse's departure could amount to constructive desertion.

One may now say that conduct amounting to constructive desertion may well explain why the parties are "living apart". But the conduct will not need to be pleaded as such. Indeed, conduct not amounting to constructive desertion may now explain the parties' "living apart". In Bartholomew v. Bartholomew, a husband returned from war service to find his home filthy and that his wife was a slut. He adopted the expedient of telling her to mend her ways or he would go. The delivery of this ultimatum having proved unavailing the husband left. The Court of Appeal held that the wife's sluttishness did not of itself amount to constructive desertion and the warning did not make it so. There would now be no need to approach the case in this way. It would be enough that the parties had "lived apart" for the necessary two years.

Termination of Desertion

Under the former law it was possible to set up the defence of subsequent determination of desertion. Desertion was said to continue until it was terminated. Such termination could occur by the deserter's return to the deserted spouse. It could also be terminated by a supervening animus revertendi coupled with a bona fide approach to the deserted spouse to resume married life, though the change of heart had to be made known to the deserted party. It was also said that a refusal of a bona fide offer to return when the deserted spouse had no right to refuse it operated to turn the tables and rendered the deserted party the deserting party.

It would seem clear that parties cease to "live apart" if the deserter does actually return on a let bygones by bygones basis, i.e., as a consequence of reconciliation. The factum of return in this sense, it is submitted, could even now be capable of
operating as a defence, e.g., that H deserted W and came back after 15 months' living apart. If, on the other hand, H deserted W and, after a year, asked to be taken back and W wrongfully rejected his offer so that H remained separate for another year, it would not be relevant that W had become the deserter for the last year. Either H or W could apply on the ground of two years' living apart. 49

Under the previous law it was also said that desertion could be terminated by the parties having resumed cohabitation and it is clear that the old law must continue to be helpful in determining whether or not spouses are "living apart". One had to be cautious because a resumption of cohabitation might be explicable on two grounds. In the first case, the parties might have meant bygones to be bygones, have reconciled and then come together again. In the second case, they may have intended simply to have an experimental reconciliation to see whether they could "make a go of things" taking advantage of the so-called "kiss and make up" rules to be found in s.26(1) and 26(2) of the former Matrimonial Proceedings Act 1963. Which of the two occurred depended on the parties' intentions and the facts of the particular case. It was vital to know which of the two cases had occurred. If it was the first, then there was a true resumption of cohabitation and the desertion would have ended. If, on the other hand, it was the second, the resumption would have only been experimental and the desertion would not have been determined. Only one period of three months, was permitted, however, and reconciliation must have been the sole or principal motive for the resumption.

It would appear that the position remains much the same under the new law. By s.40 of the Family Proceedings Act 1980 it is provided that, for the purposes of ss.24 and 39 the parties to a marriage are not to be held to have ceased to live apart or to have resumed cohabitation by reason of having resumed cohabitation on one or more occasions for a period or periods not exceeding in the aggregate three months, whether or not there have been acts of sexual intercourse between the parties, where the Court is satisfied that reconciliation was the sole or principal motive for the resumption of cohabitation.

Section 41 further states, that, for the purposes of s.39 of the Act, there is to be no presumption that the parties to a marriage have ceased to live apart by reason of acts of sexual intercourse between them (whether or not the sole or principal motive was reconciliation) without the resumption of cohabitation.

Sections 40 and 41, which are far more realistic than their predecessors, are discussed further below, but the sort of case that created difficulty is Abercrombie v. Abercrombie. 51 In 1940, the wife obtained a separation order against her husband on the ground of his persistent cruelty. In 1943 the husband sought a reconciliation as a result of which the wife wrote back in affectionate terms and meetings were arranged. On each of them sexual intercourse took place but they never spent a night together. The husband was a doctor who held various locum tenens appointments, so he had no settled abode. On two occasions they spent the night at a friend's house and they had a week-end together at a London hotel. The question arose whether there had been a resumption of cohabitation. The Divisional Court held that there had been. It considered that the occurrence of sexual intercourse was not conclusive, though it was of great weight. A resumption of cohabitation meant resuming a state of things and, if there was no such resumption, an isolated act of intercourse might be neither here nor there and so would not interrupt the desertion.

In this case, the Court viewed the visit to London, if no more, as pointing to a second honeymoon, a reconciliation and a resumption of cohabitation. Since the husband had no home because of his job and could not in fact invite his wife along with him, the Court felt that no other conclusion could be drawn. In the parties' circumstances, this was as good a return to the fold as was possible.
It will be appreciated that, if the new "kiss and make up" rules to be discussed below were to be administered in this strict manner, then none but the dewy-eyed or the foolhardy would dare risk having a period of attempted reconciliation—for fear of being told by the Court that they have ceased to "live apart".

The facts may, unusually, reveal a situation which is neither a full resumption nor a trial one. In *Bartram v. Bartram*, the wife returned, having nowhere else to go, to the husband's mother's house, where the husband was living for business reasons. The wife refused to sleep with the husband, she performed no wifely duties for him and treated him like a lodger whom she disliked, but, out of common necessity, she had to share the same meal table. Indeed, the wife had originally refused to join the husband at that house as she wished to have no more to do with him. It was held that this was not a resumption of cohabitation despite their presence together under the same roof, as the wife clearly had no intent to resume her wifely duties.

D. Proof of Living Apart under Separation Agreements and/or Separation Orders

1. *Separation Agreements*

   Since s.39(3) states that a separation agreement, whether made by deed or other writing or orally, that has been in full force for the period of two years immediately preceding the filing of an application for an order dissolving a marriage may be adduced as evidence of living apart for the required period, something must be said about such agreements. Under s.21(1)(m) of the former Matrimonial Proceedings Act 1963 (as subsequently amended) a divorce could be had on the ground that the spouses were parties to an agreement for separation, whether made by deed or other writing or orally, and that the agreement was in full force and had been so for not less than two years. Petitions under that heading were subject to the obligatory requirement of dismissal if the respondent opposed the granting of the decree and it was proved that the separation was due to the petitioner's wrongful act or conduct. This bar was laid down in s.29(2). It is not consonant with a "no fault" divorce law and has not been re-enacted. Furthermore, the ground did not entitle a petitioner as of right to a decree because s.30 of the 1963 Act stated that the grant of a decree was at the Court's discretion. This discretion has now been removed.

   It would seem that one must still ask what one asked before the new legislation: does an agreement exist? If it does not exist, then it is useless to adduce it in evidence of two years' "living apart". Obviously there will be little difficulty where there has been a properly drawn up written document. Where there is none, the matter can be problematical. In any case it is a question of fact whether or not there has been an agreement to terminate married life. If the agreement reserves to the wife a unilateral right to return to the husband after six months if she so wished, it would not be an agreement for permanent separation and it is doubtful if it would be acceptable evidence for the present purposes: see *White v. White*.

   Presumably also, as before, an agreement to separate in the future entered into between spouses living together would be void as contravening public policy and therefore unacceptable as evidence. Thus if parties agree to separate under an agreement purporting to operate at once but do not in fact separate until a year later but live in the same house and share the same bedroom, though not having sexual intercourse, the agreement would be void inasmuch as the parties did not separate at once: see *Westmeath v. Westmeath*.

   With this must be contrasted *T. v. T.* The parties agreed to part and did cease to cohabit, but, desirous of concealing their true position from the children pending the return of the wife to the U.K., the parties openly behaved as though all was well between them for just two days. It was held that, though the spouses may not have
spatially separated at once, it was quite clear that their signing of the agreement in fact marked the end of the matrimonial relationship and the agreement was valid. No doubt a similar agreement today could properly be adduced as evidence.

If the evidence falls short of a mutual engagement to carry the separation into effect or if there is no common will to live apart and no communication thereof, one cannot say that there is a separation agreement capable of being adduced as evidence. In Ducker v. Ducker the husband had been willing to consent to a separation order being made against him but he disputed his liability to maintain his wife. In fact the Stipendiary Magistrate dismissed the maintenance application. In due course the husband invited the Court to spell out a separation agreement from the fact that the wife had asked for the separation order and that his solicitor, as instructed by him, had said in Court that he would consent to the separation order. It was held that there was not a valid agreement to separate because the wife wanted both orders and the husband was willing in respect of one of them only. In short there was no acceptance in the terms of the offer. Such an “agreement” would be useless as evidence. In Smalley v. Smalley, the husband had been commanded by his wife to get out and stop out as he was not wanted any more. The husband, without further words, left and there was no further cohabitation. The Court was not prepared to infer an agreement to separate from this conduct.

The wife’s words were not an offer, but a command. Even if they were an offer, there was no due acceptance by the husband, for he had made no reply and had merely acquiesced by going. There must, therefore, be some written or spoken words, although, in construing them, the Court will, in doubtful cases, have regard to the parties’ conduct. So conduct alone will not suffice however strongly it may point to a mutual separation. In a case such as the Smalley case, then, it avails nothing to prove the separation by setting up the “agreement” as evidence.

Perhaps the furthest the Family Court will go can be illustrated by McKay v. McKay. The parties had been estranged for some while when, without prior discussion of preliminaries leading up to an agreement to separate, the wife asked: “Can I go now?” and the husband assented. This incident occurred after the wife’s goods, which were on a carrier’s van ordered by the husband, had been removed from the home. It was held in these unusual circumstances that the husband had understood his wife to be proposing that their married life was over and that he had assented to her proposal and that there was a valid agreement to separate.

The evidence must show not only that there has been an agreement to separate but also that it has been in force for the necessary period of time. In Chapman v. Chapman, the parties had orally agreed to cease living together as husband and wife but, at the same time, agreed that the husband should not leave the home as he wanted to share the lives of their children. The husband remained for five years and more. He slept in a separate room and the wife performed no wifely services for him. There was no direct communication between the spouses. A divorce petition based on the agreement failed because there was never any definite break in the parties’ apparent relations. They were not really living apart. They had not ceased to reside together. On the other hand, in Leslie v. Leslie, the husband did actually leave the home pursuant to a written agreement but, nearly a year later, came back for 14 months, not in the capacity of husband at all, but so as to be able to see more of his sons. There was no association with the wife other than at evening meals and the odd excursion in the car. The husband saw to his own washing etc. When the eldest son left home, the husband went to live at his office. It was held that the continuance in force of the agreement had not been affected by the husband’s return.

Similarly, in Daniels v. Daniels, the husband had returned to the private hospital his wife was running—as a guest or boarder—for some 11 months during the cur-
rency of their separation agreement. The spouses occupied separate bedrooms and there was no resumption of cohabitation. It was held that the continuance of the agreement had not been broken by the "return" of the husband. Ambiguous though the circumstances of these husbands' "returns" in these two cases may appear to be, there is no doubt that the spouses' conduct in both cases indicated clearly that they meant that the agreements to separate should remain in full force and effect.

(It may be noted in parenthesis that the 1980 Act continues to provide for separation agreements by persons of unsound mind: see s.185.)

2. Separation orders

Under s.21(1)(n) of the former Matrimonial Proceedings Act 1963, as amended, a divorce could be granted on the ground that (i) the spouses were parties to a decree of separation or separation order made in New Zealand, or to a decree, order or judgment made in any other country if that decree, order or judgment had in that country the effect that the parties were not bound to live together, and (ii) the decree of separation, separation order or judgment was still in force and had been in force for not less than two years. Petitions under this head were also subject to the obligatory requirement of dismissal if the respondent opposed the granting of a decree and it was proved that the separation was due to the petitioner's wrongful act or conduct. This provision was contained in s.29(2) of the 1963 Act and has not been repeated in the new legislation. Further, decrees granted under this head were, by s.30 of the 1963 Act, granted at the Court's discretion and not as of right. The discretion has been removed by the new legislation.

If a separation order is to be adduced as evidence of living apart for the required period under the new legislation, it must have been in full force for the two years immediately preceding the filing of the divorce application.

If therefore, the separation order is discharged validly under the Act it ceases to be in full force and cannot be used as evidence. It has, however, been held that, if a separation order is bad on the face of it but 'the parties have nevertheless acted upon it and looked on it as an effective order, a divorce petition may be founded on it so long as it has been "in force" for the necessary period: see Phillips v. Phillips; Samson v. Samson.63 No doubt such an order could be used as evidence under the new Act.

In Carroll v. Carroll,64 the wife had obtained a separation order against the husband five years before petitioning thereon. Cohabitation was never resumed and the order remained in force down to the date of the petition. The question was raised whether the wife's right to a decree was affected by the fact that the husband was committed to a mental hospital two months after the order was made and remained there ever since. It was held that it was unaffected and that a decree should be given. Blair J. observed that, even if the husband had been normal and had been desirous of healing the breach, it by no means followed that the wife would also have been willing to do so.

Interrelation between separation agreements and separation orders

It could happen that spouses agree to part, do in fact part, and, within the two years before dissolution is sought, one or other of them successfully obtains a separation order. This raises the question whether the agreement remained in force after the making of the separation order. Under the former legislation this was a really important question for, if a petition was based on a separation agreement having been if full force for two years, the petition would have to fail if the currency of the agreement was broken by the grant of the separation order. Reference may be
made to Ramsay v. Ramsay,63 where the petition failed and Taylor v. Taylor66 where it did not. In the former case, the wife was the petitioner and it was she who obtained the separation order. In the latter, the wife was the respondent and the separation order had been made by consent.

Under the present law one must be careful not to offer as evidence of living apart for two years an agreement which has been interrupted by the grant of a separation order while the two year period is running.

E. The Bars to a Divorce

Under the former Matrimonial Proceedings Act 1963 there was a welter of bars to the grant of a divorce. Treatment of these bars occupied many pages in the textbooks. Some bars were absolute, while others were discretionary. The new legislation has mercifully rendered the bulk of the voluminous scholarship that one had to acquire quite superfluous. No-one need amass the knowledge, therefore, of the niceties of connivance, the interstices of collusion, or think great thoughts about condonation and its remoter aspects, nor crystal gaze as to whether or not the Court will favourably exercise its discretion.

Nevertheless, it would be wrong to say that there are no longer any bars at all. Clearly it must continue to be a bar to the dissolution of a marriage where the Court has no jurisdiction in the conflict of laws sense to entertain the application. This would be the case where neither spouse was domiciled in New Zealand when the application was filed. Also, a Family Court cannot dissolve a marriage where it is not satisfied that the parties are living apart at all or that, though living apart at the time of the filing of the application, they have lived apart for the necessary two years.

Under the old law, the Court was required to dismiss any petition for divorce based on a matrimonial wrong if the wrong complained of had been "condoned"; see s.29(3) of the Matrimonial Proceedings Act 1963. The general idea of condonation was that of forgiveness, which might be conditional, or remitting by the so-called innocent spouse of the guilty spouse’s matrimonial offence (e.g. adultery or simple or constructive desertion) coupled with a reinstatement of the offender to his or her former matrimonial position. In almost all the cases in which that bar was successfully set up, one used to find that either the innocent party had resumed cohabitation with the guilty spouse or, if when the innocent spouse first became aware of the other spouse’s offence, cohabitation continued nevertheless.

One had, however, carefully to contrast condonation proper with the kiss-and-make-up rules contained in ss.29(4), 29(5) and s.34(2) of the 1963 Act. Very careful inquiry into the facts was necessary in these cases. In Brown v. Brown,67 for instance, the wife confessed her adultery to her husband and he fully forgave her and sexual intercourse took place between them as before. Shortly afterwards, the husband withdrew from cohabitation and the wife claimed that he had deserted her. The magistrates said that the husband had condoned the adultery and hence that he could not say that the wife’s adultery gave him good cause for leaving her. The husband argued on appeal that the contemporary English kiss-and-make-up rule allowed him a postponement of his final decision and that, as the three month rule then allowed in England had not yet elapsed, the magistrates ought not to have held that he had condoned the adultery. The Divisional Court held that, on these facts, there had been an absolute forgiveness from the outset and that there had never been any question of the kiss-and-make-up rule being invoked. In short, the Court said that the continuation of the cohabitation was the consequence of the reconciliation and the letting of bygones be bygones, and not with a view to reconciliation, a point which has already been made in the discussion on desertion.

There are two sections in the Family Proceedings Act 1980 which have been men-
tioned before, and which are set out again here for the sake of convenience. It is they which may be said to contain the new "kiss-and-make-up" rules for New Zealand.

Section 40 states that, for the purposes of s.24 and s.39 (which deal with the discharge of separation orders by resumption of cohabitation and the granting of orders dissolving a marriage), the parties to a marriage are not to be held to have ceased to live apart or to have resumed cohabitation by reason of having resumed cohabitation on one or more occasions for a period or periods not exceeding in the aggregate three months (whether or not there have been acts of sexual intercourse between the parties) where the Court is satisfied that reconciliation was the sole or principal motive for the resumption of cohabitation.

Section 41 states that, for the purposes of s.39 of the Act (which deals with, as we have seen, orders for dissolving a marriage), there is to be no presumption that the parties to a marriage have ceased to live apart by reason of acts of sexual intercourse between them (whether or not the sole or principal motive was reconciliation) without the resumption of cohabitation.

It used to be said that, before a matrimonial offence could be said to be condoned, the spouses must have had a bilateral intention to come together again. There was no need for the so-called innocent spouse to have broken up the home before he became capable of condoning. The bilateral characteristic of condonation was somewhat special. Mutuality was not an essential element in the reinstatement save and insofar as the wrongdoer had to consent to being reinstated. The wrongdoer's consent or co-operation could not be credited in terms of agreement or contract. Thus if an adulterous wife was "received back" in this sense by her husband and she agreed to be "received back", nothing more was required of the wife and, as in the Carson v. Carson, the husband was held to have condoned. Presumably we should now say that these spouses had resumed cohabitation. If, on the other hand, one were now presented with the facts of Cook v. Cook, one would say the spouses had not resumed cohabitation. There the wife returned to her adulterous husband as his paid housekeeper. She hoped for a reconciliation. The husband had no such hope at all. There was clearly no intention of resuming cohabitation as spouses and it was held that there was no condonation.

If a spouse attempts a reconciliation and it fails, the situation is saved by ss.40 and 41.

In Morley v. Morley, a wife had left her husband and took proceedings against him for persistent cruelty and wilful neglect to maintain her. In the course of the hearing the wife indicated her willingness to return on condition that her husband did not hit her again and that he would in future travel in connexion with his business interests in the south of England and away from his parents. The wife duly rejoined her husband and he almost at once refused to abide by the second condition, which he had previously agreed to. The wife remained with the husband for a few days, during the whole of which time she persuaded him to adhere to the conditions. Sexual intercourse took place twice, the wife being a willing party. The husband still refused to abide by the conditions. The hearing of the wife's case, which had been adjourned, was resumed. The question arose whether she had condoned the husband's cruelty. It was held that she had not. Were this case to arise now, it is considered that the Court would say that this trial, or truly conditional, reconciliation had failed and that both spouses could rely on s.40, or if not on that section, then on s.41.

With this may be contrasted Baguley v. Baguley. The wife sought a divorce on the ground of the husband's cruelty. Previous to the suit, however, the parties had separated but had been reconciled. It had been agreed that bygones should be bygones and that they would live together when the previous matrimonial home
(where much of the unhappiness had occurred) was disposed of and the husband had found another one. There therefore had been complete reconciliation as far as words could effect it, together with the "proviso" about future married life being spent in another home. During a visit to the husband's parents' home, however, a single act of sexual intercourse had taken place and the wife had been a willing party to it. The husband had not, at that stage, found a new home and the question arose whether the wife had condoned. The English Court of Appeal held that she had, for she had clearly forgiven the husband and had reinstated him. Obviously these parties were not kissing-and-making-up when in the husband's parental home, for they had already reconciled. It is, therefore, most unlikely that, had this been a New Zealand case, the Family Court would hold that ss.40 or 41 would apply. The "proviso" about the new house was not a precondition of the agreement to reconcile. Both had agreed that a new home should be found.

It is conceivable, however that the Family Court might be willing to find that the parties had lived apart from the date of the separation and that they had not resumed cohabitation and that, pursuant to s.41, it must not be presumed against them that there had been the isolated act of intercourse. It is, however, not easy to see how such a decision could be arrived at when, as a result of the agreement that bygones were to be bygones, neither party could be said to be averse to cohabitation. Mrs Morley, by way of contrast, was throughout insisting that she must not be hit again and that she and her husband must travel on business away from his parents.

Some difficulty arises in a case such as France v. France.72 The husband left his wife because she told him she did not love him and that she loved another man. She refused to cohabit with him and told him to go. This was accepted as constituting constructive desertion. Thereafter, the husband, who was in the merchant navy, revisited the wife from time to time and, over a period of two years, had sexual intercourse with her six times during visits. It was, in fact, clear that the husband was treating his wife as one of a number of girlfriends with whom he could have, and did have, sexual relations. It was equally clear that these visits and the sexual intercourse were not meant by either spouse to be attempts at reconciliation. It was held that the husband had, by having had sexual intercourse with his wife, condoned the constructive desertion.

It may very well be that a New Zealand Court might regard this case as one of consensual separation. But, even if it did, what would be the legal position? The evidence suggests clearly that there was no question of "kiss-and-make-up" and therefore that s.40 was completely inapplicable. Could it be said that each visit constituted a resumption of cohabitation and that the cohabitation ended when each visit ended? If so, then the two year period would have to run from the date of the ending of the last visit. Or would the Court say that there had been no resumption of cohabitation since the husband had been expelled, that, s.41 applies and it did not matter that reconciliation had not been the sole or principal motive for having the sexual intercourse? To arrive at this conclusion is to conform with the long-standing notion that isolated acts of intercourse between spouses does not necessarily put an end to desertion: see e.g., Mummery v. Mummery.73 It also suggests, however, that there is no stick with which to beat the general sexual laxity of people such as this husband. By saying that this husband had condoned his wife's offence, the English Court of Appeal was at least able to prevent his remarrying.

If cohabitation is resumed, must both spouses realise what precisely is the basis of their doing so? The answer must be yes, if Quinn v. Quinn74 is any guide. The wife had there said she had gone back to her husband for a trial, or experimental, period to see if things would work out. The husband, however, was never told that this resumption of cohabitation was anything but long-term. Indeed, he testified that he
looked on the return of his wife as evidencing the indication of a fresh start—especially as there had been a discussion with her about his possibly affording fees for their child’s education at a private school and her obtaining a job to help. It was held that there had to be a joint intention to treat the resumption of cohabitation as being for a trial reconciliation. Put another way, there must be mutuality or, at least, knowledge on the part of one spouse that the other was treating it so. Quite clearly the husband here had no such intention or knowledge.

What if the period of three months mentioned in s.40 is exceeded? In *Tynan v. Tynan,* there had been an estrangement between the spouses and the wife committed adultery during this period of separation. The husband began divorce proceedings but the spouses reunited in October 1968. The wife made it a condition that, if they were to reunite, the husband must abandon the divorce suit. This he took active steps to comply with but, in the events which happened, his petition was not abandoned. The wife resumed the running of the home and looked after the children. No sexual intercourse took place, though the spouses had beds in the same room. In mid-January 1969, they moved to another home where they had separate bedrooms. The marriage deteriorated and they separated again on 27 March 1969, that is to say after a reunion of four and a half months. Full reconciliation had obviously never taken place in the sense of the restoration of full emotional accord between the spouses. Wrangham J. had to hold that the husband had condoned the wife’s adultery. It would seem that the Family Court would have to hold that the two years’ living apart would begin on 27 March 1969. Neither s.40 nor s.41 could possibly apply on these facts.

An extremely difficult fact situation is to be found in *Ford v. Ford.* The husband was crippled and epileptic and, in 1964, found it wise for his health’s sake to have less frequent sexual intercourse with his wife. This upset her, and by 1965 all sexual intercourse ended for good. In 1967 the wife increasingly went out alone although they had been accustomed to going out together. In February 1967, the husband not knowing how matters stood, the wife began to associate with a man by whom she became pregnant. In August 1967, the husband noticed the pregnancy and then remarked on it to the wife, who then admitted it. The child was born on 1 December 1967 and the husband, who had done nothing about the state of affairs, offered forgiveness and to accept the child as a child of the family. The offer was flatly rejected. At the end of December the husband consulted solicitors. In May 1968 he stopped paying maintenance and the wife ceased to perform domestic services for him. Six months later the husband began divorce proceedings on the ground of adultery. It was clear that, right down to the date of the hearing, the spouses had lived in the same house and shared the same bed. The question arose whether the wife’s adultery had been condoned. Lane, J. held it had not, because, in the first place, while the husband hoped for a full reconciliation, the wife had not wanted to be forgiven so that there was no mutuality. In the second place there had been no resumption of what could properly be described as matrimonial cohabitation. By 1967, the Judge observed, the parties had reached virtually the end of the marriage as a live relationship. It seemed clear that the husband could not afford to leave and that he had remained apparently content, knowing of his wife’s adultery, to continue to accept wifely services from her and to sleep in the same bed as her. His conduct was explicable on the ground that he could not see a way out of his difficulties which another more able man could have found. While one can understand that it was held that there was no condonation one certainly does wonder when it could be said that these parties began to “live apart”, if at all. There was clearly no reconciliation, so the matter of “kiss-and-make-up” was never relevant. If one said they began to “live apart” from the time in 1967 when the marriage became an empty shell one
would be allowing there to be a divorce where there was one strained household under the one roof. If one said the "living apart" began when the maintenance and wifely services ceased in 1968 one might be on firmer ground. It might be said that there were then two households under the one roof even though circumstances compelled the spouses to share the same bed. But whether the circumstances would be considered compelling enough might very well be debatable."

**Conclusion:** It will have been seen from the above that great care must be taken by a practitioner who advises a client to take advantage of ss.40 and 41. Unless the reconciliation attempt is very clearly indeed spelt out to the other side, there is every risk that a Family Court will hold that the parties have not "lived apart" for the necessary two years because, during their currency, they have resumed cohabitation.

**F. Assistance under the Matrimonial Property Act 1976**

The Matrimonial Property Act 1976 contains several express and inferential references to separated spouses. Section 2(3), for instance, refers to parties who have "ceased to live together as husband and wife, or if they have not ceased to live together as husband and wife. . .". Section 2(4) refers to parties who "have ceased to live together as husband and wife". Section 9(4) enacts that all property acquired by either spouse "while they are not living together as husband and wife" is to be separate property unless the Court considers it to be just in the circumstances to treat such property or any part of it as matrimonial property. Section 13(3) of the Act defines a short marriage, for the purposes of dividing the matrimonial property, as one "in which the spouses have lived together as husband and wife for a period of three years . . . or, if the Court having regard to all the circumstances of the marriage, considers it just, for a period longer than three years". Reference to s.25(2)(a) shows that the Court may make an order under s.25(1) if it is satisfied that "the husband and wife are living apart (whether or not they have continued to live in the same residence or are separated)". It will be seen that an important question may arise in various contexts: are these spouses living together or have they ceased to do so, and, if so, when?

In *Edwards v. Edwards,* the Court had to decide when the spouses had ceased to live together for the purposes of s.9(4). Davison, C.J. held that he must apply the principles that were applicable to other matrimonial proceedings and that, in the last analysis, it was a question of fact whether there was the necessary physical separation and the attitude of ceasing to cohabit. He gave a most useful check-list:-

1. Are the spouses living in the same house?
2. How long did they continue to live there after the alleged separation took place?
3. Do they provide a home for their children in that house?
4. To what extent do they share the expenses of the home and of living?
5. To what extent do they each share in the household tasks?
6. To what extent do the parties communicate?
7. Have they ceased to engage in sexual intercourse?
8. In what manner do they appear and hold themselves out to the general public as living? Do they hold themselves out as Mr & Mrs So-and-So, as husband and wife living in a particular house?

Applying these tests it was held that the parties were not living apart in 1972, as suggested by the husband, in the following circumstances. The spouses went into their home in July 1972, on the basis of a reconciliation, and continued to live there until June 1978. They provided a home there for their children. The husband paid a weekly sum towards the family's upkeep. The wife, who worked, did likewise. They
jointly purchased household chattels for family use in a \( \frac{1}{12} \) share to the wife and a \( \frac{7}{12} \) share to the husband. They also bought other chattels separately and these, too, were used in the family living. The husband grew vegetables some of which were used to feed the family. He also paid the TV licence. The family all looked at the TV but not necessarily all together. Each spouse had a separate bedroom; the responsibility for this state of affairs was not pronounced upon. The husband did his own cooking, but shared the kitchen, bathroom and toilet. Although to all outward appearances the parties were Mr & Mrs Edwards and family living in the house, there was minimal communication over this period between husband and wife and husband and children. In June 1978 the wife finally left with the children. No doubt their regime had been both strange and strained but it is inescapable that they shared the same roof until June 1978, both working and both contributing to the upkeep of the family as one household under the one roof.
CHAPTER FOUR

MAINTENANCE OF SPOUSES, FORMER SPOUSES AND OF CHILDREN

Maintenance of Spouses and of Children

Introduction

The matter of maintenance of spouses and of children is dealt with in Part VI of the 1980 Act. Writing of the original Family Proceedings Bill 1978, one learned author complained that various ingredients had been thrown “all together like custard pies” and that there had ensued “a very messy result”.1 It would be unkind to suggest that Part VI was still as culinarily unacceptable so far as maintenance goes and was as clear as mud. But it is not as clear as an expert chef would require clear consommé to be.

Obviously, however, with a new Matrimonial Property Act coming into force early in 1977, and dealing more fairly with wives, it was only right that there should be a re-writing of the law relating to maintenance that would deal fairly with both husbands and wives and ex-husbands and ex-wives. It will be seen that, in a nutshell, maintenance is, as a rule, designed to be short, sharp and to the point and, where necessary, aimed at rehabilitation. As will be seen, there has also been a refurbishing of the enforcement procedures, notably the introduction of a scheme whereby the salary of a payer of maintenance can be attached and diverted into the Social Welfare Department. It can conveniently be called “the deduction notice scheme.”2

Certain matters of interpretation and application must first be considered. In the first place, in Part VI, a reference to a marriage includes a reference to a void marriage and a reference to the dissolution of a marriage includes a reference to an order declaring a marriage to be void ab initio, as may be seen from s.60(1)(a) and (b). Section 60(1)(c) states that a reference to a parent of a child includes a reference (i) to a natural or adoptive parent of the child; and (ii) in the case of a child of the marriage,3 to a party to the marriage who is not a natural or adoptive parent of the child; and (iii) for the purposes of an application under s.74(b), to a step-parent of the child even though the child to whom the application relates is not a child of the marriage.4

Maintenance is defined in s.2 of the Act as follows:

“‘Maintenance’ means the provision of money, property, and services; and includes—

(a) In respect of a child, provision for the child’s education and training to the extent of the child’s ability and talents; and

(b) In respect of a deceased person, the cost of the deceased person’s funeral.”

It is also convenient to set out here the statutory definition of the term “maintenance order”. According to s.2 it means:

“(a) . . . an order or interim order made under Part VI of this Act for the payment of maintenance; and includes—

(i) A maintenance agreement which is registered under s.83 of this Act and which has effect as a maintenance order under s.84 of this Act; and

(ii) In Part VIII of this Act, a subsisting order (including an order in or consequent on an affiliation order)7 for the payment by any person of a periodical sum of
money towards the maintenance of a person whom the first-mentioned person is, according to the law in force in the place where the order is made, liable to maintain; and

(iii) In Part VIII of this Act, a subsisting order of the kind described in s.78(1)(b) or (2) of this Act; and

(b) Where an order within the meaning of paragraph (a) of this definition has been varied, means the order as varied and all orders by which it has been varied.”

In proceedings under Part VI, s.61 enjoins that, save in certain cases, the Court is to apply the principles set out in ss.62 to 66 and in ss.72 and 73 and any other rules of law that are not inconsistent with those principles.10

The final preliminary instruction to be borne in mind is to be found in s.62. This provides that, without limiting or affecting the law relating to any other benefit, the liability to maintain any person under the 1980 Act is not extinguished by reason of the fact that the person’s reasonable needs are being met by a domestic benefit.11

Maintenance of Spouses

Under the Domestic Proceedings Act 1968, the position was that a spouse who sought maintenance from his or her spouse applied to the Magistrate’s Court and, latterly, to the District Court. Under the Matrimonial Proceedings Act 1963, the position was that the Supreme Court and, latterly, the High Court, awarded maintenance to spouses who applied therefor on bringing divorce or nullity proceedings. For better or for worse, the 1980 Act perpetuates the distinction between maintenance of spouses during the marriage and maintenance after the dissolution of the spouses’ marriage, though, as we shall see, some provisions of the Act are common to both situations.13

Maintenance of Spouses During Marriage

Dealing first, then, with maintenance during marriage, we come to s.67 of the Act. This states that either party to a marriage may make an application for a maintenance order against the other party to the marriage on the ground that the respondent is liable to maintain the applicant. Husbands and wives, then, are placed upon an equal footing. Every application under the section is, by virtue of s.68 to be heard and determined in a Family Court.

When, therefore, is a respondent “liable” to maintain an applicant? When has the Family Court got jurisdiction to entertain an application? According to s.63(2), we are to understand that, except as provided in s.63(1), neither party to a marriage is liable to maintain the other party during the marriage. Reverting, however, to s.63(1), we are told that, during a marriage, each party is liable to maintain the other party to the extent that such maintenance is necessary to meet the reasonable needs of the other party where that other party cannot practicably meet the whole or any part of those needs because of the effects of any one or more of certain enumerated circumstances.

These are as follows:

(a) The division of functions within the marriage while the parties are living together or lived together;

(b) Any custodial arrangements that apply in respect of any child of the marriage after the parties ceased to live together:
(c) Any physical or mental disability:
(d) Any inability of a party to obtain work that—
   (i) It is reasonable in all the circumstances for that party to do; and
   (ii) Is adequate to provide for that party:
(e) The undertaking by a party of a reasonable period of education or training designed to increase that party’s earning capacity or to reduce or eliminate that party’s need for maintenance from the other party where—
   (i) Because of the effects of any of the matters set out in paras. (a) and (b) above on the potential earning capacity of the party undertaking the period of education or training; or
   (ii) Because the party undertaking a reasonable period of education or training has previously maintained or contributed to the maintenance of the other party during a period of education or training—
   it would be unfair, in all the circumstances, for the reasonable needs of the party undertaking a reasonable period of education or training to be met immediately by that party.

It would thus seem that if, for instance, a married couple agreed three years ago that the wife would go out to work and the husband should act as a househusband and the agreement was implemented and the wife left the husband last week, the wife may very well be “liable” to maintain the husband. Further, if a married working couple split up last week and it was “arranged” that the wife would assume sole custody of their one-year-old child and give up her job so as to devote herself wholly to the child, the husband might well be “liable” to maintain the wife. It is, also, not hard to imagine that a healthy spouse might be called upon to maintain a spouse who has been physically or mentally disabled by accident or by natural causes.

Paragraph (e)(ii) contains what seems to be an eminently fair “tit for tat” scheme. A young wife might, for instance, go out to work as a legal secretary in order to maintain her husband while he obtains a degree or other qualification. After he obtains it, the marriage breaks down. The wife wishes to better herself by, e.g., becoming a teacher or legal executive, either of which will involve her undertaking a period of education or training. In strict theory, it could be said that she could meet her own reasonable needs by continuing on as a legal secretary and that she cannot hold her husband “liable” to maintain her. It is thought that the provision under review enables the Family Court to indicate that, the wife having assisted the husband through his education or training, it is now the turn of the husband similarly to assist his wife.

“Needs”

It is not easy to define “needs”, but some assistance is to be derived from McLaughlin v. McLaughlin, where Quilliam J. suggested that the word meant “something different from those things which a wife [might] wish to have. It is to be limited to the things which a wife must have in order to maintain a home. The appropriate synonym may be “requirements”.

Later in his judgment, he added: “It can hardly be said that the Courts should equate luxuries with needs.”

It would seem proper in an appropriate case for the Court to take the same hard line as it did under the former Domestic Proceedings Act 1968. Thus in Edkins v. Edkins, the wife had worked as a clerk before her marriage and now had the custody of the two children of the marriage aged six and eight. Since 1976 the wife had been a full-time university student and the children were cared for by their grandparents after school hours save in the university vacations. The Magistrate held that he had no jurisdiction to make an order because the wife was capable of supporting herself. This decision was upheld by Barker J., who said the Act required
a woman in her position, who was able to support herself and had made adequate
arrangements for the after-school care of her children, either to obtain some employ-
ment or else demonstrate to the Court that, for some reason, she is unable to obtain
employment.

In *Waugh v. Waugh*\(^8\) the short question was whether a Magistrate’s Court had
jurisdiction under the former Domestic Proceedings Act 1968 to make a mainte-
enance order in favour of the wife when the parties had been divorced subsequent to
the filing of the application in the Magistrate’s Court but before the hearing thereof
in that Court. Richardson J. held that there was no jurisdiction because the applicant
no longer possessed the status of wife when the application was heard. It is submitted
that this decision holds good for the purposes of ss.63 and 67.

**What order can the Family Court make?**

On hearing an application under s.67 the Court may, but subject to s.61 make any
one or more of the orders specified in s.69(1) viz:-

(a) an order directing the respondent to pay, for such period as the Court thinks fit,
but not exceeding the parties’ joint lives, such periodical sum towards the future
maintenance of the applicant as the Court thinks fit:

(b) An order directing the respondent to pay such lump sum towards the future
maintenance of the applicant as the Court thinks fit:

(c) An order directing the respondent to pay such lump sum towards the past
maintenance of the applicant as the Court thinks fit.

By virtue of subs.(2) an order under paras. (b) or (c) of subs.(1) may provide that
the lump sum is to be payable at a future date specified in the order or by instalments
specified in the order or on such terms and conditions as the Court specifies in the
order.

It must be noted that, subject to any agreement by the parties to the contrary, an
order made under subs.(1)(a) or (b) and every order made under s.99 varying or
extending such an order is to cease to have effect if the party in whose favour it is
made marries again.\(^9\)

A lesson must be learned from *White v. White*,\(^10\) decided under the previous
legislation but nevertheless still noteworthy. In making a maintenance order, the
Magistrate had fixed the sum payable at 50 cents per week to the wife and had used
the word “nominal”. The question arose whether the order was a nullity. A
unanimous Court of Appeal held that where a Magistrate pronouncing a purported
order added qualifying words indicating that nevertheless there was no liability under
it, the order was not a maintenance order as envisaged by the legislation and would
be a nullity. On the other hand, it was said that the mere addition, when the order
was pronounced, of the word “nominal” should not be treated as implying that the
amount specified is not to be payable at all. It was further stated that if it were
proved by proper evidence that, although purporting to pronounce a maintenance
order, the Court has not satisfied itself of an essential condition precedent under
what is now s.63 of the 1980 Act, the purported order might well be invalid. Care,
therefore, must be taken when an order for a very small sum is asked for or an order
for a very small sum is made.

**Maintenance on Dissolution of Marriage**

The principal policy rule appears in s.64(2), viz. that, where a marriage is dis-
solved, each party is to assume responsibility, within a period of time that is
reasonable in all the circumstances of the particular case, for meeting the party’s
own needs. On the expiry of that period of time neither party is to be liable to main-
tain the other pursuant to subs.(1) of the section. Subsection (4) makes it clear that,
except as provided in the section, neither party to a marriage is liable to maintain the
other party after the dissolution of the marriage. The message thus appears to be that
divorced spouses are to be encouraged to attain financial independence and to stand
on their own feet as soon as is reasonably possible.

Section 64(1) states that, subject to subs.(2), after the dissolution of a marriage
each party is to continue to be liable to maintain the other party to the extent that
such maintenance is necessary to meet the reasonable needs of the other party, where
the other party cannot practicably meet those needs, whether wholly or in part,
because of the effects of any one or more of three enumerated circumstances. They
correspond precisely, almost, with those mentioned in s.63(1)(a), (b) and (e), but
they must be repeated here verbatim:

(a) The division of functions within the marriage while the parties lived together:
(b) Any custodial arrangements that apply in respect of any child of the marriage
after the parties ceased to live together or after the dissolution of the marriage:
(c) The undertaking by a party of a reasonable period of education or training
designed to increase that party's earning capacity or to reduce or eliminate that
party's need for maintenance from the other party where—
   (i) Because of the effects of any of the matters set out in (a) and (b) above on
   the potential earning capacity of the party undertaking the period of education
   or training; or
   (ii) Because the party undertaking a reasonable period of education or training
   has previously maintained or contributed to the maintenance of the other party
during a period of education or training—
   it would be unfair, in all the circumstances, for the reasonable needs of the party
   undertaking a reasonable period of education or training to be met immediately
   by that party.21

Matters do not, however, stop there, for there is a merciful provision in subs.(3) to
the effect that, notwithstanding subs.(2), where a marriage is dissolved and, having
regard to the ages of the parties and the duration of the marriage, it is unreasonable
to require a party to do without maintenance from the other party and it is
reasonable to require the other party to continue to provide maintenance, the other
party is to continue to be liable to maintain the first party pursuant to subs.(1) to the
extent that such maintenance is necessary to meet the first party's reasonable needs.
This provision is thus capable of ensuring that a spouse who has given the best years
of his or her life to the marriage will not be abandoned penniless after many years.22

It will be seen from the above that no distinction is drawn between the man and
the woman.

A comparison of ss.63 and 64 shows that, after dissolution of marriage the reasons
of physical or mental disability or inability to obtain work will not provide grounds
for advancing an application for maintenance.

In former days it was considered necessary for a wife to apply promptly after the
decree absolute for maintenance so as to "keep her rights alive", and there grew up a
time-honoured practice of advising wives not in immediate need nevertheless to
apply to the Court for a nominal maintenance order. By so doing, it was thought,
such wives could ensure that such applications were safely retained on the Court's
books. The practice was deprecated by the Court of Appeal in the context of the
former Matrimonial Proceedings Act 1963 in Hare v. Hare.23 There would seem to
be no place for nominal orders of this kind under the 1980 Act.24

Another practice of bygone days was to seek, and for the Court to make, a com­
prehensive order for the maintenance covering not only the wife but the children
also. Thus, if £60 per month, say, was ordered for a wife and four children, it might
be difficult, if counsel did not agree on the matter, to say how this global sum was to be apportioned. The Court of Appeal made it clear under the former Matrimonial Proceedings Act 1963 that a separate order must be made for the wife and each child of the marriage and that, in each case, the term of the order must also be stated.26 It is to be hoped that, for the purposes of the new legislation, this caveat will be taken to heart.26

**Rules Common to Applications made During Marriage and After Dissolution**

Given that the Family Court finds that it has jurisdiction to make an order for maintenance the rules as to assessing the amount payable to the intended recipient are the same whether the order is to be made during the marriage or after its dissolution. This is made clear by s.65(1), which enacts that, in determining the amount payable by one party to a marriage for the maintenance of the other party, whether during the marriage or after its dissolution, the Court is to have regard to certain enumerated factors. These are as follows:

(a) The means of each party, including—

(i) Potential earning capacity:

(ii) Means derived from any division of property between the parties under the Matrimonial Property Act 1976; and

(b) The reasonable needs of each party; and

(c) The fact that the party by whom maintenance is payable is supporting any other person; and

(d) The financial and other responsibilities of each party; and

(e) Any other circumstances that make one party liable to maintain the other.

Subsection (2) goes on to say that in considering the reasonable needs of each party pursuant to subs.(1)(b), the standard of living of the common household is to be disregarded unless, in the opinion of the Court, there are special circumstances. Furthermore, subs.(3) provides that no party to a marriage is to be liable to pay to the other party by way of maintenance, whether during the marriage or after its dissolution, any amount the payment of which would have the effect of depriving the first party, or any dependent person ordinarily residing with the first party, of a reasonable standard of living.

It is not easy to guess when the Court will take the view that it must have regard to the standard of living of the common household. In most cases where the husband earns and the wife does not, and in many cases where both spouses earn, the standard of living of each spouse will drop if their marriage breaks down and they part—for the simple reason that there are now two households instead of the former single household in which the expenses were, most likely, shared.27 Perhaps what is said in the future must depend upon whether the Family Court is prepared to say that, where both spouses suffered lean times together in the hope and expectation of better days to come, then, if they part when the better days are about to begin, the recipient of maintenance ought to reap the benefit thereof.28

In the past, both New Zealand and English Courts were reluctant to force wives to go out to work if they had not been responsible for the breakdown of the marriage and would not have worked had the marriage continued. This was due partly to their anxiety to retain the economic status quo ante and partly to their unwillingness to put the wife in the position where she would feel that her exertions were merely going to relieve her husband of a financial liability which he had himself created.29 But in many cases nowadays, particularly if the wife is young and childless and the marriage
has not lasted for long, it cannot be unreasonable to expect her to work. Indeed for her to work may even prove to be therapeutic. In the English Divisional Court decision in \textit{Attwood v. Attwood},\textsuperscript{30} a new note was struck. It was held that justices had been wrong to ignore the wages earned by the wife, who had undertaken work solely because of the breakdown of the marriage through her husband’s deserting her and committing adultery. In such cases it was emphasised that the Court should not bring the whole of the wife’s earnings into account but should leave her free to enjoy at least a part of the fruits of her labours. The Court below had ordered the husband to pay £6 per week. This left him with £8.15s. weekly and the wife with a total of £15 weekly. The £6 was considered to be too high and was reduced to £4.10s. The present scheme seems logically to develop from this approach.

Perhaps this new outlook is best put by Richardson J. when giving the judgment of the Court of Appeal in \textit{Bunce v. Bunce}.\textsuperscript{31}

"There has in the past been an understandable reluctance on the part of the Courts to make orders which have the effect of compelling a wife, who would not have worked if the marriage had continued, to go out to work and to the full extent of her earning capacity relieve the husband of a financial liability for her maintenance which they had agreed he would undertake. However, social attitudes are changing. It is increasingly common for women to return to the work force when family responsibilities allow. The social policies underlying the Matrimonial Property Act, the increasing recognition in all spheres of the equality of the spouses and the developing philosophy that the parties to a marriage which has broken down should go their own ways in so far as they reasonably can, free of continuing claims on one another, sit uneasily with any notion that, come what may, a woman on marriage obtains an entitlement to maintenance for life. It is a matter of determining what is reasonable for the parties in their particular circumstances considered against the background of social attitudes and society’s expectations at the time. Those circumstances will include such matters as her age, health, family responsibilities, her employment history and career opportunities, her financial position and thus the reasonableness in that respect of her devoting some of her earnings to savings in order to establish herself and secure her future, the standard of living appropriate for her in all the circumstances, what she has done in the past and her wishes for the future."

In connection with assessing maintenance it will, of course, continue to be of great assistance to the Family Court if the applicant puts in a statement of income, assets and liabilities. Such a statement, commonly referred to as a “budget”, if the product of careful preparation as opposed to mere guesswork, can save much time, especially if the other party has had an opportunity to check the reasonableness of the applicant’s needs.\textsuperscript{33} If the statement can actually be agreed before the proceedings, so much the better. It is desirable that a statement should show separately the needs of the wife or husband and children.

Sometimes the Court will make an order in favour of a wife despite the absence of detailed evidence as to her weekly outgoings and add a warning that the facts as a whole will require reconsideration should a future application be made.\textsuperscript{14} It is obviously preferable for such a wife to submit a budget which is sufficiently detailed as not to cause the Court to make animadversions as to “the paucity of the wife’s evidence.”\textsuperscript{35}

In assessing maintenance in England it has been said that the normal guide-line was that a wife should receive one-third of the husband’s net income, this being a kind of flexible starting point.\textsuperscript{36} It never, however, received popular attention in New Zealand\textsuperscript{47} and it has firmly been rejected once again in recent years.\textsuperscript{38}

Subsection (2) envisages that it would be absurd to say that a wife or former wife
of a miserly husband or ex-husband who had imposed a regime of cheeseparing standards on her must therefore be awarded undeservedly low maintenance. It would be equally ridiculous, it is thought, to say that a highly extravagant wife or ex-wife who had already financially embarrassed her husband or former husband could expect to be awarded a commensurately high rate of maintenance. Further, simply because a wife got used to the luxury of five or six drinks a day and wine with dinner every night, this is no reason for awarding her maintenance sufficient to keep her in this mode of life.\textsuperscript{39}

The means of the parties

The Court will take into account not only the resources which each party has at the time of the hearing but also those which they are likely to have in the foreseeable future. Hence if, say, a husband can earn higher wages by working overtime, this is highly relevant. In \textit{Manhire v. Manhire}\textsuperscript{40} Wilson J. held that “potential earning capacity” was not limited to a normal 40-hour five day week. In his view there were no statutory rules prohibiting the husband’s doing overtime and it followed that he could not now be heard to say that he was “not interested” in supplementing his earnings in the future by doing spare-time glazing work for remuneration as he had formerly been in the habit of doing.\textsuperscript{41}

This decision is in conformity with \textit{Klucinski v. Klucinski}\textsuperscript{42} where an English Court held that a husband’s ability to earn higher wages by working overtime ought to be taken into consideration. It may very well be that his ability to raise money by overdrafts is a factor for consideration too.\textsuperscript{43}

In \textit{Davies v. Davies},\textsuperscript{44} the spouses had been living just above subsistence level. It appeared that the husband had been paying $19 weekly for a car which the Court held was not a necessity in his case. The view was taken that the car was low in priority when compared with the husband’s liability towards his wife and children and that he must either dispose of the car or make other arrangements. It is considered that it continues to be useless to seek to offset liabilities which cannot be justified by the paying party’s circumstances.

It is thought that the requirement that the Court shall have regard to each party’s earning capacity entitles it to take into account the possibility that the wife, for instance, might be able to increase her earning capacity by undergoing some training course. It may then order maintenance accordingly—as by awarding a certain sum per week until she completes a shorthand-typing course and leaving the parties free to seek a subsequent variation of the order.\textsuperscript{45}

The Reasonable Needs of Each Party

Matters likely to be material under this heading would include: the fact that the wife is in possession of the matrimonial home on which the husband pays the outgoings, so that, in assessing her needs, the husband ought to be credited with this factor;\textsuperscript{46} that the husband gets free board and lodging with his mistress and has not been frank with the Court about his assets, thus entitling it to draw adverse inferences against him about his needs;\textsuperscript{47} the fact that, when the wife married the husband, she knew he had to pay for the education at boarding school of his child by a former marriage.\textsuperscript{48}

In \textit{Goodwin v. Goodwin}\textsuperscript{49} a wife sought maintenance on divorce for herself, to end when the child in her custody reached the age of five. She had left two years previously and was only now applying at the behest of the Department of Social Welfare so that she could obtain a benefit. The husband was paying maintenance for this child, and was looking after an elder child, a girl of six, with the aid of a house-
keeper whom he paid $25 weekly. This absorbed the total profit from his farm. The payment was found to be reasonable; the husband was found to need the housekeeper for himself and the daughter; there being no surplus money to pay the wife it was impossible to make an order. It is submitted that a like result would be reached under the 1980 Act.

Financial and Other Responsibilities

Some of these are obvious, while others are less so. It seems fair to say that allowance ought to be made for any payment made by the husband of which the wife is enjoying the benefit, e.g. his repayment of a mortgage on the matrimonial home or hire purchase instalments in respect of the furniture in it if the wife is still living in the home and is using the furniture. Such payments would go to diminish his net income, as would his business and other liabilities such as insurance and superannuation contributions, especially if the wife may reap the benefit of these on his retirement and (possibly) death.

The paragraph is not, it is to be noted, confined to financial responsibilities of each party. Thus a wife may, for instance, say she is able and willing to work to provide for her own needs but cannot take up employment because she is looking after her mother who is a terminally ill cancer patient. Presumably such a de facto responsibility could be taken into account under this heading but the Family Court would doubtless require her to supply it with evidence that showed the mother’s medical condition, the extent to which she needed continuous care or nursing, whether alternative accommodation was available in hospital or with other relatives, whether hospitalization was necessary, the mother’s financial situation etc., before it would take the responsibility into account. In short, it would not be enough for the wife to rely on the bare facts that her mother was ill and living with her.

The Court will, however, frown upon a husband who has remarried and bought a business with his second wife and now argues that his first wife and children should get nothing because of his acceptance of obligations to repay the price of new assets. Nor would it look kindly upon his stated intention of putting aside an extra sum to pay off subsequent debenture holders, though it might not go to the length of awarding such a sum by way of maintenance as would compel an immediate sale of the business.

The fact that the maintenance payer is supporting any other person

It may be that the party by whom maintenance is payable is already making maintenance payments under a Court order, e.g., in favour of a former spouse or in respect of an ex-nuptial child. He or she may be fulfilling some moral obligation, as where a working spouse is supporting, or contributing to the support of, aged or infirm parents, brothers or sisters unable to work, or, even an ex-nuptial child in respect of whom no Court order has been made. Such payments may properly be taken into account.

The main problem that arises under this heading is that where a husband leaves his wife and family for another woman and it is exemplified by Newton v. Newton. The husband and wife had been living apart from some time and their two young children were in the wife’s custody. Orders for maintenance were made as follows: $20 per week for the wife, $5 per week each for the two children and $1 per week in respect of past maintenance.

The wife’s budget showed she required $40 weekly to meet living costs and that, since her social security benefit was slightly less than that, she had some difficulty in managing. The husband had, for about three years, been living with a woman who had separated from her own husband. This woman had a young child of her own
mamage and a baby of which the present husband was the father. The relationship between the present husband and his de facto wife had been a stable one and it was likely that they would marry when possible. The husband’s net earnings were some $66 weekly, and on the basis of the above orders, he was left to keep his second ménage on $35 weekly. In view of the baby’s age, the de facto wife was unable to work. Though there was an order in her favour of $4 weekly in respect of her own child, it was in arrear and not being paid regularly.

The present husband was paying $18 per week in rent, and attempts to get state housing having proved unsuccessful, it will be appreciated that, after paying his maintenance obligations as set out above, he was left with only $17 weekly to meet all the other expenses of his second family.

In short, the effect of the orders was to depress the husband below subsistence level. He therefore appealed against the quantum of the orders. Mahon J. reduced the wife’s maintenance by $8 weekly on the special footing that the husband and his de facto wife had a stable and permanent household and had a child of his own and had been discharging his maintenance obligations to his wife to the best of his ability. This typical case shows, it is submitted, that the Family Court can, in appropriate circumstances, prefer the obligations owed to a husband’s mistress and her children by him to the just claims of his wife and his children by her. It also exemplifies the working of s.65(3).

This principle was subsequently held to apply when wives sought ancillary relief in the Supreme Court against their husbands who had entered into stable de facto relationships with other women.\(^6\)

It is a question of fact in each case whether or not there is a de facto relationship of a stability sufficient to attract the above reasoning.\(^5\) In *Curline v. Curline*,\(^7\) a wife, unable to work for long-standing medical reasons, had associated with another man. They did not live together but the relationship was by no means casual and had lasted three years. Marriage had been discussed, albeit inconclusively. The man had said he was only supporting the wife in an “irregular gratuitous gifting sense”. Casey J. held that the association was a semi-permanent one falling short of a stable de facto relationship and that it would be contrary to public policy to expect the wife’s husband to continue to maintain her and therefore cancelled the order.\(^5\)

There may legitimately be placed under this heading the fact that a second wife may, when she takes on the husband, know that he has to pay school fees in respect of children of his first marriage. In such a case it may justly be said that the second wife must take the husband thus encumbered and accept the fact that his expenditure on the fees is a prior charge to be deducted before her maintenance is calculated.\(^5\)

**What orders can the Family Court make?**

Section 70(1) states that a Family Court, on or at any time after the making of an order dissolving a marriage may, but subject to s.61:

(a) order either party to the proceedings, or the personal representative of either party, to pay to the other party for such term as the Court thinks fit, but not exceeding the life of the other party, such periodical sum towards the maintenance of the other party as the Court thinks fit.\(^6\)

(b) Make any other order referred to in s.69(1), either instead of, or in addition to, an order under (a) above. Thus, the Family Court could order, for instance, a lump sum towards the applicant’s future maintenance as well as, or instead of, periodical payments. By virtue of s.70(2), s.69(2) is to apply to an order for the payment of a lump sum made under s.70. No order is to be made in proceedings under the section, according to subs.(3), in favour of a party who has married again. Furthermore, subject to any agreement by the parties to the contrary, an
order made under the section under review, and every order made under s.99 varying or extending such an order, is, according to subs.(4), to cease to have effect if the party in whose favour it is made marries again.

In deciding whether or not to order a husband to pay his wife a lump sum, Wood J. held in *Kokosinski v. Kokosinski* that he could properly take into consideration a period of cohabitation between parties before marriage as “conduct of the parties” and “circumstances of the case”. In this case the parties had lived together for 24 years before they married. They had a son three years after cohabiting for the first time. The wife had helped the husband build up an engineering company which the wife and son eventually bought out. She now wished to buy a flat nearer the business and to get out of cramped conditions in their former week-end retreat. A lump sum was ordered. Behaviour outside of the marriage such as the parties’ cohabitation could come within the rubrics of “conduct” and “circumstances”.

**Maintenance on Recognised Overseas Decrees**

There is a special conflict of laws situation which requires note here. Let it be supposed that a wife divorces her husband in England and that, almost at once, the husband emigrates to New Zealand leaving no assets in England. Let it also be supposed that the New Zealand Courts would recognise the English decree under s.44 of the Act. It may very well be more practicable for the wife to seek maintenance in the Family Courts of New Zealand than in the Family Division of the English High Court. It had been held in New Zealand, before the passing of the 1980 Act, that the Supreme Court could not award maintenance in such a case because it had not itself granted the decree of divorce. Subsection (5) of s.70 enacts that, in s.70, a reference to an order dissolving a marriage includes a reference to a decree or order recognised in New Zealand by virtue of s.44 as if that decree or order were an order of a Court of competent jurisdiction in New Zealand. Accordingly the wife in the hypothetical case put above could now apply for maintenance under s.70.

**Conduct Affecting Maintenance**

The rules as to the relevance of conduct and/or misconduct to maintenance are the same. Section 66 provides that, in considering the liability of one party to a marriage to maintain the other party to the marriage, whether during the marriage or after its dissolution, and the amount of maintenance, the Court may have regard to—

(a) conduct of the party seeking to be maintained that amounts to a device to prolong that party’s inability to meet reasonable needs; or

(b) misconduct of the party seeking to be maintained that is of such a nature and degree that it would be repugnant to justice to require the other party to pay maintenance.

The section seems to preserve what used to be said before the fault basis was removed from our divorce law, viz. that the Courts sometimes had to go behind the decree and inquire which party was really to blame and used to accept that it did not follow that that party was bound to be the respondent and that more than one woman, indeed, had committed adultery because of her husband’s conduct towards her. “It is a matter of experience”, Sir Richard Wild had said before the 1980 Act was passed, “that the actual ground of the decree in undefended petitions often cloaks the real cause of the breakdown and it is no doubt the Court’s duty, where the conduct of the parties is relevant on applications for [maintenance] to look for the underlying truth.”

For the purposes of taking conduct into account, it might seem that the Court should hear the evidence and, if it thought that the spouse seeking maintenance had misconducted himself or herself so as to attract s.66(b), proceed to make a
declaratory judgment or finding to the effect that, in view of the misconduct, the maximum discount to be deducted from the maintenance, if circumstances warranted deduction, should be, e.g., 25 percent. Such an approach has merit in that it would serve to prevent any further dispute as to the "blame" to be attributed to the applicant. On the other hand, such finding might well fetter a Court subsequently asked to vary the order. Furthermore, if a Judge could declare a maximum discount, he would also have to be free to declare a minimum, or, even, a fixed discount. Indeed, where an applicant had behaved like a saint, he could declare a bonus! The English Court of Appeal set its face firmly against such an approach as being unprecedented in the context of maintenance. It was also said on the same occasion that it was permissible and desirable for the Judge to make his findings of fact as to specific incidents and matters in the matrimonial history and to indicate his general view as to the relative degree of blame for the marital breakdown. In the Court's view, it would be a rare case in which the Judge's view would not be accepted in later proceedings if he had conducted a full hearing embracing the issue of conduct and had seen and heard the witnesses. It is submitted that this approach is the more proper one.

Conduct which amounts to a device to prolong a party's individual needs could, of course, include a failure to take practical steps to seek or hold employment or a failure to proceed with or apply oneself to a course of training aimed at providing a work qualification.

One of the more important benefits wrought by the introduction of a "no fault" basis for our divorce law would appear to be that the difficulties experienced by the English Court and, to a lesser extent by our own, as to how far a spouse is estopped per rem judicatam from raising in reduction of maintenance matters which are inconsistent with the decree, are no longer relevant.

An instance of what used to occur was this: a wife might obtain a divorce on the ground that her husband had deserted her. If, in maintenance proceedings subsequent to the divorce, he tried to show that the Judge had been wrong in finding him to be a deserter, his evidence to that effect would be disallowed. So, too, if he tried to show that he had had just cause for leaving her, his evidence would be disallowed for he should have put up this defence in the divorce proceedings. On the other hand, there would have been nothing to prevent his showing that the quarrels and unhappiness during their married life had been due to his former wife's conduct, for this would not have affected the substantial issue of whether or not he had deserted her. Similarly, a spouse against whom a decree had been made on the ground of adultery could not be heard in the later maintenance proceedings to say that the adultery had not been committed or, if it had, it had been forgiven.

It is submitted that this section cannot detract from the position of a spouse who is doing no more than stand on his or her rights. In Vose v. Vose, decided under the Domestic Proceedings Act 1968, the spouses agreed to sell their home and buy a property comprising two flats. This latter property was settled as a joint family home. It was agreed that each should occupy a flat and that the wife would cook for the husband. He had a heart attack and went to live with relations whilst he recovered. On his return, he wanted to move in with the wife but she refused. The husband thereupon bought another house, sought to cancel the joint family home certificate and asked his wife to come and live with him in the new house, which would, he said, be registered as a joint family home. The wife again refused and subsequently claimed maintenance, with success. It will be appreciated that this husband had really been attempting to coerce the wife into giving up her rights in the existing joint family home. She was entitled to stand on her rights and, it is sub-
mitted, her refusal to follow her husband could not be counted as misconduct for the purposes of the section.

It remains to be seen what kind of misconduct will render it repugnant to justice to require the other party to pay maintenance to the claimant. In O'Sullivan v. O'Sullivan,71 decided under the former Domestic Proceedings Act 1968, the wife conceived a child by another man after she and her husband had begun to live apart. The child was thus not a child of the family. Paternity proceedings brought against the alleged father of that child were dismissed whereupon the wife claimed maintenance for herself on the ground that, owing to this child's delicate health, she could not work despite her ability and willingness to do so. It was held that the wife had been wrongly awarded $15 weekly by the Court below. The husband was not the child's father, and the wife was claiming only because the paternity proceedings had failed. Why should this wife's misconduct be made the raison d'être of the order and why should the husband be required to shoulder another man's burden for lack of proof against that man? It is considered that it would now be considered repugnant to justice to require a husband in this position to maintain his wife.

With this should be contrasted Yarrall v. Yarrall.72 There the wife sought maintenance for herself despite the fact that she had two extramarital associations, and that, as a result of one of them, had borne a child some six months before the present hearing. The husband took the view that he should not be called on to maintain a wife who was unable to maintain herself only because of her need to look after the ex-nuptial child. He overlooked, however, the fact that she had to look after five young children of his, which warranted her remaining at home and not working. McMullin J. observed that the wife's associations had occurred either at the time when the marriage had substantially broken down or when it was altogether at an end, and ordered $12 per week maintenance to her. It is submitted that, under the new scheme, such a wife would not be prevented by her conduct from claiming successfully.

It may very well be that useful guidance is to be found in J (HD) v. J (AM).73 From the date of the husband's remarriage, his former wife conducted a sustained vendetta of malice and persecution against him and his second wife. She subjected them to a stream of letters and telephone calls, some of which were violently abusive. She also actually called at their home and, on one visit, she attacked the second wife violently and was in due course convicted of assault. On various occasions she breached an injunction that had been issued to restrain her from molesting the husband and his new wife. The former wife's conduct was partly due to psychiatric illness but it also contained a significant element of intentional harassment. What is more, it exacerbated a psychiatric illness from which the husband was suffering. Sheldon J. held that any conduct which interfered with the other party's life or standard of living, whether or not it affected the other party's finances, and which was so gross and obvious that to order the other party to support the one whose conduct was in question, would be repugnant to justice. He further said that, in assessing the effect of a party's conduct on the question of financial provision, the test to be applied was whether, after making all allowances for his or her disabilities, and for both parties' temperaments, the character and gravity of the conduct was in fact such that it would be repugnant to justice to ignore it in deciding the provision that the other party should make. On the facts, he held that, in all the circumstances, the wife's conduct had been of such a character that it could not be ignored in deciding what maintenance liability the former husband should be expected to bear.74

In Crawford v. Crawford,75 the wife had formed a liaison with a male friend of her husband only a year after her marriage. She later formed an association with another friend of his and this subsequently gave rise to divorce proceedings. There was
evidently nothing to justify the wife’s entering into these liaisons. Bearing in mind that we now have a “no fault” principle in our divorce law and that the commission of adultery was not in itself culpable under the previous law as it might only be the culmination of marital disharmony for which the other party was to blame, one would suppose that this wife’s conduct would still debar her from claiming maintenance from her husband, even though the “co-respondent” was not living with her and openly supporting her.

On the other hand, there may be a case where a wife, having done all she possibly can to persuade her deserting husband to return to her and their children, in her loneliness lapses and commits two isolated acts of adultery. In such a case, it is hardly to be expected that the wife would suffer any reduction in the award of maintenance she might have got had she not lapsed.

It also remains to be seen how far misconduct may reduce a party’s liability but not extinguish it altogether. Thus, may a Court award a lesser sum to a nagging and critical wife whose husband has been persistently cruel to her?

In West v. West, the conduct of the wife had inexcusably reduced the duration of the marriage to virtually nil and she had made virtually no contribution to looking after the matrimonial home. She had failed to cohabit with her husband, in fact, for more than a few weeks and the house was perfectly suitable. She suffered from an uncontrollable personality defect which caused an inability to leave her parents and go into full married life. It was held by the Judge that the wife’s conduct justified a substantial reduction in the amount of her financial provision pursuant to the English statutory scheme, and the Court of Appeal refused to disturb his holding. It is submitted that such a result could be reached by a Family Court under s.66(b).

Possible conflicts between ss.63 and 64

In Fletcher v. Fletcher, decided under the former legislation, a wife claimed maintenance on divorce. She already had a valid and subsisting maintenance order made by a Magistrate’s Court. Wilson J. refused to make the order sought saying that, if he made it, all future proceedings would then have to be made in the Supreme Court with its attendant expense and possibly greater delay. As a matter of policy, he considered that such applications should be discouraged. The wife had not proved the need for a permanent maintenance order because she already had a valid and enforceable order. The case did not escape criticism. Certainly, after the 1980 Act, maintenance matters will be in the hands of the one Court, viz. the Family Court, but it could still be put forward that a spouse in receipt of maintenance pursuant to an order under s.63 does not need an order under s.64. On the other hand, it has to be admitted that, under s.69(1)(a), a respondent cannot be ordered to pay a periodical sum beyond the parties’ joint lives whereas, under s.70(1)(a), either party or the personal representative of either party can be ordered to pay a periodical sum for such term as the Court thinks fit but not exceeding the life of the other party. It seems wrong that an applicant should be prevented from claiming, upon dissolution, under the more generous s.70.

Lump Sums

In Long v. Long, speaking as far as back as 1972, Richmond J., speaking for the Court of Appeal stated that, since married women were now able to achieve economic independence through their own labours, orders for maintenance will normally be periodic in form and a capital sum will not be directed to be paid unless the circumstances warrant a departure from the normal practice. At the same time it is to be observed that, since those words were spoken, an entirely new matrimonial property régime has been imposed on those spouses who have not availed themselves of the possibility of contracting out of it by the Matrimonial Property Act 1976. It
is also to be observed that s.69 of the 1980 Act does not suggest that husbands and wives are to be treated differently and it must be assumed that a wife can be ordered to pay a husband a substantial lump sum. It is to be noted, too, that the lump sum is to be devoted to future or past "maintenance" and, therefore, it must be supposed that there is no jurisdiction to order payment of a capital sum for extraneous purposes.

Cases where lump sums will be awarded are likely to be rare because most spouses are not persons of affluence and it must follow in practice that most payee spouses must rest content with periodical sums under s.69(1)(a). But it would seem proper to award a wife a lump sum where her husband is living largely on capital which is his separate property and whose income therefore does not fairly represent their standard of life, and against a husband who has voluntarily reduced his income by taking part of his naval pension as a lump sum. It is not the function of s.69 to enable the Court to award a sum in the nature of a dowry for the future marriage of an attractive young woman whose chances of remarriage are high, but, on the other hand, an order for a lump sum may enable the Court to get at the savings of a husband that have been made only because he had neglected to maintain his family properly.

Mention must also be made here of Hoogendam v. Hoogendam. A separation order had been made between the parties and a custody order had been granted to the wife in respect of three children. She was also given possession until further order of the former matrimonial home. After a re-hearing, maintenance of $22 weekly was ordered for the wife, and of $7 weekly for each of the three children. The husband earned $74.50 per week and had $4,600 in the bank, a sum largely saved by the combined thrift and prudent management of both spouses. Neither spouse had claimed any part of that sum by taking proceedings under the former Matrimonial Property Act 1963. When the husband’s budget was examined, he was left with some $20 a week to pay his maintenance commitments of $43 per week. The Magistrate had said the husband could draw on the savings to meet his liabilities for maintenance—which would, of course, in the end exhaust his capital.

When the husband appealed, the question arose whether the Magistrate’s order had been one for a lump sum payable by instalments or whether it was a straightforward order for periodical sums which would partly be met by weekly resort to cash savings. Mahon J. held that the order was of the latter kind and not a lump sum order. He also indicated that, as a general rule, where a husband continued to earn the same wage or salary after separation as he was earning while marital cohabitation still subsisted, it would not be right to augment the weekly sum available for maintenance by stripping him of his capital assets by instalments. In the end, he reduced the maintenance payable to the wife to a manageable sum.

The case exemplifies the desirability of dealing with maintenance and property matters at once. Under the present régime the spouses would very likely have shared the savings equally as being matrimonial property and the wife’s maintenance would have been fixed accordingly.

Consent Orders and s.170

Under the former Domestic Proceedings Act 1968, s.120 made it possible for the Court to make consent orders. In Carrell v. Carrell, a Magistrate, on the application of the wife, made separation, non-molestation, custody and tenancy orders by consent. After hearing evidence from both parties and receiving submissions from their counsel, he also made a maintenance order. Both parties were in Court when the consents were given. The question later arose: were the consent orders valid? It
was contended by the husband that consent to the orders had been made by counsel and not by the parties. Cooke J. held that if counsel appearing for a party informed the Court that he consents to an order on behalf of that party then both the Court and the other party was entitled to rely on the authority of counsel even if his client is not present. A fortiori, this is so if his or her client is personally present and makes no demur. As counsel had not acted outside his instructions in consenting to the orders, it was held that they must stand.

It was also said that where, unknown to the other party's counsel, usual authority has been expressly limited by instructions, but nevertheless counsel has entered into a compromise for which he had no actual authority, the Court has a discretion to set aside the compromise and orders based thereon. But this is exceptional and the discretion will be exercised only where grave injustice would be done if the compromise were allowed to stand.

This approach holds good for the purposes of the 1980 legislation.

This provision appears to encourage parties to make their own monetary bargains, not only as regards themselves but also in respect of any relevant children, in much the same way as do the provisions as to registering maintenance agreements. Where parties do seek a consent order, no doubt their agreement will be subject to the careful scrutiny of the Court, especially as regards children, and, if found to be unobjectionable, it may then be embodied in a Court order.

In England, the House of Lords, in a case called Minton v. Minton, made much of the principle that, after a marital breakdown, the property and financial issues ought to be settled once and for all so as to avoid bitterness between the parties. This so-called “clean break” principle has much to commend it, no doubt, in the different English statutory schemes “in a somewhat different social setting”. There is no doubt, moreover, that the applicability of the rule has since caused difficulty to English Courts confronted with different situations from those before the House of Lords.

In so far as there is a “clean break” rule in New Zealand, it would seem that it is s.32 of the Matrimonial Property Act 1976 which is the authority for it. It is enough to state here that its prime aim is to ensure the resolution of property division and maintenance problems by requiring that the parties take one bite at the cherry instead of two. It reads as follows:

"32. Court may discharge or vary maintenance orders—(1) In any proceedings under this Act, the Court shall have regard to any maintenance order made against one spouse in favour of the other spouse or in favour of any child of the marriage and to any maintenance agreement and may, if it considers it just, discharge, vary, extend, or suspend any such order, whether it has been made in the High Court or in a Family Court, and may cancel, vary, extend, or suspend any maintenance agreement, whether or not that agreement has been registered under Part VI of the Family Proceedings Act 1980.

“(2) An order made under this Act in respect of matrimonial property shall not be sufficient to support an application for discharge, variation, extension, or suspension of a maintenance order pursuant to section 99 of the Family Proceedings Act 1980, or for cancellation, variation, extension, or suspension of a maintenance agreement pursuant to that section.

“(3) For the purposes of this section, the expression ‘maintenance agreement’ means any written agreement made between a husband and wife, and providing for the payment by either party of sums of money towards the maintenance of the other party or of any child of the marriage."

On the other hand, there is no doubt that a Court-approved deed purporting to settle all claims under the Matrimonial Property Act 1963, the Matrimonial Proceedings Act 1963, or any other statute or at common law, has been held not to
prevent the wife’s subsequently claiming permanent maintenance after divorce.98

Section 170 must only be used to make intra vires consent orders. In Penman v. Penman99 an interim maintenance order under the former Domestic Proceedings Act 1968 had been made by consent. Section 77(1) of that Act, as it then stood, required that there must have been an adjournment for a period of over a week, of an application for a maintenance order, or for discharging, varying or extending or suspending a maintenance order, or referring an application to a conciliator. In fact, none of the grounds mentioned in the subsection existed. Beattie J. held that s.120 of the Act, which permitted the Court, if it thought fit, to make any order under the 1968 Act by consent of all the parties thereto, only gave the Court power to make consent orders for matters properly falling within the jurisdiction of the Act and not to grant jurisdiction where none existed.

Section 61 and “any other rules of law that are not inconsistent with” the principles set out in ss.62 to 66, and ss.72 and 73.

It will be recalled that s.61 states that, in most proceedings under Part VI, the Court is to apply the principles set out in ss.62 to 66 and in ss.72 and 73, and any other rules of law that are not inconsistent with those principles. Some attempt must now be made to describe these “not inconsistent” rules of law.

It has long been accepted that a Court must not use its powers to order financial provision in order to punish the spouse who has brought about the breakdown of the marriage100 and it is thought that this rule survives intact.

At the same time, the unpalatable fact has to be faced that in many cases—perhaps in most—a party’s standard of living will have to suffer even though he or she has been without blame, because there will be two families to support instead of one.101

If one spouse brings about the breakdown of the marriage, his or her first duty is clearly towards the children and the innocent spouse he or she has repudiated. Consequently, as an English Divisional Court has held in Roberts v. Roberts,102 if another woman lives with a man, either as his second wife or as his mistress, her rights must, so to speak, be postponed to those of his first wife. This no doubt continues to be so, though it must be recalled that, in assessing the maintenance he is to pay, the Court is required by s.65(1)(c) to have regard to the fact that the husband is supporting that other woman. But if that husband’s income is so low that he cannot support more than one household, he must obviously be allowed to retain sufficient to maintain himself and any dependants living with him. In another English case, Ashley v. Ashley,103 the husband had deserted his wife leaving her with their two children. As a result she had been compelled to seek social security. It was held that, although anything the wife might receive from her husband would merely reduce the amount of social security she received and consequently would benefit the National Assistance Board and not herself, this was irrelevant in assessing the sum the husband should be ordered to pay: any other decision would merely be to permit the husband to shift his liability to maintain his wife and children on to the community as a whole.104 On the other hand, his own income must not be reduced below subsistence level, even though, as in the Ashley case, this means that the innocent wife must still turn to the state benefit system to bring her own resources up to the minimum. A similar approach had been made in New Zealand, as may be seen in Spanjerdt v. Spanjerdt.105 A husband appealed against the quantum of a maintenance order made under the former Domestic Proceedings Act 1968 on the ground that the Court should have had regard to the wife’s ability to apply for a benefit under the social security legislation. It was held by Richmond J. that considerations of public policy must lead him to say that persons who could afford to
perform their statutory obligations under the 1968 Act should not be allowed to throw the burden of maintenance onto the social security fund. The appeal was dismissed, it being clear that the husband could reasonably be expected to afford the $25 per week ordered without reducing his own financial situation to an unreasonably low level. This policy rule, it is submitted, survives and is, indeed, preserved by the terms of s.62.

It has been held under the former legislation that, if there is a chance of reconciliation, it is right not to place a spouse who is ordered to pay maintenance during the marriage in a position where he would be forced to sell the matrimonial home and it is considered that this salutary ruling continues to stand.

In *Ropiha v. Ropiha*, the Court of Appeal held that, save where a defendant to an application for interim maintenance could not, because of his circumstances, sensibly be expected to bear the full burden of the maintenance needs of the applicant, a Court would generally, in exercising its discretion under the former Domestic Proceedings Act 1968 to award interim maintenance, take no account of the fact that the applicant was receiving a discretionary means-tested and regularly adjusted benefit such as an unemployment benefit under the Social Security Act 1964. This rule, it is submitted, continues to hold good.

At the same time, financial provision must not be ordered for some ulterior purpose, such as forcing one spouse to grant the other a tenancy of their former home or starving the other spouse into a reconciliation. Nor should a spouse be awarded less maintenance simply because he or she chooses to seek a separation order rather than divorce, thus preventing the other from marrying again until that other takes successful proceedings for dissolution. The Act gives the right to both remedies and the motive need not necessarily be spite. It may arise out of religious scruples or hope of reconciliation. The motive should be of no concern to the Court.

In theory, if not always in practice, a second wife must, so to speak, take her husband with all his financial obligations on marriage so that she and her children must rank after the first wife and her children. A fortiori, on this basis, a mistress must be in no better position. In *Lindsay v. Lindsay*, a husband was well off and had married a woman who was in receipt of a regular salary and continued to receive it after the marriage. There was no suggestion—indeed there could be none—that payment of maintenance to the husband’s former wife would reduce the husband and his second family below a reasonable subsistence level. In those circumstances, in assessing the husband’s liability to maintain his wife for the first time, the Court of Appeal applied without qualification the ruthless but logical principle going back to *Lyne v. Lyne* that the obligation to provide for the first wife is the primary duty of the former husband and that the obligations accruing from his second marriage must not be discharged or allowed to be in any substantial sense at the expense of the first wife. No doubt this continues to be true of spouses upon whom a liability to maintain is imposed by the new Act, but how many of them will in fact be in the fortunate position of the husband in the *Lindsay* case? Not a great many. Even so, the Courts may take the view that the *Lindsay* approach should be modified in the light of changed social mores and in the light of the new maintenance philosophy adumbrated by the 1980 Act:

In some cases, the Courts had been prepared under the former legislation to say that the wife of a short marriage who could go out to work was not entitled to claim maintenance from her husband. It is conceived that the Courts may properly continue to take this attitude.

In *F v. F*, the applicant was formerly the wife of the respondent from whom she had separated in 1958. The respondent had divorced the applicant in 1963 and had remarried. The applicant did not remarry. She did not seek, or receive, any
maintenance for herself or for her son whose paternity was disputed by the respondent. The applicant, now unable to support herself, applied for a social welfare benefit. She was told she must bring the present proceedings. She had no wish to have anything to do with the case and did not want the respondent to have to pay; although he could well afford to do so. The case necessitated a raking over of the wife’s conduct. Chilwell J. held that it was contrary to public policy that a marriage that had been treated by the parties as completely dead for nearly 20 years should be resurrected in order to support a claim for a maintenance order. It is to be hoped that this rule will survive the 1980 legislation.

The Maintenance of Children

Parental Liability and the Extent Thereof

The Family Proceedings Act 1980 draws a “distinction” between the child born out of wedlock and other children. For convenience, maintenance of children born out of wedlock has been dealt with elsewhere.

Section 72(1) makes clear that each parent of a child is liable to maintain the child

(a) until the child attains the age of 16; and
(b) where it appears to the Court to be in the best interests of the child who has attained, or will shortly attain, the age of 16 years, until the child attains the age of 18 years or such earlier age as the Court directs; and
(c) where it appears to the Court that the child is, or will be, engaged, after attaining the age of 16 years, in a course of full-time education or training and it is expedient that the child should continue to be maintained, until the child attains the age of 20 years or such earlier age as the Court directs.

This provision, it will be appreciated, merely states the parent’s liability to maintain and defines the duration of that liability. It is left to subs.(2) and (3) to lay down a list of factors for the Court to bear in mind when actually deciding upon the quantum of the parent’s liability. They provide as follows:

“(2) In determining the amount that is payable by a parent for the maintenance of a child, the Court shall have regard to all relevant circumstances affecting the welfare of the child, including—

(a) The reasonable needs of the child; and
(b) The manner in which the child is being educated or trained, and the expectations of each parent as to the child’s education or training.

(3) In determining the amount that is payable by a parent for the maintenance of a child, the Court shall also have a regard to the following circumstances:

(a) The means, including the potential earning capacity, of each parent:
(b) The reasonable needs of each parent:
(c) The fact that either parent is supporting any other person:
(d) The contribution (whether in the form of oversight, services, money payments, or otherwise) of either parent in respect of the care of that or any other child of the marriage:
(e) The financial and other responsibilities of each parent:
(f) Where the person against whom the order is sought is not a natural or adoptive parent of the child—

(i) The extent (if at all) to which that person has assumed responsibility for the maintenance of the child, the basis on which that person has assumed that responsibility, and the length of time during which that person has discharged that responsibility; and

...
(ii) Whether that person assumed or discharged any responsibility for the maintenance of the child knowing that that person was not a natural parent of the child; and

(iii) The liability of any other person to maintain the child:

(g) Any property and income of the child:

(h) Where the child has attained the age of 16 years, any earning capacity of the child.

The section, it will be seen, squarely places a liability to maintain their children on both parents. In other words, it recognises that it is reasonable that women, with their growing economic independence, must accept, along with the benefits thereof, the concurrent burdens—one of which is the contribution towards the maintenance of their children in appropriate cases. This sentiment was expressed by McMullin J. in *Scott v. Scott*,121 where a husband earned $55 per week gross and had to maintain himself and the parties’ six children with the aid of a housekeeper with two children. The wife was in good health and able to earn: indeed, to all intents and purposes, she was a single woman and was in fact earning $44 per week. Out of this she had to maintain herself and pay $10 per week rent. A separation order had been made by consent and the children were put in the husband’s custody without any objection on the wife’s part. The Magistrate ordered her to pay 50 cents per week per child to the husband for the children’s maintenance. It was objected on appeal that this was a mere nominal sum, ordered so as to protect the future position. McMullin J. disagreed, holding that this limited sum, though not a major contribution, did deal with the realities and not the mere possibilities. It is submitted that this reasoning is applicable to the present law.

In this connection, there must be considered the case of *Van der Oort v. Van der Oort*,122 decided under the Destitute Persons Act 1910. The mother of two children, both under three years of age, had left the matrimonial home taking them with her. She brought proceedings to obtain separation, maintenance and guardianship orders but they were refused because she was found to have had no justification for living apart from her husband. He kept the home open for their return. Subsequently, the mother sought a maintenance order in respect of each of the two children. The husband contended that no orders should have been made by the Magistrate and appealed. He relied on a provision in the 1910 Act, s.26(8), which precluded maintenance orders being refused on the ground that the defendant parent was willing to support the child while it lived with him unless the Court was satisfied that there was reasonable cause for the child to live apart from that parent. The appeal was dismissed, Tompkins J. holding that it was only when a Magistrate was not satisfied that the child had reasonable cause for living apart from its parent that such a defence could succeed.

In this case the children were too young and too dependent on their mother to choose where and with whom to live, so that, if it was the mother’s will to live apart, there was little or nothing that they could do. If the father wished to maintain them only if they lived with him, he must act—as by seeking a custody order against the mother and, having obtained it, by invoking the procedures for enforcing it. It was further said that, while a child was in the lawful custody of the mother, no Court would hold that there was no reasonable cause for the child to live apart from its father.

The above-mentioned provision of the 1910 Act was not re-enacted in the Domestic Proceedings Act 1968 and it does not re-appear in the 1980 legislation. It is nevertheless submitted that the Family Courts would adopt the same line of reasoning in a similar case today.
It will be appreciated that s.69 draws no distinction between the ex-nuptial child and a child born in wedlock so far as the duration of the parent’s liability to maintain is concerned or as to the quantum of the order. Section 69 is therefore capable of applying to ex-nuptial children where paternity has been duly proved in accordance with s.72.

Who may apply for a maintenance order in respect of a child?

Section 74 makes it clear that applications for maintenance orders in respect of children may be made only (a) by a parent against another parent; or (b) by a person who has lawful care of the child in question, or by a Social Worker, against a parent or parents of the child. Applications under the section are to be heard and determined in a Family Court.

The Family Court will doubtless, as did the Supreme Court, refuse to countenance one parent’s holding a pistol at the head of the other as happened in Seabrook v. Seabrook. In brief, the wife, after being divorced by her husband, went to live in Wellington with her second husband. With her were one daughter and two sons of her first marriage, of whom she had custody. She did not get a Court order, or consult with her first husband, and sent the three children to schools of her own choice. Although her first husband did not approve of her decision, she claimed maintenance of some $20 per week for each child to cover this education she had chosen. Speight J. disallowed these high claims and made an order for $8 per child per week. The Court of Appeal affirmed his decision, holding that the wife could not use this fait accompli as a foundation to cover the cost of the schooling she alone had opted for.

What orders may the Family Court make?

On hearing an application under s.74 of the Act, a Family Court is empowered by s.76(1) to make any one or more of the following orders:

(a) an order directing the respondent to pay such periodical sum towards the future maintenance of the child as the Court thinks fit;

(b) an order directing the respondent to pay such lump sum towards the future maintenance of the child as the Court thinks fit;

(c) an order directing the respondent to pay such lump sum towards the past maintenance of the child as the Court thinks fit.

The above powers are made expressly subject to subss.(2) and (9). The former enacts that the Court is not to make an order under the section pursuant to an application under s.74(b) of the Act against a step-parent of a child unless the Court is satisfied that (a) either (i) no natural or adoptive parent of the child is alive; or (ii) no natural or adoptive parent of the child can be found who is capable of providing proper maintenance for the child; and (b) the child has at some time lived with the step-parent as a member of the step-parent’s family. Subsection (9) provides that no order is to be made under the section for the future maintenance of a child who is under 16 at the date when the order is made is to have effect after the child attains the age of 16.
unless the Court so directs.

Thirdly, and equally important, is the rule laid down by subs.(6): no order made under the section for the maintenance of a child who is of, or over, the age of 16 but under the age of 18 at the date when the order is made is to have effect after the child attains the age of 18 years, unless the Court so directs.

Fourthly, there is the matter of extension of orders, and this is dealt with by subs.(7). On the application of any person who is entitled to apply under s.74 of the Act for a maintenance order in respect of a child, the Court may extend a maintenance order made in respect of that child where the child has not attained the age of 16 or 18, as the case may require, at the date on which the application is heard, but may otherwise make a fresh order.

Fifthly, in the event of the Court’s making a maintenance order under the section in respect of a child who has attained the age of 16 or 18, subs.(8) empowers it to order the respondent to pay, in respect of the past maintenance of the child during the period commencing on the date on which the child attained that age and ending on the date of the making of the order, such sum at such time or times and in such manner as the Court thinks fit.

Contributions by Other Parent

Section 77 (1) provides that, where an application is made under s.74 of the Act against a parent of a child, (a) that parent may join another parent as a respondent in the proceedings or (b) the Court may in any case direct that another parent be joined as a respondent in the proceedings. Under subs.(2), where, pursuant to an application made under s.74 of the Act, the Court has made a maintenance order against a parent of a child, and another parent was not a respondent in those proceedings, (a) the parent against whom the order was made may apply to the Court for an order requiring another parent to make a monetary contribution towards the maintenance of the child; and (b) on hearing the application, the Court may order another parent to make such monetary contribution towards the maintenance of the child as the Court thinks fit.

A respondent should not attempt to take the law into his or her own hands

In J. v. J.\(^{10}\) the parties had been divorced, the husband having committed adultery. The wife remarried about a year later. At the time of the final decree, the wife and three children were living in a house owned by the husband and were still doing so at the time of the present proceedings in which, inter alia, the wife sought maintenance for these children. The husband had, in fact, consented to an order for five dollars per week for each child but opposed antedating such order. It appeared that, after learning of the wife’s remarriage and of the fact that her second husband was—as was indeed the case—living in the home which he (the first husband) had provided for the wife and children, he took the law into his own hands by deducting $10 a week from the maintenance of five dollars per week each which he had been paying for the children. He regarded the deduction as a sort of “rent” and considered that $10 was what ought to have been paid by the second husband for himself and the wife. Wilson J. held that the husband was not entitled to make deductions in this way from the maintenance which he was under a duty to provide for his children. He therefore ordered the husband to pay for the maintenance of each child the sum of five dollars a week commencing from the date of the final decree, but that he was to be credited for any payments of maintenance made since that date.

Step Parents

Section 60(1)(c)(iii) of the Act states that a reference to a parent of a child includes
a reference, for the purposes of an application under s.74(b) of the Act, to a step-parent of the child even though the child to whom the application relates is not a child of the marriage.131

The question accordingly arises: who is a step-parent? Though there are some limitations on a step-parent’s liability to maintain a step-child, the Act does not specifically define a step-parent or step-child. Some help is to be gleaned from decisions under the former Domestic Proceedings Act 1968. In Sample v. Sample,132 a maintenance order had been made against the husband in respect of his wife and an 18-month-old child. It was admitted that the husband was not the father of the child and that, were it not for the necessity to care for the child, the wife could have maintained herself by regular employment. It was held at first instance that the husband was the step-father of the child. On appeal, Mahon J. stated that a step-parent meant a spouse by a subsequent marriage of the child’s parent.133

Matters were taken further, however, in Lineham v. Lineham134 by Cooke J. A child had been born to the respondent wife when she was a single woman aged 19. No entries relating to the child’s father appeared in the register of births. The wife’s subsequent marriage broke down and an order was sought against her husband under the 1968 Act in respect of the child on the basis that the husband was step-father to the child. Cooke J. held that the relationship of step-parenthood included the relationship between a child born to a woman then unmarried and a man who was not the child’s natural father—in other words, the term “step-parent” in the present context described the relationship of a husband to his wife’s child by a previous union, whether or not that union was a marriage.

In S. v. S.,135 Greig J. was considering the liability of a foster-parent to maintain a foster-child under the 1968 Act. In the course of his judgment he referred to the cases mentioned in the text above and noted that there was no real difficulty in regard to step-parents because that relationship was an objective one which depended on the status of marriage. In his view, foster-parentage was another matter and did not depend on any objective status such as marriage. A foster-parent was one who had a specified relationship to a child but not by blood and was, in effect, someone who took the place of the father or mother and who acted as a father or mother in the upbringing and maintenance of the child. It was not enough, in his Honour’s view, that a husband happened to be the foster-mother’s husband. This would not, per se, make him the foster-father. But he went on to say that neither the condition of step-parentage nor the status of being a member of a family could be decided entirely objectively, as both required some, at least implicit, acceptance which can be shown from words or conduct.

Miscellaneous Provisions Regarding Maintenance

1. Reports as to Maintenance

Section 91(1) empowers the Court, in any proceedings under the Act relating to maintenance, to request any officer of the Department of Social Welfare to submit to the Court a report in writing on the means, earning capacity, and economic circumstances of a party to the proceedings, and on any matter relevant thereto. The officer is required by subs.(2) to report accordingly. The Registrar of the Court is obliged by subs.(3) to give a copy of the report to every barrister or solicitor appearing for a party in the proceedings or, in the case of a party who is not represented by a barrister or solicitor, to the party. Any party, moreover, may, by virtue of subs.(4) tender evidence on any matter referred to in the report. If the Court requests it, the
2. Discretion of Court as to Orders
A very obviously convenient procedural rule is to be found in s.92. This states that where an application is made to a Court for an order under Part VI of the Act, the Court may make any other order under Part VI that it could have made if an application for that other order had been made at the time when the first application was made.

3. The Rules as to whom money payable under a maintenance order may be paid
Section 93(1) provides that the money payable under a maintenance order is, unless a direction of the Court otherwise requires, to be paid to a Maintenance Officer at any office of the Department of Social Welfare. However, subs.(2) enables a Court, on or at any time after making a maintenance order, to direct that the money payable under the order is to be paid (a) to or on behalf of the person for whose maintenance the order is made; or (b) to any account in a trading or savings bank standing in the name of any such person; or (c) to any other person. All such money, according to subs.(3), is to be payable in accordance with the tenor of the order, though subs.(4) gives the Court a discretion from time to time to vary or revoke any direction given by it under this section.

The section also deals with maintenance orders providing for the payment of lump sums. Subsection (5) states that such an order may direct that the money be paid to the Public Trustee, or to any other trustee approved by the Court, to be held by him and dealt with by him in accordance with the order. The receipt of the trustee, or of any person authorised by the trustee in that behalf, is, by virtue of subs.(6), to be a complete discharge to the person paying the same for any money paid to the trustee pursuant to any order under subs.(5). Subsection (7) requires the Public Trustee to invest all money paid to him pursuant to an order under subs.(5) in the Common Fund of the Public Trust Office and to apply that money and the income arising from it in accordance with the order. Unfortunately, perhaps, the trustee has no power over the lump sum until it is paid to him pursuant to the order of the Court, and it is the case that the enforcement of the payment of the lump sum remains, pursuant to subs.(8), in the hands of the person who would be entitled to take enforcement proceedings had the subs.(5) order not been made and does not pass to the trustee. In other words, enforcement proceedings may not be taken by the Public Trustee or other trustee. Even so, the provisions under review are useful where it is felt that it would be unwise to leave a lump sum in the hands of an individual who is likely to be extravagant or who is likely not to spend it in a sensible manner. In this section, “trustee” includes the Public Trustee by virtue of subs.(9).

Also to be noted is the special provision made for the case of recipients who are mentally disordered. Section 96 provides that where a maintenance order is made by a Court for the payment of a periodical sum in favour of a person who, at the date of the making of the order, is receiving care and treatment in a hospital as defined in s.2 of the Mental Health Act 1969, the order may provide for (a) the payment of a periodical sum in respect of periods while that person is receiving care and treatment in such a hospital; and (b) the payment of a different periodical sum in respect of periods while that person is not receiving care and treatment in such a hospital. The section saves the constant obtaining of variation orders as the patient goes to and fro between hospital and home for respective periods of treatment and leave.
4. Maintenance Where Application for a Dissolution is Refused

Section 95 would appear to speak for itself. It reads as follows:

“(1) Where an application under section 37 of this Act (in this section referred to as the principal relief) has been dismissed after a hearing on the merits, and the Court is satisfied that the proceedings for the principal relief were instituted in good faith and that there is no reasonable likelihood of cohabitation being resumed between the parties, the Court may make any order under [Part VI].

(2) The court shall not make an order under subsection (1) of this section, other than an order varying, extending, or cancelling any such order, unless it has heard the application for the order at the same time as, or immediately after, the application for the principal relief.”

5. Dissolution of Marriage is not to affect prior Maintenance Order

It might well have been expected that once the marriage of a husband and wife had been dissolved, any prior maintenance order against one of them in favour of the other would automatically cease to be in force. This is not the situation at all, for it is enacted by s.44 that no maintenance order in favour of a husband or wife shall be deemed to be discharged by reason only of the dissolution of the marriage between the husband and the wife. It must necessarily be the case that an order under s.69 cannot be made for the first time in favour of a spouse whose marriage has ceased to exist at the time of the hearing.

6. Security for Maintenance

It is enacted by s.97(1) that on or any time after making a maintenance order, a Court may order the person by whom maintenance is payable under the order or the personal representative of that person to give such security as the Court specifies for the payment of any sum that is to be paid pursuant to the maintenance order. For this purpose, the Court may, by virtue of subs.(2), direct the Registrar of the Court to settle and approve a proper deed or instrument, to be executed by all necessary parties. The very fact of security obviously makes secured payments more attractive to the payee, for there is less likely to be any enforcement problem. By tying up the payer’s capital, it also prevents him from trying to frustrate the order by disposing of his assets.

Payments are normally secured by ordering the paying spouse (or his or her personal representative in the case of a deceased spouse) to transfer specified assets to trustees who will then hold them on trust to pay the sum ordered over to the payee and the balance over to the payer. Alternatively, the Court may order specific property to be charged with the payment of the sum of money in question.

When the order comes to an end, the capital must be returned to the payer (or his estate, if he has already died), and any charge must be cancelled. Whether or not the Court will order maintenance to be secured must depend on the capital or secured income which the paying party has available, and the number of spouses against whom an order of this kind can be made cannot, in the nature of things, obviously be large.

A party cannot normally be expected to use all his property for this purpose, for example to sell up all his furniture. In New Zealand security has been refused on the ground that it was desirable to leave the husband in unfettered control of his capital for the sake of his business, and because there was no evidence that the husband was likely to deliberately disregard the orders of the Court or of any reasonable probability that he would be unable to meet them in the future. It has been held in England that, if a party is
not in need of immediate provision but may require it in the future, a nominal order may be made secured on assets yielding a substantial income. She or he can then apply for a suitable variation if necessary; in the meantime the income can be paid over to the other party.\(^\text{143}\)

The Court may order both secured and unsecured periodical sums.\(^\text{144}\)

Because of the advantages that secured payments afford, the Court may order a smaller sum to be secured than it would have ordered by way of unsecured provision.\(^\text{145}\)

A Family Court or District Court may from time to time vary or extend an order made by it under the Act for the giving of security for the payment of maintenance, whether as to the term of the order or the nature of any security, or by increasing or diminishing the amount of any security, or otherwise; or discharge an order made by it under the Act for the giving of such security, and these powers may be exercised even though the order that is varied, extended or discharged was made by consent of the parties.\(^\text{146}\)

Presumably a deed may be settled in anticipation of an order under s.97(1), but the order giving validity to the deed and the provision for the wife which it is intended to secure can only be made on the making of the relevant maintenance order or at any later time.\(^\text{147}\)

7. Apportionment of Maintenance Payments

It sometimes occurs that a person by whom maintenance is payable under two or more maintenance orders will make only a part payment of the total amount due under those orders and that he fails to specify the manner in which the amount he has paid is to be apportioned to the amounts payable under the several orders. To meet these difficulties s.98 provides that, where any person by whom maintenance is payable under two or more maintenance orders makes any payment of part only of the total amount for the time being payable under those orders, the amount of the payment is to be deemed to have been apportioned in the proportions that the amounts payable under the several orders bear to the total amount payable under all of those orders.

8. Restriction on Payment of Maintenance in Advance

It is emphatically provided by s.100(1) that no money payable under a maintenance order is to be paid more than 12 months in advance of the due date for payment unless the Court by which the order was made has given its prior approval. Should any money be paid in breach of this rule, then, unless the Court otherwise decides, it is not to be taken into account in any proceedings to enforce the maintenance order or for the punishment of any disobedience to the order. Indeed, subs.(2) goes on to provide that those proceedings may be taken in the same manner as if the advance money had not been paid. According to subs.(3), an approval under subs.(1) or a decision under subs.(2) may be given subject to such conditions as the Court thinks fit. Money paid in breach of the section is recoverable as a debt owing to the person who paid it, unless, it is provided by subs.(4), it has been received by the person who is entitled to receive it under the maintenance order. Subsection (5) states that the above-mentioned rules do not apply to any payment under a registered maintenance agreement in accordance with the terms of the agreement. The aim of the section is to enable to Court to protect the payee from his or her own extravagance or lack of wisdom in dealing with what may very well be a substantial sum of money. The payer is, of course, also protected in that his temptation to part with more cash than he can afford will be subject to control.
9. Effect of Adoption

Any paternity order or maintenance order in respect of an adopted child and any agreement (not being in the nature of a trust) which provides for the maintenance of the adopted child ceases to have effect when the adoption order is made. This is consonant with the fact that the effect of the adoption is virtually to put the child in the position of the legal child of the adopters and to discharge all existing parental rights and duties. However, where the child is adopted by his natural mother either alone or jointly with her husband, the order or agreement does not cease to have effect by reason of the making of the adoption order, a point that has before now been misunderstood.

Furthermore, where the child has been adopted by his mother, either alone or jointly with her husband, the making of the adoption order does not debar the subsequent making of a paternity order or maintenance order or of an application for a paternity order or maintenance order in respect of the child. Accordingly, the mother has the best of both worlds: whether she adopts alone or jointly with her husband, she does not lose the only claim for financial provision for the child that she probably has, and it is immaterial that she adopts the child and then obtains her paternity order or that she obtains the paternity order and adopts later. There are those who would criticise this permissiveness.

Interim Maintenance

If an applicant for a maintenance order or for the variation, extension, suspension or discharge of a maintenance order were compelled to wait for the proceedings to be concluded before he or she were able to obtain financial relief the position might very well be impossible. The Act therefore provides in s.82(1) that, where an application for a maintenance order or for the variation, extension, suspension, or discharge of a maintenance order has been filed, any District Court Judge may make an order directing the respondent to pay such periodical sum as the District Court Judge thinks reasonable towards the future maintenance of the respondent's wife or husband and any of the respondent's children until the final determination of the proceedings or until the order sooner ceases to be in force.

Where an application for a maintenance order has been filed, subs.(2) says it shall not be necessary to file a separate application for interim maintenance and that any notice of the application served on the respondent must fix a date for a hearing on the question of interim maintenance. Any such notice must, according to subs.(3), inform the respondent that, if he or she does not appear on the assigned date, the Court may make an interim maintenance order against the respondent in the respondent's absence. No order made under the section is to continue in force, according to subs.(4), for more than six months after the date on which it is made. An order made under the section may be varied, suspended, discharged or enforced in the same manner as if it were a final order of the Court.

Interim orders may be made by consent.

There seems to be nothing in the section to prevent the award of a global weekly sum, e.g. $55 per week for the maintenance of the respondent's wife and two children. In other words, a separate interim order in respect of each individual, e.g. $10 weekly for each child and $35 weekly for the wife, is not required.

Under the former legislation, an interim maintenance order was held to cease automatically to have effect on the making of a decree absolute of divorce. No doubt the same is true when an order dissolving a marriage takes effect in accordance
with the terms of s.42 of the Act.

An applicant “in the wrong” may be able successfully to resist the cancellation of an interim order. This was the case in the decision in Wilson v. Wilson,\(^{138}\) decided under the previous legislation. The wife had left the parties’ children for England without consulting her husband and without seeking the Court’s approval. She was able to show that the sum fixed by the Magistrate had placed the burden of housing the children almost wholly upon her. Henry J. declined to cancel the interim order in the wife’s favour.

**Attempts to Defeat Claims for Maintenance**

A person may well attempt to try to defeat an application for maintenance and/or a lump sum by, for instance, disposing of his property or transferring it out of the jurisdiction. He might do this in anticipation of an application or of an order or, alternatively, after an order has been already made. His hope would be to be able to say he now had not the property to meet the order. To prevent fraudulent dispositions of this kind, the Act provides as described below.

**Restraining Dispositions**

Section 183(1) enacts that, where it appears to the Court that a disposition of any property is about to be made, whether for value or not, by, or on behalf of, or by direction of, or in the interests of, a party to any proceedings under the Act in order to defeat the claim or rights of any person under Part VI of the Act or in respect of costs, the Court may, on the application of that person and on such notice being given as the Court may direct, by order restrain the making of the disposition or may order any proceeds of the distribution to be paid into Court to be dealt with as the Court directs. Subsection (2) provides that a disposition made after an order of the Court under subs.(1) restraining the making of the disposition has been served on, or come to the notice of the person disposing of the property, or any auctioneer, agent or solicitor acting in connection with the disposition, is to be void. The Court may consider any claim of any person interested and may make such order as it thinks fit.

This provision is not new, as the former Matrimonial Proceedings Act 1963 contained a similar one in s.80. The term “property” includes real and personal property, and any estate or interest in any real or personal property, and any debt, and any thing in action, and any other right or interest. This is the “official” definition set out in s.2.

**Setting Aside Dispositions**

Section 184(1) provides that, where the Court is satisfied that any disposition of any property has been made, whether for value or not, by or on behalf of, or by direction of or in the interests of, a party to proceedings under the Act in order to defeat the claim or rights of any person under Part VI of the Act or in respect of costs, the Court may, on that person’s application, make an order under subs.(2) of this section. In any case to which subs.(1) applies, the Court may, though subject to what is said in subs.(4) of this section, by virtue of subs.(2), order that: (a) any person to whom the disposition was made and who received the property otherwise than in good faith and for valuable consideration, or that person’s personal representative, is to transfer the property or any part thereof to such person as the Court directs, or (b) any person to whom the disposition was made and who received the property otherwise than in good faith and for adequate consideration, or that person’s personal representative, is to pay into Court or to such person as the Court
directs, a sum not exceeding the difference between the value of the consideration (if any) and the value of the property, or (c) any person who has, otherwise than in good faith and for valuable consideration from the person to whom the disposition was so made, or that person's personal representative, or any person who received that interest from any such person otherwise than in good faith and for valuable consideration, is to transfer that interest to such person as the Court directs or is to pay into Court or to such persons as the Court directs a sum not exceeding the value of the interest. Subsection (3) empowers the Court to make such further order as it thinks fit for the purposes of giving effect to any order under subs.(2).

Subsection (4) states that relief, be it under the present section, or in equity, or otherwise, in any case to which subs.(1) applies, must be denied wholly or in part if the person from whom relief is sought received the property or interest in good faith, and has so altered his position in reliance on having an indefeasible interest in the property or interest that, in the Court's opinion, having regard to all possible applications in respect of other persons, it is not equitable to grant relief, or to grant relief in full, as the case may be. The Court is given a discretion by subs.(5) to make such order as to costs as it thinks fit on any application under this section.

This provision is not novel, for s.81 of the previous Matrimonial Proceedings Act 1963 was to a similar effect. A similar provision also occurs in s.56 of the present Matrimonial Property Act 1976. The word “property” once more includes, according to s.2 of the Act, real and personal property, and any estate or interest in any real or personal property, and any debt, and any thing in action, and any other right or interest.
CHAPTER FIVE

PATERNITY ORDERS UNDER THE FAMILY PROCEEDINGS ACT 1980

One of life's perpetual problems will always be: if a woman has a child extraneously, how can the paternity of that child be established and how, if at all, can she obtain maintenance for herself and the child? Can she recover the cost of, e.g., the baby's layette? If the baby dies, can she claim financial assistance in respect of the funeral? In less polite days she would have sought a "bastardy order", but since the Domestic Proceedings Act 1968 came into force at the beginning of 1970 the more polite term "paternity order" has been used.

Who can apply for a paternity order?

According to s.47(1) of the Family Proceedings Act 1980 such applications may be made:-

(a) In any case, by the mother of the child (this means the biological mother, not the child's adoptive mother: W. v. Y.).

(b) Where the mother is under the age of 16 years, by any person having custody of the mother.

(c) With the written consent of the mother, by a Social Worker.

(d) Where the child has been born, and the mother is dead, or has abandoned the child, or is for any reason unable to make an application herself, a number of persons may apply, viz.

(i) a parent of the mother; or
(ii) a guardian of the child; or
(iii) a Social Worker; or
(iv) any other person who has the leave of the Court to apply.

Against whom may an application be made?

A paternity order in respect of a child can only be made against a male who fulfils two conditions, viz., that he is not married to the mother and has never been married to her or, if he has been married to her, the marriage was dissolved before the conception of the child: s.47(2).

In this context there has to be remembered that the Act places limitations on a father's liability to maintain an ex-nuptial child. It is clearly stated in s.73(1) that no person who is not married to the mother of a child, and has never been married to the mother, or whose marriage to the mother has been dissolved before the conception of the child, shall be liable as a father to maintain the child unless:-

(a) A Court has declared him to be the father of the child; or
(b) A Court has appointed him to be a guardian of the child, or has declared him to be a guardian of the child, by reason of being a parent of the child; or
(c) A Court has, before or at the time of making a maintenance order against him, made a paternity order against him; or
(d) His name has at any time been entered pursuant to the Births and Deaths Registration Act 1951 in the Births Register as the father of the child; or
(e) He has been declared to be the father of the child by an order made in a country outside New Zealand (being an order to which s.73 applies pursuant to subs.(2) of
that section); or
(f) He has, in any proceedings before the Court, or in writing signed by him, acknowledged that he is the father.

For the purposes of the section, the Cook Islands, Niue and Tokelau are to be deemed to be countries outside New Zealand by virtue of subs.(3).

Where the mother (or other applicant) can show that the father comes within any of the above categories, the task is made lighter. Matters are considerably eased, for instance, where the father can be shown to be a guardian by reason of being a parent; or where the father admits his fatherhood before the Court; or where his name appears on the Register of Births as father of the child. One cannot, of course, expect such good fortune in every case and one must recognise that, in some cases, one will have to accept that one will have to prove paternity and get a paternity order before obtaining the financial relief sought for the mother.

It is possible that there may be difficulty in determining when conception took place, as in Knowles v. Knowles.\(^3\)

**Jurisdiction in the Conflict of Laws sense: s.48**

If an application for a paternity order is made in respect of a child, be it already born, unborn, alive or dead, it must be the case at the time of filing the application that:-

(a) The child’s mother resides or is domiciled in New Zealand, or
(b) The respondent in the proceedings resides or is domiciled in New Zealand; or
(c) The mother is dead and the child resides in New Zealand.

If the case does not come within these rules, the application will not lie. If, therefore a male American tourist makes his girlfriend, also an American tourist, pregnant while they are touring in the South Island, it would be useless for the girlfriend to apply for an order in the Family Court in, say, Dunedin.

**Is there a time limit within which an order must be applied for?**

A frequently adopted ploy for a man who fears, or knows, that he is the father of an ex-nuptial child is to leave the country with all speed. In England, the usual refuge is the Irish Republic. For New Zealanders, Australia is the usual haven.

The general rule laid down by s.49(1) is that no application for a paternity order in respect of a child is to be made after the expiration of six years from the child’s birth. Exceptionally, however, an application may be made after the expiry of the six-year period:-

(a) Where at any time within the two years immediately preceding the making of the application, the respondent has
   (i) contributed to, or made provision for, the maintenance of the child; or
   (ii) lived with the mother as if he were her husband; or
(b) Where, at any time before the making of the application, the respondent has
   admitted expressly or by implication that he is the father of the child: s.49(2).

A father may be very unexpectedly caught by the time-limit exception, as may be seen from M. v. R.\(^4\) The child had been born in 1904 and the application for a paternity order had been made in 1916. The mother relied on the fact that the father had maintained the child for a six-week period over the 1915-1916 Christmas holidays. The child had written to ask if he could spend the holidays with the father, but at no stage was it ever accepted, or suggested even, that the letter was written with any ulterior motive or that either party intended the letter to be used for the purpose for which it had been used. The father had only regarded the board supplied by him as a simple act of hospitality. The mother regarded the visit as a substantial relief to her
circumstances, which were bad. It was held that the object of the subsection was to put a limitation on the time within which an order could be applied for, so as to prevent claims when rebutting evidence might have disappeared and that the object of the qualification of the limitation was because the acts or conduct were in the nature of fresh evidence to support paternity—which, in fact, the father admitted.

In what Court should an order be sought?

Section 50(1) states that every application for a paternity order in respect of a child is to be heard and determined in a Family Court. However subs.(2) states that the provisions under review are not to limit the High Court’s jurisdiction to determine the paternity of a child under any other enactment or rule of law.

The making of Paternity Orders

When it hears an application under s.47 for a paternity order in respect of a child the Family Court is obliged to, where it is satisfied that the respondent is the father of the child, make an order declaring that the respondent is the child’s father: s.51(1). The consequence is that, for the purposes of maintenance, a paternity order in respect of a child must be taken as conclusive evidence that the person against whom it is made is the child’s father: s.51(2). If, therefore, a respondent challenges paternity after the order has been made, he has left it too late. It is, therefore, vital to dispute paternity before the Court makes a paternity order.

In Hall v. Vail, it was held that, before the Court made a paternity order, it must be satisfied from the evidence on a balance of probabilities that the defendant is the father of the child, giving due weight to the gravity of the applicant’s allegation of paternity against the defendant.

In that case intercourse did take place between the parties on 11 October 1969 on the man’s admission. The intercourse from which the pregnancy resulted must have occurred between 20 September and 17 October. Two others had intercourse with the girl after 17 October. She was associating with a third youth before and after the pregnancy began but the Magistrate found that the girl had been mixing with a thoroughly disreputable, unsavoury and immoral crowd of young people. Looking at the whole of the evidence the Magistrate felt he could not make any order. Wild C.J. said the matter was one of credibility and would not disturb the decision and must dismiss the appeal.

Whose evidence is necessary?

In some jurisdictions, the mother, if alive, is required to give evidence. The New Zealand law continues to be what it has been for many years, viz., that the evidence of the mother of a child shall not be regarded as necessary for the making of a paternity order in respect of the child: s.52(1). On the other hand, it is easy for a woman to say that such and such a man is the father of her child and it may well be not particularly easy for that man to refute the allegation. Thus s.52(2) enacts that no paternity order is to be made upon the evidence of the child’s mother, whether the child is born or unborn, unless her evidence is corroborated in some material particular to the Court’s satisfaction. In this context it is necessary to recall s.167 which enacts that every question of fact arising in any proceedings under the Act, not being criminal proceedings or contempt proceedings under s.130, are to be decided on a balance of probabilities.

In connection with the requirement of corroborative evidence it must be remembered that evidence of mere opportunity without other supporting evidence does not amount to corroboration. In A. v. B. the putative father denied ever having had intercourse with the mother but did admit he took her to his flat on 7
February 1969, the date on which intercourse was said to have taken place, where
they spent the evening in the company of others. They did not go into his bedroom.
The putative father also said he had taken the mother home afterwards and said he
had never seen or heard of her since that night until she telephoned him about
Easter-time to say that she was pregnant. Mahon J., applying the above-stated rule,
said that there was no corroborative evidence and said that no order should have
been made against the father.

He also held that failure to deny an allegation made against a person, except in
very exceptional circumstances, does not give rise to an inference that that person
impliedly admits the truth of the allegation. It had been put to the Court that if the
alleged father had not had intercourse with the mother at the relevant time he would
have said so on the telephone to the mother and her mother instead of preserving a
non-committal demeanour.8

An applicant for a paternity order can properly subpoena the alleged father to
testify at the hearing.9 On the other hand, if not subpoenaed, a man taxed with
paternity may elect not to give evidence in Court and this fact does not corroborate,
because he is entitled not to go into the witness box.10

In B. v. B.,11 the alleged date of intercourse was 1 June 1977. The parties had lived
together as man and wife for some years and had ended their relationship some 18
months before this alleged intercourse. The appellant claimed that there was a
renewed association for six weeks and, during that time, there had been weekly
meetings culminating in sexual intercourse on 1 June. There was independent
evidence that, on the relevant date in June, the parties were seen together at the
respondent’s workplace. They left the building together but there was no evidence as
to whether or not they went back. It was the appellant’s case that they had and that
this was followed by the intercourse which resulted in the pregnancy. On appeal
against a finding that there was no corroboration White J. held that there was
evidence which amounted to more than mere opportunity. The pleadings showed
that the respondent denied any resumption of any relationship during May and June
1977 and this was quite inconsistent with the evidence of the independent witness
who, as we have seen, testified they were together on 1 June. In short, the respon-
dent’s denial of any relationship might turn out to be false. If it were, it would be
corroborative evidence. The case was sent back for further hearing.12

It may be very difficult to draw the line between a case where there is evidence of
mere opportunity and nothing more and a case where, in the circumstances viewed as
a whole, as established by independent testimony, some evidence is to be found
which is capable of adding something to the bare evidence of opportunity. In the lat-
ter case, the tribunal of fact may be properly enabled to find that opportunity and
surrounding circumstances taken together make it more probable than not that the
mother’s evidence is correct. Such a case is Archer v. Rogers13 where the parties met
early in 1977, and from then until June they were in a group who went out together.
In June the defendant putative father came to live at the applicant mother’s home
because of problems at his own home. Incredibly, he was given a bed in the appli-
cant’s bedroom. He remained in that home until October 1977, when he was told to
leave for reasons other than the sharing of the bedroom. The applicant testified that,
between June and October, they had regularly had intercourse in the shared
bedroom. The child was born in May 1978. The mother of the applicant testified as
to the bedroom sharing and also said that, before the defendant came to live with
them, he and the applicant went out together; that while they were sharing the
bedroom the applicant did not go out with anyone else; that the applicant cared for
the defendant and, after he had left, did not go out with anyone else because, she
thought, the applicant was waiting for him to come back. The mother of the defen-
The defendant had remonstrated about the bedroom sharing and contacted a bishop at the church attended by the mother of the applicant. The episcopal direction that it should cease was not complied with and the applicant’s mother said she continued to put the parties on trust. The Court of Appeal held unanimously that opportunity did not occur in a vacuum and all the circumstances of the parties and their association had to be considered as part of the matrix of facts in which the opportunity had occurred. Here the opportunity had been exceptional. The applicant’s mother’s evidence that her daughter was both friendly with and affectionate towards the defendant strengthened the probability that they did take advantage of their prolonged and excellent opportunity to have sexual intercourse. Taking the evidence of attachment together with the evidence of these extraordinary opportunities, as a matter of common sense there was evidence capable of corroborating the evidence of the applicant. Hence the paternity order made by the Magistrate and confirmed on appeal by Bain J. had been rightly made.\(^\text{14}\)

Corroboration of every material particular is not required. All that the Act requires is that the mother’s evidence be corroborated “in some material particular”. In G. v. C.,\(^\text{15}\) the putative father argued that there was no corroboration of the mother’s evidence that he was the father. He had admitted to intercourse before August 1972 and mid-November 1972 onwards. About mid-September 1972 the mother had had her last period before the birth of the child, who was born on 6 July 1973. The estimated time of its conception was between the end of September and early October 1972. The putative father’s admissions were held to corroborate the mother’s evidence (that she had been on intimate terms with him) in some material particular.\(^\text{16}\)

**Section 74**

Section 74 of the Act enacts that an application for a maintenance order may be made in respect of a child only (a) by a parent against another parent; or (b) by a person who has lawful care of the child, or by a Social Worker, against a parent or parents of the child. It is to be noted that, for the purposes of proceedings under this section, a paternity order in respect of a child is to be conclusive evidence that the person against whom it is made is the father of the child: see s.51(2).

**False Statements**

There must also be borne in mind the provisions of s.53 lest anyone be tempted to lie. Every person who, in any application for a paternity order under the Act, makes any statement that, if made on oath in the proceedings, would amount to perjury as defined in s.108 of the Crimes Act 1961, commits an offence and is liable on summary conviction to a fine not exceeding $1000. It may very well be that a practitioner ought to warn an applicant of this very severe provision at the time the application is signed.

**Blood Tests**

Since paternity orders and their being made (or refused) may very well depend upon the results of blood tests, it is as well to consider the matter of blood tests in civil proceedings generally. Section 54(1) states that in any civil proceedings, whether under the Act or not, in which a child’s parentage is in issue, the Court may, of its own motion or on the application of a party to the proceedings, recommend the carrying out of blood tests\(^\text{17}\) on the child and any person who may be a natural parent and that a report of the results be compiled by a person who is qualified to compile such a report and submitted to the Court. It will be observed that the Court can only recommend the carrying out of tests. It cannot order that they must be car-
ried out. Further, whether or not the Court has made such a recommendation, it may of its own motion or on the application of a party, adjourn the case in order to allow time for such blood tests to be carried out and for such a report to be compiled and submitted to the Court.

For the purposes of this provision, subs.(2) states that blood tests may be carried out by any person or persons who are qualified to do so, whether or not any of them is the person by whom the report is compiled, and that the consent of a minor who has attained the age of 16 to submit to blood tests is to have the same effect as the consent of a person of full age.

What must the report contain?

A report on blood tests must, according to s.55(1):
(a) State the reporter's qualifications; and
(b) Include, or be accompanied by, a statement showing the circumstances in which a blood sample was taken from each person to whom the report relates, and the manner in which that person was separately identified from each other person to whom the tests relate; and
(c) State whether blood tests were made in any of the following systems, viz.,
   ABO
   Rh
   MNSs
   Duffy
   Kidd
   Kell
   Haptoglobins
   Gc's
   Phosphoglucomutase; and
(d) State whether blood tests in any other systems were made and, if so, which of those systems; and
(e) State the result of the tests, and, finally, state, in relation to each person to whom the report relates (other than the child), whether the results of the blood tests show that the person is not a natural parent of the child.

It may, of course, turn out that the blood tests carried out on a person do not show that that person is not a natural parent of the child. In this eventuality, s.55(2) permits the report to contain an evaluation of the significance of the results of the blood tests in determining whether that person is a natural parent of the child. When a report on blood tests has been submitted to a Court under this provision, the Court may, of its own motion or on a party's application, obtain from the compiler of the report a written statement explaining or amplifying any matter in the report. A written report so obtained shall be deemed to form part of the report: s.55(3), (4).

Is there a right to question a report?

Where a report on blood tests is submitted to the Court, it may, on the application of any party, by virtue of s.56, summon as a witness in the proceedings not only the person who compiled the report but also any other person who has done anything necessary for the carrying out of the blood tests or for the preparation of the report. Thus the doctor and/or his laboratory technician might be summoned as a witness.

What if there is a refusal to undergo a blood test?

This situation is provided for in s.57(1) which states that, in any civil proceedings
in which the natural parentage of a child is in issue, whether or not the Court has recommended as described above that blood tests should be carried out on a person, evidence may be given to the Court as to the refusal of that person to consent. Where the person is under 16, evidence may be given as to the refusal to consent to such blood tests of the person who is competent to do so on that person’s behalf. One might, for instance, find that a 19-year-old mother refuses to take a test for herself and also says she will not allow her one-year-old baby to be blood tested.

Subject to the right of the refuser to explain the reasons for his or her refusal and to cross-examine witnesses and call evidence, subs.(2) permits the Court to draw such inferences, (if any), from the fact of refusal as appear to it to be proper in the circumstances.\textsuperscript{18}

**Costs of Blood Tests**

Where costs are incurred in the taking of blood samples and testing them, each party must, unless the Court otherwise directs, primarily meet his or her own costs and the costs of any witnesses called by him or her. However, s.58, which lays this down, also states that costs so incurred are to be costs in the proceedings.

**Deception and its consequences**

It would be comparatively easy for a person set upon deceiving the Court to ask someone to go in his or her place for the blood test or to arrange to proffer for testing a child other than the relevant child. Section 59 accordingly enacts that every person commits an offence and is liable on summary conviction to a fine not exceeding $1000 who, for the purpose of the providing of a blood sample for a blood test, the results of which that person knows are intended to be used in any civil proceedings in which the natural parentage of a child is in issue, (a) personates any other person; or (b) with intent to deceive, proffers a child that is not the child whose natural parentage is in issue in the proceedings. Hence the need for the taker of the sample to be careful in identifying those who are to be tested—and for that matter that all concerned with the testing and the reporting do not muddle up their samples and/or their reports.

**Maintenance**

The real object of seeking a paternity order will be found, in practice, to be that of obtaining the financial relief that becomes legally available on or after the making of the order.

According to s.78(1), on, or at any time after making a paternity order in respect of a child that has already been born, a Family Court may (a) make a maintenance order in respect of the child pursuant to s.74 (which deals with applications for maintenance orders in respect of children) and (b) if the child is dead, order the respondent to pay such sum as the Court specifies, in such manner as the Court specifies, in respect of the child’s funeral expenses.

Since payment under (a) above is capable of going on for several years, the father will find that he may well be wearing a heavy millstone round his neck down the years. What is more, by virtue of subs.(2) but subject to the time limit to be mentioned shortly, a Family Court may, on or at any time after making a paternity order in respect of the child, make an order for the payment to the mother of such sum as the Court specifies, in such manner as the Court specifies, in respect of expenses reasonably incurred by her by reason of the pregnancy and the birth of the child and towards her support during the pregnancy and for such period after the pregnancy (not exceeding one month) as the Court specifies.
The time limit

As stated above, no application may be made under subs.(2) after the expiration of 12 months from the birth of the child, or, where the mother has miscarried, from the date of the miscarriage: s.78(4).

Little imagination is needed to calculate what it might cost in maintaining a mother for, say, six months before the birth and one month after, if she has had a difficult pregnancy necessitating many visits to her general practitioner and perhaps to a specialist and confinement in a private hospital. Add to that the baby's layette and, quite likely, the cost to the father could easily very well exceed the $1000 mark.

Subs.(3) makes it clear that an order of the kind contemplated by subs.(2) of s.78 may be made:-
(a) instead of, or in addition to, any maintenance order in respect of the child made pursuant to an application under s.74; and
(b) whether or not the child has already been born; and
(c) where the child has already been born, whether or not the child is living.

Applying for maintenance orders in favour of unmarried parents

Such applications may be made by virtue of s.79. The natural parent who has, or has had, custody may apply for a maintenance order in favour of himself or herself against the other natural parent so long as the three conditions laid down in the section are fulfilled. These are that the natural parents of the child are not married to each other, that the natural father of the child is a person to whom s.73(1) applies, and either natural parent has, or has had, custody of the child. As one would expect, applications of this kind are heard and determined in a Family Court, and s.80 states accordingly.

When it hears an application of this kind the Court is required by s.81 to be satisfied of the following matters:-
(a) that it is desirable, in the interests of providing, or of reimbursing the applicant for having provided, adequate care for the child, to make a maintenance order; and
(b) that it is reasonable to make a maintenance order, having regard to—
   (i) the means, including the potential earning capacity, of each parent; and
   (ii) the reasonable needs of each parent; and
   (iii) the fact that the respondent is supporting any other person; and
   (iv) the financial and other responsibilities of each parent.

If satisfied as to these matters, the Family Court may direct the respondent to pay to the applicant, for such period as the Court thinks fit, such periodical or lump sum towards the future maintenance of the applicant as the Court thinks fit, or such lump sum towards the past maintenance of the applicant as the Court thinks fit. An order under this section may be made subject to such other conditions as the Court thinks fit: subs.(2). Orders under the section cease to have effect if the person in whose favour it is made subsequently marries—unless it sooner expires: subs.(3).

Hopefully this section does away with the difficulty apparent from English v. Schoenmaker, a decision under the former legislation. The mother sought a maintenance order for herself, alleging inability to support herself in the past by reason of caring for her child, whose father was the respondent. The parties had lived together for much of 1973, had parted towards the end of 1973 and the child was born early in 1974. In August of that year, having had no financial help from the respondent, she got a live-in housekeeper’s position and received both board and wages and was able to have the baby with her. She was assisted by the maintenance order that had been made in respect of the child. In the lower Court it had been
found as a fact that she was at all material times able to provide for herself. Her main difficulty was that for some months prior to her application and its hearing she had not received any payment, she had not been able to work and she had lived on savings. The problem was whether the Court below could make an order in respect of this past expenditure. There certainly was authority for the proposition that the Court could back-date liability so as to include a period ante-dating the hearing but there was a more fundamental problem here because, at the date of the hearing, the mother was able to “maintain” herself within the meaning of s.53(2)(b) of the Domestic Proceedings Act 1968. Counsel for the mother, having noted that she had lost some hundreds of dollars in keeping herself out of her savings when the father was paying nothing, submitted that she was now less financially able to weather life’s adversities because of loss of some of her savings and in that sense was not as well supported as she would have been had she not expended her own funds. Speight J. held that, like the Magistrate, he must sympathetically reject this submission, for the mother could not say she was unable to support herself. Practitioners may now rejoice in the fact that s.53(2)(b) does not reappear in the new legislation with the effect that the five-year limit on the maintenance for a mother no longer applies.

**Points of special significance as to maintenance of ex-nuptial children**

It is not part of the philosophy of the Act to punish or penalise the father of an ex-nuptial child for his conduct. Before the present legislation was passed it was recognised that the child’s needs was a highly important factor in assessing the quantum of maintenance that should be paid in respect of it. It was also there recognised that the mother’s means must be relevant too, and the fact that she works, though one must bear in mind the position of a working mother with children of tender age. If a mother does choose to go out to work to provide for herself and the child and therefore does not seek financial help for herself from the father, this ought not to be wholly taken against her when computing what ought to be paid in respect of the child. Nor ought it to be taken against her that she arranges with her own mother or other close relative to look after the child while she is at work in return for a small weekly “babysitting” fee. At the same time, such an agreement does benefit the ex-nuptial child’s mother by freeing her to work.

In some cases, mothers of ex-nuptial children consider the possibility of having the child adopted and eventually decide against it. Such a decision should not be taken against the mother, or, through her, against the child. Were the rule otherwise it would mean every such mother would be penalised.

It would not, it is submitted, be right to award, say, $10 per week for the child, $400 for expenses connected with the pregnancy and the birth and $30 per week for the mother, suspend the second and third orders and say $10 per week is as much as the father can pay, and is fair to both parties, adding that the defendant might win a lottery, receive a legacy or change his mind about his studies for a degree and obtain lucrative employment. The statutory scheme implies the notion of payment, not immediate suspension, and an order based on some contingency such as winning a lottery cannot have a sound basis as, indeed was held in *Van Oosteran v. Raines*.

It must not be lost sight of that an ex-nuptial child may be the child of parents who have long lived in a de facto relationship which has just broken down, of a couple whose marriage was dissolved before the child’s conception or may have been born as a result of a casual liaison between two people who mean little or nothing to one another. The child indeed may have been conceived through mistake or callous irresponsibility on the part of an unmarried couple, as White J. put it in *G. v. H.* If the intercourse was consensual, then it may very well be said that both parents must share “the statutory burden for producing “a hostage to fortune”.” But, as White J. said, circumstances will vary from case to case.
Can the defendant be subpoenaed?

In *D. V. E.* the putative father appealed against a paternity order on the sole ground that he had been wrongfully compelled by subpoena to give evidence against himself in proceedings which, he argued, were either criminal in nature or of a kind which were neither civil nor criminal. He added that he might eventually be made to suffer from disobedience proceedings. Wilson J. held, as stated above, that a defendant in a paternity suit was a compellable and competent witness against himself. Applying for a paternity order does not seek to punish or penalise a defendant. It is merely a civil proceeding, so questions as to privilege as to something he had already done did not arise at all. The making of a paternity order and a maintenance order against a man does not per se render him liable to a criminal proceeding.

Can a maintenance order be made without a paternity order first being obtained?

Even though a paternity order has not been made by a Family Court in respect of a child, the mother of that child is permitted by s.78(5) to make an application against a male person to whom she is not married for any order under subs.(1) or (2). The matter does not end there, however, because subs. (6) states that, on hearing an application of this kind, a Family Court must, before making a subs.(1) or (2) order against the respondent, be satisfied that he is a person coming within s.73(1)(a), (b), (d), (e) or (f). This means that the respondent must be a person whom a Court has declared to be the father; whom a Court has appointed to be a guardian of the child, or has declared him to be a guardian of the child, by reason of being a parent of the child; whose name has at any time been entered pursuant to the Births and Deaths Registration legislation in the Register of Births as the father of the child; who has been declared to be the father of the child by an order made in a country outside New Zealand, being an order to which s.73 applies pursuant to subs.(2) of that section; or he has, in any proceedings before the Court, or in writing signed by him, acknowledged that he is the father of the child.

This procedure merely avoids the need to obtain a paternity order. It does not keep the affair out of Court altogether.

Keeping paternity proceedings out of the Family Court

The parents of an ex-nuptial child may well inquire whether it is possible to settle matters in a satisfactory manner without taking legal proceedings. It will be seen that ss.83-90 are concerned with the registration of maintenance agreements. Broadly speaking, if a registrable agreement is duly registered, it will have the same force and effect as if it were a maintenance order made by a Family Court under the Act, it will bind the parties according to its tenor and, while it remains in force, the payee under it cannot ask for, and the Court cannot make, a maintenance order in respect of the person(s) in respect of whom maintenance is payable under the agreement. A “maintenance agreement” is extensively defined in s.2. The definition includes “a written agreement made between a person and any other person who acknowledges parenthood of a child, and providing for the payment by that parent of a periodical sum of money or a lump sum of money or both towards the maintenance of the child”. It includes also “a written agreement made between any persons who acknowledge themselves to be the parents of a child and providing for the payment by either parent of a periodical sum of money or lump sum of money or both towards the maintenance of the other parent, where the parties—(i) are not married to each other; and (ii) have never been married to each other or (if they have been married to each other) have had their marriage dissolved before the conception of the child”.
Thus if M has had a child X by F, M and F may agree in writing that F shall pay M $20 per week for her own maintenance and $8 per week for that of X, M may then register the agreements, whereupon she could not seek a maintenance order either for herself or X while the agreement remained in force. Although she could, under s.99, seek a variation order in Court, she could also, under s.83(2), agree in writing with F to vary the agreements, and register the written variations. In this way, therefore, it would be possible for M and F to deal with their problems without entering a courtroom.

**Effect of Adoption:** Any paternity order or maintenance order in respect of an adopted child and any agreement (not being in the nature of a trust) which provides for the maintenance of the adopted child ceases to have effect when the adoption order is made. This is consonant with the fact that the effect of the adoption is virtually to put the child in the position of the legal child of the adopters and to discharge all existing parental rights and duties. However, where the child is adopted either alone or jointly with her husband, the order or agreement does not cease to have effect by reason of the making of the adoption order.

Furthermore, where the child has been adopted by his mother, either alone or jointly with her husband, the making of the adoption order does not debar the subsequent making of a paternity order or maintenance order or of an application for a paternity order or maintenance order in respect of the child. Accordingly, the mother has the best of both worlds: whether she adopts alone or jointly with her husband, she does not lose the only claim for financial provision for the child that she probably has, and it is immaterial that she adopts the child and then obtains her paternity order or that she obtains the paternity order and adopts later. There are those who would criticise this permissiveness.
CHAPTER SIX

SOCIAL SECURITY AMENDMENT ACT 1980

It is intended to cover only those aspects of the Social Security Amendment Act 1980 in which solicitors are likely to be involved. Therefore a comprehensive review of the scheme of the Act, its procedures or effect will not be discussed other than incidentally for the specific points raised.

The Act relates to procedures on the granting of a domestic purposes benefit and it applies to such benefits granted after 1 April 1981.1

The Act is administered through the Social Welfare Department and is commonly referred to as the “Liable Parent Contribution” (or LPC) scheme. Some helpful pamphlets on the scheme for liable parents, and for employers, and for professional people, are freely available from that department.

The effect on Maintenance Order when Domestic Purposes Benefit is granted

Section 27J(1) provides that “notwithstanding anything in the Matrimonial Proceedings Act 1963 or the Domestic Proceedings Act 1968 or any other enactment, any maintenance order or registered maintenance agreement that provides for the maintenance of a beneficiary and any child2 in the care of the beneficiary, shall be suspended and unenforceable during the period commencing with the date from which a benefit is granted to the beneficiary and ending with the date from which the benefit is cancelled, and no liability for, or rights to, maintenance under that order or agreement shall enure during any such period.”

The term “benefit” is defined in s.271 as meaning “a domestic purposes benefit granted under s.27B” of the Social Security Act 1964, and “beneficiary” has a corresponding meaning.

During the period of payment of the benefit “every attachment order, charging order, or other order, every notice, and all proceedings relating to the enforcement of maintenance under the maintenance order or registered maintenance agreement [to which S.27J(1) relates] shall be suspended . . .”3

Thus the effect of any such formal maintenance arrangements between parties is automatically “eclipsed” by the grant of a domestic purposes benefit and the “eclipse” continues so long as the benefit continues to be paid. When the benefit is cancelled, the effect of the arrangements made between the parties will once again come into effect. So a wife who has the benefit against her husband of a maintenance order for herself of $30 per week and two children at $15 per week each (a total of $60 per week) will not be able to pursue her husband in respect of these obligations during any period when she is in receipt of a domestic purposes benefit. During such period she will not be able to pursue him for arrears under the maintenance order either. Once her benefit is cancelled, she can continue to look to him to pay $60 per week under the order and she can continue, or take up, proceedings to recover arrears, including those owing immediately before her benefit was granted. However, she clearly has no right to seek any maintenance under the order for any part of the period during which she received a benefit. So far as the maintenance order is concerned, the effect of a grant of the domestic purposes benefit operates like a time machine which jumps from the time of grant of benefit to the time of cancellation of benefit as if the intervening period had never existed.
Nonetheless something useful can be achieved between parties in the timeless void when a domestic purposes benefit is being paid. What it is appears in s.27J(4):—

"Nothing in subs.(1) of this section shall prevent a maintenance order being made while a benefit is being paid."

The Court, on making such an order (which itself would be suspended in effect from the time of its being made by operation of s.27J(1)) cannot have regard to the fact that "the person liable to pay the maintenance is paying or is liable to pay a contribution towards the cost of the benefit . . . ."

Such a provision is just, and more or less expedient, because, otherwise, those domestic purposes beneficiaries who had no formal maintenance arrangements when their benefits commenced may have been disadvantaged when the benefit was cancelled were an application for maintenance not permitted until that stage. The lesson for the practising lawyer is apparent. Where it appears likely that a client in receipt of a domestic purposes benefit will need maintenance for himself or herself or for dependent children (or both) at some future time when the benefit is cancelled, then it is wise to obtain orders so that when the benefit is cancelled an enforceable obligation to pay maintenance exists.

Of course, many beneficiaries have their benefits cancelled for reasons which would also disqualify them from an entitlement to continuation of the maintenance orders. Remarriage, the formation of a stable de facto relationship, or commencement of full-time employment, are examples. In these situations a legal obligation on the person who, under the Social Security Amendment Act 1980, is called the "liable parent", will normally continue in respect of children.

Although s.27J(4) does not refer specifically to variations of maintenance orders, it is submitted that the words "maintenance order" in that context can sensibly embrace variations thereof as well. This would enable the continued relevance of the "eclipsed" maintenance order to the world of reality to which that maintenance order may at any moment return—upon cancellation of the benefit.

When a person is granted a domestic purposes benefit and there is a consequent suspension of the kind referred to in s.27J(1) and (2) the Social Security Commission is required by s.27J(3) "as far as practicable, [to] notify every person who is affected by the order or notice or is a party to the proceedings".

Application to suspend assessment pending objection

The Social Security Commission not only has the task of assessing the contribution of the liable parent but also of considering objections to assessments lodged by liable parents. There is no time limit on making an objection and therefore the liable parent who returns from a couple of years in parts unknown may object when he learns of the amount of the assessment made in his absence.

The objector must give written notice of his objection to the Commission at his nearest office of the Social Welfare Department. However, if he wishes to have his liability (imposed under the assessment) suspended pending final determination of his objection he must apply, not to the Commission, but to a Court. Section 27I interprets "Court" in this context to be the District Court nearest to the objector's place of residence. After 1 October 1981 the Family Court will exercise this jurisdiction.

Section 27O(2) permits the Court, upon such application for suspension of liability to make "such order (if any) as it thinks just". Section 27O(3) provides that:

"An application under subs.(2) of this section may be made and dealt with ex parte, if the Court is satisfied that the delay that would result if service on the Commission were required would cause hardship to the liable parent."
If suspension is granted, it may extend for the period pending the final determination of the order. That period is not necessarily limited to the time the Commission spends considering the objection.

In fact, the Act requires the Commission to move with haste because s.27Q allows the Commission only 14 days after receipt of the notice of objection in which to:

- (a) Reconsider the case; and
- (b) Advise the objector of its decision; and
- (c) If it decides not to allow the objection in full, file the notice of objection in the Court, together with a copy of the notice of the required contribution to which it relates.

Therefore, the period pending final determination of the objection will only end at this stage if the Commission allows the objection in full. Otherwise the Commission (not the objector) must lodge the documents in the Court and the objection falls to be determined by the Court.

**Hearing of objection by Court**

As soon as practicable after the filing of the notice of objection in Court by the Commission, the Registrar is obliged to set the objection down for hearing and notify the objector and the Director or District Agent of the Social Welfare Department (of the office from which the notice of objection was filed) of the date and time of the hearing. The objection is heard and determined in accordance with rules of Court. The liable parent and the Commission may each appear and be heard and may be represented by counsel and either side may call and cross-examine witnesses.

Each ground of objection must be properly specified, indicating the ground or grounds in s.27P on which the objection is founded. If a ground of objection is not so specified, the liable parent cannot proceed without the leave of the Court. It must be noted that the grounds of objection set out in s.27P are exhaustive. Therefore, it may be presumed that the occasions when a Court would permit an objection to proceed notwithstanding that the notice of objection did not specify an appropriate ground, would be cases in which the Court had reason to believe that the point of the objection was one which related to one of the appropriate grounds, and it was just (considering the situation of the Commission) and expedient to proceed rather than return the objector back to the starting point again.

The Commission must "adduce sufficient evidence to establish, in the absence of proof to the contrary, that the objector is liable in law to maintain each dependent child named in the notice of the required contribution". In other words, it is sufficient for the Commission to establish a prima facie case of legal liability of the objector to maintain each of the relevant children. Subject to that, the onus is on "the objector to satisfy the Court that the objection should be upheld".

The beneficiary, even if married to the objector, is a compellable witness for either party in these cases, and, indeed, it is a condition of the continued grant of the benefit that the beneficiary attend the hearing and give all evidence that may be required of the beneficiary during the hearing.

**Grounds of objection**

The exhaustively listed grounds on which objection to a contribution assessed by the Commission may be made are all set out in s.27P. They are quite restrictive in scope.

1. **Section 27P(a)**

   The first ground is:
   "(a) That the objector is not liable in law to maintain a dependent child of the
beneficiary named in the notice of the required contribution."

The basic objection in s.27P(a) is that the objector is not liable in law to maintain a child. A "liable parent", in relation to the dependent child of a beneficiary, means every person (other than the beneficiary) who is liable in law to maintain the dependent child . . ." Thus, an objection under s.27P(a) really amounts to the objector's denying that he or she is a liable parent of the relevant child. The central crucial question is whether or not the objector is liable in law to maintain the child.

A foster-parent or step-parent may argue that he is not liable to maintain a child which is not his natural child, but was a child living with the family or maybe even living as a child of the family before a husband and wife parted. In some of these situations liability may be shown not to exist. However, what of those cases where there is potential liability, as in the case of a step-parent where the Court may exercise its discretion against requiring any maintenance contribution? Imagine a situation where a step-father married a wife who had a teenage son of a former marriage. The marriage founders after three months, and the teenage son's own attitude to his step-father was a strong factor in the breakup. In such a situation, a Court may, it is submitted, be prepared to release the step-father of any maintenance obligation for that child. Nevertheless it cannot be denied that he is potentially liable in law to pay maintenance for the boy. Is the concept of "liable in law" to be construed restrictively to include the step-father in the above example, so that he must pay the Social Welfare Department where an ordinary maintenance Court would have required no contribution? Or is it to be construed widely to mean liable in law after the processes of the law have been traversed? The latter interpretation seems more just. However, if liability is assessed after the processes of law have determined, in accordance with the principles of maintenance law, how does one reconcile the situation of a person who is clearly liable to pay maintenance (say the parent of a child) but who is not required to pay because the normal maintenance laws (after deducting certain expenses allowable in accordance with the principles of law) show he has insufficient funds to pay? Is such a person able to say he is not "liable in law" to maintain the child? It is submitted that the latter situation can be distinguished from the former example where the question of liability was quite removed from the question of ability to pay. In the former example, even if the step-father were well-to-do, he may have been found to have no "liability" and the relevant legal principles and exercise of discretion related to the propriety of his being requested to pay—and not at all to his ability to pay.

Again, the information obtained by the Commission may be wrong, so that the grounds for alleging that the objector is a liable parent are fallacious.

Possibly the situation where a parent successfully rejects a maintenance application in respect of a child over the age of 16 years for discretionary reasons may also provide grounds for objection under s.27P(a).

A successful objection on this ground will mean that the objector will not be obliged to pay any contribution for any child whom he is not liable in law to maintain.

2. Section 27P(b)

Four grounds where the contribution may be reviewed are set out in s.27P(b). If one of these grounds is successfully made out, the Court directs the Commission to review the contribution required so that the objector contributes to the maintenance of the child in proportion to his liability in law to maintain that child. The degree of contribution (if any) is to be expressed as a percentage.

(i) The first such ground is:-

"(i) Some other person (not being the beneficiary) is also liable in law to contribute to the maintenance of that child."
This caters, for example, for the situation where the beneficiary is not a parent of the child and there are two liable natural parents. It can also cover a situation where a foster-parent or step-parent and a natural parent may, by exercise of the Court's discretion, each be required to pay a contribution—one on the ground of parenthood, the other on a finding that the child is a child of the family.

Note also clauses 3 and 4 of the Twentieth Schedule to the Act, which provide for abatement of contribution by a liable parent where there is (or are) another liable parent (or other liable parents) in respect of the same child or benefit. These relate to a mechanical abatement, whereas s.27P(b)(i) anticipates a discretionary proportionate abatement.

Note also the situation of a natural father whose child has been adopted by the natural mother.

(ii) The second ground is:-
"(b) That child is not the child of the liable parent by birth or adoption."

This seems a clear enough invitation to those who dispute paternity (whether natural or by adoption).

How, though, does it affect the natural father of a child adopted by its natural mother? Can he claim under this paragraph that the child is not his by adoption? By the adoption the child is deemed to be the child of the adopting parent or parents and the retention of a potential maintenance obligation against the natural father in these particular circumstances can only be described as anomalous. This dilemma will no doubt fall to be determined on a finding of what the legislature intended in the provision.

(iii) The third ground is:-
"(iii) The liable parent has already provided for the maintenance of that child, whether by way of settlement of property, lump sum maintenance, or otherwise."

How liberally or restrictively this provision will be construed remains to be seen. The provision of maintenance must have been for the relevant child and, it is suggested, must be adequate in the circumstances of the parties or in relation to the obligation which would have been imposed by this Act.

(iv) The fourth ground is:-
"(iv) Of any other matter that could be taken into account on an application under the Matrimonial Proceedings Act 1963 or the Domestic Proceedings Act 1968 for the payment of maintenance by the liable parent in respect of that child."

Thus any matter which under those two Acts could reduce the contribution of a liable parent for a child can be raised here and, if successful, his or her contribution will be proportionately reduced.

There is no provision for the proportionate raising of any other liable parent's contribution in compensation.

3. Section 27(c) to (f)

The remaining grounds of objection arise from a variety of mainly mechanical failures which it is not intended to discuss here. Suffice it, for the sake of a cursory completeness, to mention these grounds.

Section 27P(c) provides for objection on the basis that the gross earnings figure relied on by the Commission in calculating the contribution is incorrect. Nevertheless, the proviso to that paragraph removes this ground if the objector himself begat the error by supplying the Commission with a certificate of his earnings from the Commissioner of Inland Revenue disclosing his earnings to be the figure relied
upon for the calculations. In the event of genuine mistake, where the proviso applied, the liable parent could require a review pursuant to s.27ZH. 25

If the contribution has been calculated in accordance with the wrong paragraph of clause 2 of the Twentieth Schedule, an objection may be made. 26 That clause provides that the weekly contribution of the liable parent shall be the least of the amounts derived from four sets of calculations, viz.:

(a) $20 per week for each of the dependent children of the beneficiary whom the liable parent is liable in law to maintain, plus a further $20 where one or more of those children is under 5 years.

(b) The weekly amount of the benefit (including child supplement benefit). 27

(c) A “personalised” calculation of the liable parent’s ability to pay based on his income less certain specified deductions.

(d) One third of the liable parent’s net income after income tax at the appropriate rate for code “S” is deducted.

If the arithmetic used is wrong, or the application of the correct paragraph of clause 2 of the Twentieth Schedule is applied wrongly, an objection may be made. 28 Without going into detail, and by way of example only, a wrong interpretation by the Commission of “Where public transport is reasonably available to the liable parent . . .” under clause 2(c)(iii)(aa) and (bb) would appear to provide grounds for an objection under s.27P(e).

Section 27P(f) permits an objection if “the provisions of clause 3 or clause 4 or clause 5 of the Twentieth Schedule to this Act should have been applied in the calculation of the contribution but have not been so applied, or have been so applied incorrectly”.

Clause 3 provides that “. . . where two liable parents are liable to contribute in respect of the same dependent child, the amount of each person’s contribution attributable to the child shall be reduced by one half”.

Clause 4 provides that “. . . where two or more persons are liable to contribute towards the cost of the same benefit, the total amount payable by those persons shall not exceed the amount of the benefit; and where necessary, the respective amounts payable by those persons shall abate proportionately”.

Clause 5 generously provides that “After being calculated in accordance with this Schedule, the amount so calculated shall be rounded down to the next complete dollar”.

When an objection succeeds, the Court, pursuant to the appropriate subsection of s.27S, directs the Commission to review the contribution on the basis of the relevant Court finding. That review must be completed within 7 days after the Court order and the objector notified in writing accordingly. 29

 Appeals

Within 28 days after the making of the decision by the Court (or within such further time as the Court may allow) 30 the liable parent or the Commission may appeal to the High Court. However, the Commission may only appeal on a question of law, whereas the liable parent may appeal on questions of law or fact. 31 A further appeal by either party may be to the Court of Appeal on a question of law if the Court of Appeal will grant leave to appeal; otherwise the High Court decision is final. 32 Pending an appeal, unless the Court making the order appealed from otherwise directs, the operation of the order is not to be suspended. 33

Relief in cases of hardship

Section 27ZG brings a ray of hope to the liable parent who is put to serious hardship by the operation of the Act. This “safety valve” is operated at the discretion of the Commission.
The criteria to qualify for consideration for relief are set out (and limited to those described) within the section, viz.:-

"In any case where it is shown to the satisfaction of the Commission—

(a) That any liable parent is in such circumstances that the exaction of the full amount of the contribution has entailed or would entail serious hardship; or

(b) That, owing to the death of a liable parent, the dependants of the liable parent are in such circumstances that the exaction of the full amount of the contribution owing at the liable parent's death has entailed or would entail serious hardship, the Commission may, subject to this section, release the liable parent or the executor or administrator of the deceased liable parent (as the case may be) wholly or in part from the liability, and may make such alterations in the contribution as are necessary for that purpose; and may, if the contribution as previously calculated or any part of the contribution has already been paid, refund any amount paid in excess of the contribution as altered under this section."

This provision appears to be wide enough to cope with a situation, say, where a liable parent is ill and off work for a fortnight, thereby avoiding the formalities of a reassessment. It can also cope (it is hoped) with the situation where some extraordinary expense payable by the liable parent appears socially desirable but is not provided for in clause 2 of the Twentieth Schedule. The variety of human situations make this provision eminently practical.

**Review of contributions**

The contribution required from a liable parent may be reviewed on the initiative of the Commission or the liable parent. The Commission is obliged to review every contribution "from time to time".

Section 27ZH(2) enables a liable parent "at any time [to] apply to the Commission for a review of a contribution on either of the following grounds:-

(a) That, since the contribution was calculated, there has been a change of circumstances.

(b) That evidence that was not considered when the contribution was calculated would justify a different contribution."

The words used appear plain enough. The procedures under the Act call for a certain amount of activity on the part of the liable parent (in the ideal case) by way of providing information of income and preparing a "self-assessment" on forms provided. The above-mentioned grounds follow this through and the liable parent must be awake to changes in circumstances, whether his own or those of the beneficiary or child; and alert to check information or evidence relevant to the initial assessment.

When an application for review is made by a liable parent, the Commission is obliged to review the contribution and notify the liable parent of its decision within 14 days.

The Commission must backdate any revised contribution to the appropriate date, being the date of the relevant change in circumstances or the date of the original contribution, as the case requires. Procedures for review, objection on review and appeals are dealt with in the same way (with the necessary modifications) as in respect of an original assessment.

**Application to vary or discharge deduction notice**

In very brief terms, a deduction notice issued by the Commission under s.27Y(1) (whether by consent of the liable parent or unilaterally because of 14 days arrears
of contribution) requires the employer of the liable parent to make the appropriate deductions from the liable parent’s salary or wages, and pay those deductions to the Commission at any office of the Social Welfare Department. The employer must take the notice at face value and is not put on inquiry. This principle is not affected by notice to the contrary. Therefore, an employer would be unwise to rely on the word of a liable parent, or a solicitor acting for a liable parent (or anyone else for that matter), advising that it was all being “fixed up” and that he could safely disregard the deduction notice. If he accepts that advice, the employer does so at peril that the Commission may recover any resultant shortfall as a debt due to the Crown. Moreover he may also be prosecuted under s.27ZA(7).

The other effects of a deduction notice are not intended to be covered in this paper, but they appear in ss.27Z to 27ZF of the Act. For the present purposes it is sufficient simply to note that a deduction notice is a matter to be treated seriously by an employer because of the obligations thereby imposed.

Section 27ZC(1) provides:

“If an employer of a liable parent considers that a deduction notice has been issued in error, or contains an error, the employer or the liable parent may bring the matter to the notice of any office of the Department of Social Welfare.”

Rather curiously, the wording of that subsection gives the appearance that the state of mind of the employer vis-à-vis the deduction notice is a condition precedent not only to the employer’s but also the liable parent’s complaining. One can imagine, for instance, the situation where a clerical error results in a misspelt name so that the wrong employee is named as the liable parent. Can he not complain except on behalf of his employer or with his employer’s approval? In the event of such a complaint, the Department presumably will not refrain from looking into the matter on the basis of such a technicality.

However, the meaning of s.27ZC(1) in this regard may be crucial in some such cases if the procedure of subsequent Court applications described in s.27ZC(2) is to be correctly based. It is submitted, when taking into account the avowed purpose of this part of the Act to “iron out wrinkles” in the system and the implications and wording of s.27ZC(2), that a liable parent may, of his own initiative, bring a matter to the notice of the Department under s.27ZC(1).

“If the matter is not rectified,” says s.27ZC(2), “to the satisfaction of the employer or the liable parent, as the case may require, within 7 days of the day on which the employer or the liable parent brings the matter to the notice of the Department of Social Welfare, the employer or the liable parent may apply ex parte to the Registrar of a District Court for variation or discharge of the notice.”

The Registrar is empowered to vary or discharge the notice where he “is satisfied that an error has been made and the notice ought to be varied or discharged”. Even if the Registrar so holds, the variation or discharge does not take effect until notice of that order is served on the employer. The Department of Social Welfare is also advised by the Registrar of the alteration to the deduction notice.

There is no provision for appeal from the Registrar’s decision on this ex parte application.
CHAPTER SEVEN

GUARDIANSHIP ACT 1968

SECTION 23
The Golden Rule that the Child’s Welfare is Paramount

Any discussion of the Guardianship Act 1968 must focus on s.23 of the Guardianship Act 1968. It is the central section of the legislation and it proceeds in the following terms:-

"(1) In any proceedings where any matter relating to the custody or guardianship of or access to a child, or the administration of any property belonging to or held in trust for a child, or the application of the income thereof, is in question, the Court shall regard the welfare of the child as the first and paramount consideration. The Court shall have regard to the conduct of any parent to the extent only that such conduct is relevant to the welfare of the child.

(IA) For the purposes of this section, and regardless of the age of a child, there shall be no presumption that the placing of a child in the custody of a particular person will, because of the sex of that person, best serve the welfare of the child.

(2) In proceedings under subsection (1) of this section the Court shall ascertain the wishes of the child, if the child is able to express them, and shall, subject to subsection (a) of section 19 of this Act, take account of them to such extent as the Court thinks fit, having regard to the age and maturity of the child."2

The above provisions will be discussed more fully later. It must be pointed out now that, when reading cases concerned with minors, it is as well to pause to think whether it was decided under the former Guardianship legislation or under the 1968 Act as originally enacted or under it as subsequently amended. The new subs.(1A) inserted by s.12(1) of the Guardianship Amendment Act 1980 appears, it may as well now be said, to be superfluous window-dressing inserted to placate dissident and obstinate elements who considered themselves unable to accept the law as it was being administered previously.

It simply states, in a more prominent way than previously, what has been accepted law for some time. Social changes and attitudes have had a large part to play in the development of the law concerning minors. Whereas, in Victorian times, although a father may often have obtained custody of the children, it would have been unthinkable in most cases for him to take over the minute to minute work of what was called "mothering". Nowadays it is increasingly common to find fathers taking on that role which is increasingly referred to as "parenting"—a suitably unisex term.

Notwithstanding that more fathers than ever before are seriously seeking and obtaining custody of their children, more mothers gain custody than fathers. There are clear reasons for this. Most women of child-bearing age have grown up with an expectation of the role of caring for children and have therefore trained themselves (or been trained) to adopt that role. Mostly the fathers of their children, for similar social reasons, expect the mother to fulfil that role. The instinctive division of roles in families more often than not leaves the mother with close contact with children, especially young children.

As children grow their development is often assisted by “modelling” on a parent
or adult of their own sex.

The new subs.(1A) is simply a statutory reminder that old rules of thumb are not to be applied as if they were legal principles but the Court must look at the particular child and particular parents and determine in each case which situation will most benefit the child. In some cases, even though the mother may have normally had the day to day care of children there may be special reasons, such as an especially good relationship between a child and father, why the father should have custody of the child.

For the above-mentioned reasons of common sense, which reflect the expectations and behaviour of most people in our community, it is not offensive to the law to continue to suggest that in many cases a mother is likely to be better fitted to have the care and control of young or sickly children (particularly little girls) or those who for some other reason especially need a mother's care. It had been emphasised many times, however, that the "tender years" doctrine was not a rule of law, but this seems to have been as conveniently forgotten by the misguided agitators as has the point that the "mother principle" was not to be regarded as a rule of law either. Who would readily give custody and care and control of a three-year old child to a mother who simply left the child with her husband and never bothered to see the child for 20 months?

No doubt there is much common sense in applying as a rule of thumb that, other things being equal, it may well be better for a boy past tender years to have the influence of his father. Even so, the Courts have made it clear that there is no principle to this effect.

The Welfare Rule

As has been pointed out, the golden rule enshrined in s.23(1) of the Act is that the Court is to have regard to the child’s welfare as being the "first and paramount consideration", and is to have regard to the conduct of any parent "to the extent only that such conduct is relevant" to the child’s welfare. This reference to conduct was said to represent a change in the law. At any rate, the Statutes Revision Committee devoted long and anxious consideration to the matter. The change has the very great merit of recognising that not every bad spouse is bound also to be a bad parent and that it is only in the rare case that one parent is 100% blameless while the other is 100% blameworthy.

What does "welfare" mean?

It was long ago said that welfare was not to be measured by money only or by physical comfort only but in the widest sense: hence moral and psychological welfare must be considered as well as the child’s physical well-being, and the ties of affection cannot be disregarded. Many years later it was said that an overall view must be taken, that undue emphasis should not be given to material, moral or religious considerations or any other factor and that all aspects of welfare must be taken into account and that would include consideration of the child’s physical, mental and emotional well-being and the development in the child of standards and expectations of behaviour within our society.

Jeffries J. has aptly observed that s.23(1) is a "direction which is seductive in its simplicity, but in reality conceals a most complex and far-reaching judgment."

And it is fair, too, to say that the welfare of the children is a praiseworthy but vague concept, at any rate in custody cases and that it cannot be an arbitrary standard in the sense that certain considerations must always be taken into account.
Thus the ethnic background of the parents may need to be borne in mind, for the attitude taken by the Court would differ according to whether it was dealing with, say, children from a Yugoslav, Tongan, Cook Islands, Tokelau Islands background, and, for that matter, born and bred New Zealanders. Similarly, a home with a particular parent may carry with it the advantage of the presence of an extended family of relatives and life-long friends and so militate in favour of awarding custody to that parent. It is no objection that a father proposes to give up work and live on a social welfare benefit in order to maintain himself and his daughter of three years of age if that was preferable to her being in the custody of her maternal grandparents. Even in these lax days, moral welfare and the possibility of receiving religious instruction may go in favour of one parent as against the other who is living in a de facto relationship. Clearly no Court would ever make an order likely to lead to ill-treatment of the child physically, and a girl found to be sleeping with her stepfather must obviously be removed. A solo mother with no strong affection for her child has not been preferred to the child's grandmother. If parents divorce and propose to remarry it is relevant which of their new partners will probably make the better parent substitute, but, in the end, all any Court can do is reach the best decision it can on all the evidence and it is not possible to solve these problems arithmetically or quantitatively by using some sort of points system. Obviously also a loving mother is preferable to a callous father especially where sick children are concerned and a father with relatives who can provide a home is preferable to an incompetent mother who put her own enjoyment before her duty to her children and made them take second place to her boarders in her boarding house. And, turning to the child, it must always be recalled that, if interviewed by the Court, there is not only a risk that it may have been coached by a parent and that its own expressed wishes may be so contrary to its long-term interests that the Court must altogether disregard them. A deserting mother may be better positioned to provide educational facilities than the "innocent" father in a remotely placed home. It has been said that, in the case of younger children in particular, a permanent home life may be preferable to their having to go to boarding school as the alternative. Boys, quite young, have been placed in their father's custody for fear that their mother, a devout Jehovah's Witness and the equivalent of a minister of that religion, would indoctrinate them to the extent of regarding their father as a pariah and of having their relationship with him collapse. It would be rare, but not impossible, for a Court to "split" a family of brothers and sisters by giving the former into the father's custody and the latter into their mother's.

There is a great deal of truth in what Jeffries J. has said about the reporting of custody cases:

"Custody cases are reported, and more should be in New Zealand, not because they are utilitarian and provide a precedent, or even a guide, but because they have a cultural value that is necessary to all those engaged from time to time in this important aspect of the court's work". It is sometimes said that there is consolation in the fact that a custody order is not a permanent order. As Jeffries J. said in \( D \text{ v.} \ D \), "It is not a 'permanent order' only in the sense that there is no element of entrenchment which might prevent its re-examination and revision." Otherwise it has the customary characteristics of permanency. A difficult or intractable decision, as is so often found in custody cases, cannot and should not be made with the thought that if it does not succeed it can readily be corrected or altered. Such an approach might give encouragement to risky experimentation and change without solid justification. As I understand it the law is unchanged since the Court of Appeal stated it in Miller v. Low [1952] N.Z.L.R. 575:
“In order to justify an alteration . . . in the order for custody made . . . in 1951 we think that it requires to be shown that the circumstances have changed since that time to such a material degree as to require a change in the custody to ensure the welfare of the children in the new circumstances (ibid, 589).”

It has been said that a trial judge should not allow custody to be finally determined by the expressed wishes of a child as young as 12, but that he could interview the child so as to get an impression for himself as to the child’s personality, any views or wishes of the child and their degree of strength and whether the child was happy and well-cared-for in its present surroundings so that, having done so, he may take these matters into account.31

Conduct

There was no hard and fast rule before the 1968 Act became law that a so-called “guilty” spouse could not have custody after divorce. Each case was said to depend on its merits, its particular circumstances and the welfare of the child.32 A deserting mother has been given custody of two girls and a boy aged 10, eight and six, as she was able to supply care, guidance and better educational facilities.33 Mothers who have committed adultery have been granted custody in past years when divorce was primarily based upon matrimonial wrong.34

It is, of course, easy enough to find cases where custody was given to the parent who was considered “innocent” by the Court. A father was awarded custody of a girl just over four years of age, the mother living in adultery with a man whom she would not be able to marry.35 Some twenty years later, the Court of Appeal gave custody of two girls, aged about nine and six, to their father. Matters were fairly evenly balanced as to what he and his wife could provide, but it was found preferable as a matter of moral welfare to let the girls live with their father. He had done his best to preserve the family unit when the wife broke up the home to live in adultery for her own selfish purposes.36

It cannot therefore be said that award of custody is some kind of prize or reward for being innocent and refusal of custody is due punishment for being guilty. Conduct is relevant only to the question of suitability of the person who is seeking, e.g., custody. Conduct which shows what that person’s character is will accordingly bear upon the welfare of the child.37

In these days when there are a great many successful solo parents, a Court may hold that a child’s best interests may be served by granting custody and guardianship to its natural father rather than permitting it to be adopted as desired by the mother.38

There is a distinct shift in emphasis, however, which has been developing from the middle 1970s. It is to the effect that an unimpeachable parent has no prior claim to custody, the issue being always the child’s welfare. At the same time, the Courts have become less inclined in recent years to make objective evaluations of what is, or ought to be, for the child’s welfare. The vital question has thus become: upon whom does the child fix psychologically as his or her parent if, in the future, that child may only have that one parent?39

In A v. A,40 Jeffries J. awarded custody of a boy of eight and a girl of six to their father. They had been in his care for some two years but he was now serving a prison sentence, having been convicted of cultivating cannabis plants, and had seven more months to serve. He had an understanding and compassionate girl-friend who knew the children well from caring for them for two years. In effect, therefore, the Court was awarding custody to her. The Magistrate had granted custody to the mother.

In two English cases, in each of which the sexual side of the marriage seems to have not been wholly satisfactory, mothers who had formed adulterous relationships were granted custody of their children as against fathers who claimed to be “unimpeachable”.41
Wardship

In New Zealand wardship orders have been made to protect a minor from contracting a possibly undesirable marriage; to prevent a minor from associating with a person considered not to be desirable, e.g. a 16-year old girl with a 28-year old married man; to protect a minor against her own reprehensible conduct in going off with a married man and being party to a mocked-up car accident to make it look as if they had disappeared, which would naturally have shocked the two families; to protect a child against undesirable qualities in a parent, e.g. involvement in drug-taking; protecting a right of access to a child after adoption; to preserve the status quo before matrimonial proceedings are heard and to prevent the removal of a child from the New Zealand jurisdiction.

Wardship orders can be sought in the High Court but not in the Family Court. However, orders seeking enforcement of custody or access rights in respect of Wards of Court may be sought in the Family Court. S.9(5) states that:

"In relation to the custody of, or access to, any child who is under the guardianship of the High Court or who is the subject of an application under this section, the High Court shall have all the powers of a Family Court and any order of the High Court which relates to the custody of or access to any such child may be enforced under this Act as if it were an order of a Family Court."

SECTION 11
Interim custody orders permitted

S.11(1) as amended now states that "subject to section 24 of this Act, the Court may from time to time:
(a) On application by the father or mother, or a step-parent, or a guardian, of a child; or
(b) With the leave of the Court, on application by any other person, make such interim or permanent order with respect to custody of the child as it thinks fit."

The express permission to a Court to make interim orders—viz. custody orders to "hold the fort" until the substantive custody application can be properly or fully heard—is a useful one. Prior to the amendment there had been some doubt whether a Court had jurisdiction to make an interim order because the only statutory reference to such an interim order had been contained in s.4 (where jurisdiction to make an interim order was preserved to a District (now Family) Court notwithstanding substantive proceedings in the High Court). It is now clear that a Court may make an interim order for custody, thus securing an effective interim arrangement, while remaining seised of the substantive issue.

An interim order with respect to the custody of a child is, nonetheless, a custody order until the further order of the Court or its expiry (if it is expressed to be for a limited time). Thus it is competent for the Court to make an access order pursuant to s.15 on an interim custody order. Necessarily such an access order must be reviewed when the substantive custody issue falls for determination. Likewise an interim custody order could be enforced under s.19.

SECTION 20
Preventing removal of children from New Zealand

A most effective weapon has been added to the armoury of those unfortunate parents who must deal with an attempt by another parent (or anyone else) to spirit a child out of New Zealand. In addition to the power, exercisable by a Judge or
Registrar of either the High Court or a District Court, to issue a warrant to a constable or social worker to take the child is the power31 to

"... order that any tickets or travel documents (including the passport) of the child, or of the person believed to be about to take the child out of New Zealand, or of both, be surrendered to the Court for such period and upon such conditions as the Court thinks fit."32

The added safeguard of requiring travel documents and passport of the alleged absconding person as well as of the child is applauded for its practicality. The order may be made when the appropriate judicial officer or Registrar "has reason to believe that any person is about to take a child out of New Zealand with intent to defeat the claim of any person who has applied for or is about to apply for custody of or access to the child, or to prevent any order of the Court (including an order registered under section 22A33 of this Act) as to custody of or access to the child from being complied with".34

Such an application may require such urgency that the usual niceties may have to be compromised. Thus the section anticipates the situation where the applicant for this order may not yet have filed an application for custody or access but yet the law may move swiftly to preserve the situation.

SECTION 20A
Offence of hindering or preventing access

Because of the high feelings which often run between parents about access this new provision is likely to remain a controversial issue. On one side is the objective desire to see lawful access orders being put into the intended effect. On the other side is the subjective avowal of a custodial parent that he or she knows what is best for the child whatever the Court may say. The feelings of the child and of the non-custodial parent frustrated in attempts to obtain actual access are in the middle of this battle-field. Onto this scarred terrain now marches s.20A which holds the following criminal sanction:

"(1) Every person commits an offence and is liable on summary conviction to a fine not exceeding $1,000 who—

(a) Without reasonable excuse; and

(b) With intent to prevent an order for access to a child from being complied with—
hinders or prevents access to a child by a person who is entitled under the order to access to the child.

(2) Nothing in this section shall limit the power of a Court to punish a person for contempt of court."

The effectiveness of this provision is yet to be tested. Pursuant to s.4(3), which comes into force on 1 October 1981 to coincide with the Family Courts Act 1981, the criminal sanction of s.20A(1) will be exercised by a District Court, not a Family Court.

It will be noted that there are four ingredients to the offence viz.

(a) The alleged offender must be shown to have actually hindered or prevented access.

(b) The complainant is entitled to such access under a Court order.

(c) The alleged offender had no reasonable excuse for the obstruction.

(d) The obstruction was with intent to frustrate compliance with the access order.

Thus if the custodial parent attempted to require the child to go but the child ran away from home and hid until the access time had passed no offence is committed. Likewise if the custodial parent attempted to persuade the child not to go but the
child still went for access.

It may be difficult for a successful prosecution to be brought when the access order simply provides "reasonable access". It can be anticipated that most cases requiring such a sanction will have got to the stage where the order provides specific days and even times and places. Nevertheless if it can be demonstrated that the proposed access was reasonable there is no logical reason why the more general term could not sustain a prosecution in very clear circumstances. In such circumstances evidence of patterns of access actually exercised and of a demand for access actually delivered relating to the incident would seem prudent starting points.

If the child was too ill to exercise access or the person seeking access arrived drunk or under the influence of drugs there would certainly be reasonable excuse. The difficult cases will lie where the custodial parent says the child is too upset to go.

This new provision may well be of assistance to practitioners who are faced with a custodial client who has unreal expectations concerning denial of access, e.g. the mother who objects to access lest the child meet his father’s girlfriend; the father who cannot see that he is using the children to make his wife pay emotionally for leaving him. The practitioner can now refer to the dire financial penalties which could fall if a court order is not complied with.

Of course there is inevitably a small number of parents who, usually because of unfinished emotional business with the other parent, write themselves a script of martyrdom concerning denial of access. In some of these the imposition of criminal sanctions may simply reinforce their "virtue" because they can say to the other parent "See what you're making me suffer". Some cases will no doubt respond successfully to a sanction. However, when the "righteous martyr" syndrome is detected by the court another response may be called for if the interests of the children are to be served. It is respectfully suggested that consideration could be given in such cases to the imposition of a condition on the custody order (pursuant to s.11(2) requiring the custodial parent to undertake a course of counselling or psychiatric treatment or psychological assistance under the direction of the Court with a view to that party's working through whatever grief or resentment feelings are causing the objectionable behaviour.

SECTION 16
Access by Other Relatives

It is perhaps best to illustrate the kind of position which calls for a remedy and then explain the law. In Wilkes v. Asher, the father of the relevant child had been killed on active service and the paternal grandparents took the widowed mother and the child into their home to live with them. As a result, a strong bond of affection developed between the child and the grandparents. Subsequently, the widow remarried and the child went to the new home. The child's step-father then refused to allow the grandparents access to their grandchild. Stanton J. considered that it would require strong grounds to justify the total exclusion of the grandparents from their grandchild and that it was in the latter’s best interests that the grandparents’ affection for him should be encouraged. He made an access order in their favour pursuant to s.3 of the Guardianship of Infants Amendment Act 1927. To alleviate this, and other, types of distressing situation, s.16 of the Guardianship Act 1968, as inserted by s.8 of the 1980 amending legislation, enacts that:

"(1) If a parent of a child has died, or has been refused access to the child by a Court, or if a parent who has access to a child is not making any attempt to exercise access to the child, the Court may if it thinks fit order that —

(a) The parents of that parent of the child, or either of them; or
(b) Any brother or sister of that parent of the child; or
(c) Any brother or sister of the child—
shall have access to the child at such times and places as the Court thinks fit.
(2) Any order made under subsection (1) of this section may be made subject to such
conditions as the Court thinks fit.”

No doubt some would argue that the section does not go far enough. For instance,
an elder sister of a child is not assisted by the section if she desires access to the child
and both parents are still alive and neither parent has been refused access or, having
been awarded access, is not failing to exercise his or her access rights.

On the other hand, the view has been expressed by Chilwell J. that the Court may
have an inherent jurisdiction, preserved by s.33(3) of the 1968 Act, to grant access to
grandparents in respect of a child, both of whose parents are still alive. The later
decision of the Court of Appeal in Tito v. Tito appears implicitly to overrule that
view stating that ss.15 and 16 of the Guardianship Act provide an exhaustive list of
persons in whose favour access orders may be made. However all is not lost and the
Court of Appeal pointed to an acceptable alternative, viz. that a custody order could
be made with a condition pursuant to s.11(2) that the child have access to certain per-
sons. How such a condition could be enforced is a problem the Court left to another
day. The view is respectfully expressed that if the condition was not observed then
the only effective remedy might lie in wardship proceedings which would give the
High Court control. The problem is, of course, that a condition to a custody order is
neither a custody nor an access order (or at least not an access order pursuant to
ss.15 or 16) and it is therefore doubtful if s.19 procedures would be available for
enforcement of that condition.

Jurisdiction

Section 4 provides that after 1 October 1980 the High Court and the Family Court
shall continue to have concurrent jurisdiction to hear proceedings under the Act.
It is worth noting that s.4(2) states that:
“A Family Court shall not have jurisdiction in respect of criminal proceedings
under this Act”
but s.41(5) provides that
“Nothing in this section shall limit the power of a Family Court to punish a per-
son for contempt of court.”

Removal of High Court Access Orders to District Court

Section 26(1) has sensibly been amended to provide for the removal of a High
Court access order to the District Court. There are, of course, occasions when an ac-
cess order may be made on its own without necessarily being made at the time of the
making of a custody order.

Proceedings not open to public

A new s.27 limits the persons who may be present during the hearing of pro-
cedings (other than criminal proceedings) under the Act to the following:
“(a) Officers of the Court:
(b) Parties to the proceedings and their barristers and solicitors:
(c) Witnesses
(d) Any other person whom the Judge permits to be present.”

This permits a witness to be present in court either before or after his evidence is
given but full control is finally vested in the Judge by s.27(2) and (3) viz.
“(2) Any witness shall leave the courtroom if asked to do so by the Judge.
(3) Nothing in this section shall limit any other power of the Court to hear pro-
ceedings in private or to exclude any person from the Court.’’

The expressed statutory approval of the competence of a witness to be present in Court certainly meets the ethnic expectations of many polynesian and other people whose cultures are more community-based than that from which our legal system originally sprang. Moreover in a Family Court setting a witness, or another person permitted by the Judge to be present, may assist the parties or the Court to deal more effectively with the matter in issue by providing a more relaxed atmosphere. On the other hand, if the presence of a witness or other person was seen to discomfort a party the Court could be expected quietly but firmly to request that person to leave the courtroom.

Restriction of publication of reports of proceedings

Relaxed as a hearing may be, Parliament has jealously guarded the privacy of proceedings from the world at large by providing that, without the leave of the Court who heard the proceedings no person shall publish any report of proceedings under the Act.62

An individual who offends in this regard renders himself liable to imprisonment for a term not exceeding 3 months, or to a fine not exceeding $500.63 Those who offend can take comfort in the fact that those penalties are alternatives.

A body corporate who offends is liable to a fine not exceeding $2,500.64

The needs of persons professionally involved in the Courts to follow the development of the law are met by s.27A(4) which provides that:

“Nothing in this section shall apply to the publication of any report in any publication that—
(a) Is of a bona fide professional or technical nature; and
(b) Is intended for circulation among members of the legal or medical professions, officers of the Public Service, psychologists, advisers in the sphere of marriage counselling, or social welfare workers.”

SECTION 28A
Power of Court to call witnesses

The inquisitorial aspect of the Court’s attempt to determine what is for the welfare of the child has led to the passing of s.28A which enables the Court, in any proceedings under the Act (not being criminal proceedings) to “call as a witness any person whose evidence may in its opinion be of assistance to the Court.”65

A party or the spouse of a party to the proceedings may be called by the Court to give evidence under this section66 but any witness called by the Court “shall have the same privilege to refuse to answer any question as the witness would have if the witness had been called by a party to the proceedings.”67

The expenses of a witness called by the Court are “paid in the first instance out of the Consolidated Account. . . .” The words “in the first instance” imply that the Court may, if it thinks it proper to do so, order one or both of the parties to contribute to such witnesses expenses by way of an order for costs.68

The procedure upon the Court’s calling a witness is for the Court or any barrister or solicitor appointed to assist the Court69 to examine and re-examine the witness.70 All other parties or their counsel or solicitor (including any barrister or solicitor appointed to represent a child) may cross-examine the witness.

The significance of s.28A is better realised when the surrounding sections 29, 29A and 30 are considered. The Court itself is empowered directly or through various assisting agencies (e.g. social welfare officer, psychologist, counsel for child) to gather certain information and views into the pool of resource material from which the decision must be drawn.
The Court is therefore charged by Parliament to take positive steps to ensure that the child’s welfare is brought to light. If partisan interests suppress certain evidence about which the court may hear a whisper but receives no substance, the court is put on inquiry and may obtain witnesses to clarify the point. There may also be occasions when a material witness may be more willing to come to Court if requested by the court than by a party, even counsel for the child. Thus the power may be used to obtain evidence which, if called by a party, may injure relationships between the witness and one or both parties. For example a grandparent may be reluctant to take sides but may be prepared to speak frankly to the Court. There is certainly an opportunity here for responsible counsel and the court to work as a helping team to resolve the issues with the least detrimental effect to all relationships involved.

SECTION 29
Reports from Director-General of Social Welfare

The Court continues to have a discretionary power to call for a social welfare report in any case where guardianship or custody (other than interim custody) or access is sought. The barrister or solicitor acting for each party is entitled to receive a copy of that report. A party acting for himself is also entitled to a copy. So is a barrister or solicitor acting for a child.

The Court may order that the report not be shown to a party, otherwise the party may see the report. However, a barrister or solicitor acting for a child must not give or show the report to the child unless the Court specifically orders otherwise.

The parties may give evidence about matters in the report. However, the Court is reserved the right “if it thinks fit” to “call the person making the report as witness”. This implies, of course, that it is not competent for a party to require the calling of the social worker but it is within the Court’s sole discretion. In this regard note that the words “on the request of any party” have been dropped out of the relevant subsection by the 1980 Amendment.

SECTION 29A
Expert Evidence

In proceedings under this Act there is great temptation for the litigants, especially if they are the child’s parents, to call as experts, pro and con, psychologists and/or psychiatrists. Of course, the Court must give weight to the evidence before it and particularly to the assessments of those with experience, especially if they have had some time with the parties and the children. But psychologists or psychiatrists cannot make the decision for the Court, nor can their opinions take the place of the Court’s opinion and decision. Their opinions must necessarily have some considerable influence on the Court particularly where there is no clear merit or demerit on one side or the other.

Richardson J. has recently put the point that he accepted evidence from the behavioural sciences that the crucial feature in the emotional and psychological well-being of a child was the affectional tie between the particular adult and the particular child, “Study of the psychology of children and of the influences of individual and group behaviour”, he said, “and attitudes has advanced to the point that there can be no question that the Courts can benefit from the evidence of experts in the field. In accepting the assistance of those trained in observing children and analysing the influences that shape them, the Courts do not abdicate their function in determining questions affecting human relations any more than in other areas where expert evidence is adduced.”

In Epperson v. Dampney two healthy normal children had been subjected in eight months to five interviews in the professional chambers of the father’s
psychologist and the mother’s psychiatrist. The first instance judge felt that the expert evidence compelled him to find in favour of the father though he would have preferred to find for the mother as custodian. On appeal, a majority of the New South Wales Court of Appeal reversed him, being of the view that he had given undue weight to his impressions of the expert evidence and that it was in the long-term interests of the children that they should be with their mother. The message of this decision is that “claims for custody of physically and mentally hale and hearty children should not be buttressed by calling expert psychological or psychiatric evidence, and the day of “trial by experts” in this area instead of by the Judge has not yet dawned.”

In N v. N the boy of seven had been given a Bene Anthony test by a psychiatrist, this test being devised to ascertain the emotional affinity of a young child towards each parent in such a way that the risk of contrived or artificial answers would be minimised. This doctor thought the boy should be in the father’s custody lest there be quite serious psychological damage. This doctor did not agree with another psychiatrist, who thought that the father had attempted to influence the boy against his mother. The Court of Appeal took the view that the expert evidence must be given the weight that seemed appropriate in the context of other relevant evidence and other considerations bearing on the welfare of the child or children. The results of a test such as this one by itself could not automatically be regarded as the decisive factor in awarding custody. There was also a girl of nearly four, who certainly should not be removed from her mother’s custody. It was better for both siblings to be reared together and, in the first instance Judge’s view, the son should be taken from the father’s influence of him towards hating and rejecting his mother. He had awarded custody of both children to the mother and the Court of Appeal refused to say he had exercised his discretion wrongly.

Psychiatrists and Psychologists

Because of their own professional ethics almost all psychiatrists and many psychologists will only provide reports concerning children if the report is requested by both parties or by the Court or by counsel for a child—in other words, on a non-partisan basis. Sometimes practitioners become confused by the differences between psychiatrists and psychologists. A psychiatrist is a doctor, medically trained and qualified to diagnose questions of sanity, insanity and mental health, and to prescribe treatment for mental health problems. A psychologist is trained in the science of behaviour and may be experienced or qualified to comment on development of a child in physical, educational or emotional terms. A psychologist may be able to identify behavioural or relationship symptoms which differ from the normal and can propound theories to explain these. He may be able to produce programmes to rectify relationship or behavioural difficulties. Lawyers practising in this field are well advised to learn something of the methods used by each of these groups of experts and, of course, in any case it is important to know in what field the particular expert has gained experience. Both groups of experts are in a position to gain a wide experience of human behaviour.

Changing Attitudes — The Team Approach

Section 29A(1) provides that

“On any application for guardianship or custody (other than interim custody) on access, the Court may, if it is satisfied that it is necessary for the proper disposition of the application, request any person whom it considers qualified to do so to prepare a medical, psychiatric, or psychological report on the child who is the
subject of the application.”

This section reflects a changing attitude by the Court towards expert evidence in custody cases. Whereas the Courts have in the past seemed to regard expert evidence as a direct attack on their prerogative to determine the question at issue, now there is an easier relationship where the Courts appear better able to cope with the evidence provided by experts. It is not surprising that the Courts have exhibited insecurity about expert evidence in the past. After all the psychiatrists, psychologists and social workers could all point to various developmental theories, tests and research results making up a tidy methodology against which the application of legal principles and the adversary system seemed crude or even missing the point. The last decade has seen a movement towards responsible compromise. The adversary system has been abandoned as the first resort with a substituted direction towards counselling and mediation. However, it is retained at last resort because apart from abandoning the problem (which is unthinkable), no other workable solution has been propounded. On the other hand the experts in the social sciences appear to accept more readily the decision of a court which has had the ability to properly consider and can understand what evidence they can provide. And of course the experts will not always agree in any particular case so a decision must be made—which is what courts are supposed to be good at!

The Court can seek assistance from experts of its own motion now. This promotes the concept of a team in which the various experts provide material and the Judge, who has knowledge of the significance of that material, makes a decision. Thus this provision permits the development in practise of a family court served by ancillary services. It is to be hoped that those Judges who accept this specialist role will take steps to familiarise themselves with the language and methods of the usual experts so that their decisions can be properly informed.

Section 29A(2) requires that

“In deciding whether or not to request a report under subsection (1) of this sec­tion, the Court shall, if the wishes of the parties are known to the Court or can be speedily ascertained, have regard to those wishes.”

This does not require that the Court be bound by those wishes but means that the parties will be able to be involved to an extent in the Court’s decision on this point—which is itself a worthwhile feature of this procedure.

A report provided to the court is dealt with in the same way as a Social Welfare report. 84

The report is limited to “medical, psychiatric or psychological” 85 and it follows that the person requested to furnish the report must be a person qualified in one of those disciplines.

SECTiON 30

Power of Court to appoint solicitor or counsel

There are two types of appointment of a barrister or solicitor under s.30. The first is “To assist the Court”. 86 The second is “To represent any child who is the subject of or who is otherwise a party to the proceedings”. 87

The respective roles of counsel appointed under each of those provisions must sensibly differ because of the focus of the appointment. An appointment to assist the Court can include a brief to provide argument on a point of law or it could involve undertaking a special task in the proceedings to assist the Court. If in doubt as to what his brief includes or allows, a barrister or solicitor appointed to assist the Court should ask a Judge in chambers for directions.

The role of a barrister or solicitor appointed to represent a child is less easy to define in general terms. The wording of the new s.30(3) makes it clear that whether
the appointee is a barrister or a solicitor the scope of his brief is the same. In other words, the section allows for the appointment of a legal representative for a child if a barrister is appointed his role is not more restricted than if a solicitor had been appointed. 88

The appointed counsel “may call any person as witness in the proceedings, and may cross-examine witnesses called by any party to the proceedings or by the Court.” 89

Counsel representing a child must ascertain how he is best to represent that child. It may be most effective to obtain initial contact with the child on his or her own home ground where the child has the familiarity and security of the territorial advantage. In some cases the child will be able to give counsel a clear direction which is effectively an instruction on the usual lawyer-client basis. In other cases, particularly where children are very young or are emotionally disturbed, counsel must look more widely for the direction of the representation. But the representation is for the child and it is submitted that the appointment is not provided simply to enable the Court to learn what an additional counsel’s view of the case might be. 90

Counsel appointed to assist the court or represent a child may call witnesses which necessitates interviewing and briefing witnesses and prospective witnesses. Experience indicates that with the consent of the parties counsel may achieve useful results by direct discussion with the parties which can pave the way for a settlement which is in the interests of the children.

The value which is now seen in appointing representation for children is reflected in s.30(2) which provides that “. . . in any proceedings under this Act which relate to custody of a child or to access to a child, a Court shall, if those proceedings appear likely to proceed to a hearing, appoint a barrister or solicitor to represent any child who is the subject of or who is otherwise a party to the proceedings, unless the Court is satisfied that the appointment would serve no useful purpose.”

This obviously requires a specific determination in each case. The scheme of the Act is plainly that children shall normally be represented and the Court could be expected to provide reasons for departing from that scheme on the basis that no useful purpose would be served by appointment in that case.

SECTION 31
Appeals

Appeals (other than appeals in respect of criminal proceedings or disputes between guardians or reviewing a guardian’s decision) may be made from a District Court or a Family Court to the High Court. 92 The appeal must be brought within 28 days after the decision or such further time as the Court from which the appeal is taken allows. 93

Every appeal to the High Court “except an appeal upon a question of law, shall be by way of rehearing of the original proceedings as if the proceedings had been properly commenced in the High Court”. 94 That those words mean fully what they say has been determined by the Court of Appeal. 95 Unless the Court of Appeal grants leave to appeal on a point of law, the decision of a High Court on an appeal is final. 96

If the proceedings originate in the High Court there is a right of appeal to the Court of Appeal. Normally this is the usual appellate procedure (i.e. not a rehearing) but s.31(6) allows the Court of Appeal, in its discretion, to “rehear the whole or any part of the evidence” or it may receive further evidence “if it thinks that the interests of justice so require”.

No appeal lies from a decision of the Court of Appeal. 97
The Decision to Appeal

Considerable care should be bestowed upon the question whether or not to appeal, particularly from the High Court to the Court of Appeal, or from a District or Family Court to the High Court where the appeal is on a point of law only. Basically, an appeal against the exercise of a discretion will be upheld if the appellate tribunal is persuaded that the Court below acted on a wrong legal principle or, in the area of factual matters, if satisfied that the Court below either gave too much weight to certain aspects of the evidence in the case or that he gave insufficient weight to aspects of the evidence or, in a more broad way, that the exercise of his discretion was wrong. The Appeal Court will not substitute its own views as to the children’s best interests for those of the first instance judge unless it is satisfied that his decision was not in accordance with the child’s welfare. There are cases where the decision is finely balanced and an Appeal Court cannot say the trial Court was wrong. An Appellate Court which has not seen and heard the witnesses will rarely be able to conclude in a case where the exercise of the discretion depends essentially on the evaluation of witnesses that the trial judge was wrong. While the importance to be attached to the assessment of the witnesses necessarily varies from case to case, the Appeal Court must give due weight to any advantages the trial court derived from seeing and hearing the witnesses.99
FOOTNOTES

CHAPTER ONE
COUNSELLING AND CONCILIATION

1 Particularly important is the reaching of sensible interim arrangements about the welfare, custody and access of children at an early stage.
2 The Registrar or a Counselling Co-ordinator or other counselling personnel of the nearest Family Court could advise a practitioner of available counselling services, including non-Court counselling services, if he is in doubt as to whom a client should be referred.
3 This is not to say that the first resort may not be to the Family Court.
4 S.8(2). Clearly paternity proceedings would be outside s.8 for they are not between husbands and wives. On the other hand it is difficult to see how s.8 can sensibly apply to proceedings for a declaration that a marriage has been validly dissolved or is void under, respectively, ss.27 and 28 and 29-31, so far as reconciliation is concerned. Certainly it could apply in respect of conciliation. It would also seem that an application for an order presuming that the other spouse is dead and that the marriage be dissolved under ss.32-36 is, in truth, susceptible to neither reconciliation nor conciliation.
5 A “counsellor” is defined by s.2 as meaning “(a) A person—(i) nominated by an approved marriage guidance organisation or counselling organisation; or (ii) Nominated by a Court—to act as a counsellor under this Act; or; (b) A counsellor or counselling supervisor appointed pursuant to the Family Courts Act 1980.” Section 2 also defines an “approved marriage guidance organisation or counselling organisation” as meaning an organisation approved by the Minister of Justice under s.5 of the 1980 Act. Section 5 allows him from time to time, by notice in the Gazette, to approve any body of persons (whether incorporated or unincorporated) as a marriage guidance organisation or counselling organisation for the purposes of the Act; any such approved organisations may nominate any person to act as a counsellor under the Act. Parliament has thus taken steps to ensure that only those with adequate training and experience will act as counsellors and not bumbling, inexpert would-be do-gooders.
6 S.9(3).
7 Of course counselling services are available on a voluntary basis within the community from several organisations but these lack the formality and “teeth” of counselling under the Act. See s.17.
8 If understanding Court staff with a tolerable degree of sympathy are provided, and there are simple forms for requests for counselling, then there will be encouraging conditions for direct access by applicants to Family Courts—and even the possibility that the Family Court may develop into being a place of first resort for parties to failing marriages rather than the last resort (as has been the case in the past). Lawyers probably have a unique position, as “salesmen” of the concept of recourse to the Courts, to assist in the creation and promotion of this helpful image of the Family Court.
9 A legal adviser may well advise clients to consider such a course in fulfilment of his duty under s.8(1)(b)—but note the provision of s.9(3). When the Court arranges referral the counsellor is paid from the consolidated account.
10 With the recognition of conciliation as a valid objective of the counselling procedure it can fairly be said that this part of the counsellor’s role has received recognition and statutory ratification.
11 Not, note, for a divorce or for maintenance or custody, of or access to a child: s.10(1), but see s.10(4).
12 Cf. Domestic Proceedings Act where the Court not the Registrar, made the referral to conciliation.
13 Who is a counsellor has been mentioned above.
14 It is to be hoped that a request under s.9 will not be used as a ploy to avoid ultimate reference to a conciliator. It must be borne in mind that notwithstanding earlier counselling, the situation may be quite different at the stage of later proceedings. Therefore the
Court and legal advisers must consider the matter afresh because in some cases the climate for counselling may be improved whereas in others further counselling might offer little chance of success.

15 S.10(2).
16 Dispensation is thus at discretion. It is not mandatory.
17 S.10(3).
18 This refers to applications for maintenance by one spouse against the other. It does not refer to maintenance after dissolution of marriage, which is the subject matter of s.70.
19 And not, therefore, by anyone else such as a grandparent or an uncle or aunt of the relevant child. But see Tito v. Tito [1980] 2 N.Z.L.R. 257.
20 S.10(4).
21 Which seems, notwithstanding the egalitarianism of the Status of Children Act 1969 and the Guardianship Act 1968, to place ex-nuptial children whose custody is in dispute in a different category from their peers whose parents are or were married so far as the availability of the counselling facility in such proceedings is concerned.
22 It seems an unlikely straining of the plain words of s.67 to assert that the reference to custody could be said to encompass cases where access was the issue and custody was not in dispute. Access is, of course, dealt with in its own separate sections of the Guardianship Act (ss.15 & 16), even though the two concepts are closely related. The applicant for access who desires to have that issue referred to counselling would be prudent to frame his or her application to include the issue of custody, even though that is not what is, in reality, being sought. The most regrettable aspect of such well-intentioned artifice is that the responding party may take the custody application as a real threat or empty posturing.
23 S.13 Guardianship Act 1968.
24 Meyer Elkin, with many years experience in the Conciliation Services in Los Angeles Court, U.S.A., assesses 50 per cent of custody and access cases are there resolved at the conciliation stage—with a resultant saving in relationships, legal fees and the expense to the State of the expense of Court sitting time.
25 There is no statutory limitation on the discretion of the Court to direct that the matter remain referred to the counsellor notwithstanding that 28 days have elapsed. A specific direction is required from the Court and it seems sensible that it be exercised in accordance with the policy of the Act. The possibilities come to mind of 28 days having been insufficient to deal with all counselling matters, or there being a likelihood of progress with further counselling. Such a direction may even be able to be used by a Court to encourage a party to co-operate with the counselling process although such a use of the discretion would require sensitive, albeit firm judgment and, in those circumstances it is suggested, should be reviewed by the Court from time to time. The scheme of s.10 is that, normally, a party can proceed to obtain a resolution of the problem in Court after 28 days. Access to the Court, subject to the policy of the Act, ought not lightly be denied a party. Efficient mobilisation of the counselling service is to be hoped for in this context.
26 S.11(1).
27 S.11(2). This is a significant advance from the role of the conciliator under the Domestic Proceedings Act 1968, s.11(2)(b) does not require that the understandings be spelled out or even that the issues they affect be identified, though that may be advantageous and it is suggested that there is room for a development in this area if it seems useful to have the areas of understandings revealed. It is a "pointer" to the Court and the parties’ solicitors as well as being a reminder on record to the parties of their having reached an understanding.
28 S.11(3). This section, when read with s.10(5) and (6), makes one realise that the counselling envisaged is normally crisis-counselling or short-term counselling. However, if the parties and the counsellor agree then the counselling can extend for as long as need be (as was the case, on occasions, with conciliation under the Domestic Proceedings Act 1968).
29 S.12.
30 Although only the husband and the wife are referred to, the section does not appear to preclude the counsellor's including other people, such as children of the parties in counselling, subject, no doubt, to the consent of the parties and also having regard to s.18(3) and the question of privilege.
31 Not quite all, for s.19(1) excludes expressly proceedings under s.27 (which is concerned with
applications for a declaration as to the validity of a marriage or of its dissolution; s.29 (which deals with applications for orders declaring a marriage to be void ab initio) or s.32 (which deals with applications for a declaration of presumption of death and dissolution).

32 S.19(1).
33 S.19(2). This provision does not apply to proceedings for a separation order (although the provisions of s.19(1) would apply to proceedings for a separation order).
34 S.19(3). See also above comments on similar provision in s.10(3).
35 S.19(4). The counselling will probably normally be crisis or short term counselling.
36 Defined in s.2 of the Act.
37 Discussed below.

38 S.14(1).
39 S.14(2).
40 S.14(3).
41 S.14(4).
42 S.14(5).
43 S.14(6).
44 S.14(7).
45 Defined in s.2 of the Act.
46 S.15(1). One wishes that orders for dissolution and for declaring a marriage to be void ab initio could have been included.
47 S.15(2).
48 S.15(3). As to orders made by consent, see generally s.170 of the Act.
49 Ss.14 and 15.
50 S.14(6).
51 The role of a barrister or solicitor at a mediation conference is not one that will come easily to many. It can usefully be seen as a negotiating situation and also as a place to try to achieve results sought in a Court but without the expense of preparation and appearance at a formal hearing. For example, for a lawyer to explain his client’s budget may take 5 minutes, when, in our Court, the exercise may take half an hour. Similarly the results of one hour’s formal cross-examination can often be achieved informally in 10 minutes or so. If mediation conferences can be arranged by appointment and many cases are finally disposed of there, then this innovation will become popular with lawyers and clients alike.
52 That is, under s.11(1)(b) of the Act.
53 That is, under s.13(2)(b) of the Act.
54 S.17(1). Section 17(2) provides that s.20(1)-(3) and (5) of the Summary Proceedings Act 1957 are to apply to a summons under s.17 as if it were a witness summons issued under s.20 of the 1957 Act.
55 Section 18(2) states that nothing in s.18(1) is to apply to a record made by a Family Court Judge under s.14(7) of the Act, or to any consent order made under s.15 of the Act, or to any proceedings for the review of such an order.
56 S.18(3).
58 Consider ss.8, 9(1) and 19 of the Act. No doubt it is true to say that the jurisdiction of the Family Court is, like that of the former Domestic Proceedings Court, inquisitorial: see J. v. J. [1972] N.Z.L.R. 1089, 1091.
59 See s.8(2). Under the former Domestic Proceedings Act 1968 it was, unhappily, the case that some practitioners told clients that it was not necessary to see a conciliator, thus suggesting that a few lawyers did not understand the import and importance of the conciliation provisions of that Act.
60 That is, under s.9(1).
61 The authors gratefully acknowledge the help they have received in connection with the preparation of this paper from Mr K.D. MacRae, B.D., LL.B., lately Supervisor of Conciliation Services and that of the Court Conciliation Centre, Auckland.
CHAPTER TWO

SEPARATION ORDERS

2 Section 19(1)(a) of the former Domestic Proceedings Act 1968 was to the same effect save that the disharmony had to be “serious” and there was the further requirement that the parties were “unlikely to be reconciled”. Furthermore, the section made it clear that the granting of an order was at discretion and not as of right, as now. The previous learning as to when the discretion should or should not be favourably exercised has thus been rendered nugatory.
6 The Law Report does not give the facts of this case, but they are noted by Webb in [1971] N.Z.L.J. 176.
7 [1971] N.Z.L.J. 176, at p.177 Quaere whether the case would now be decided the same way?

There must be some parenthetical discussion of the requirement that it must be unreasonable to require the parties to continue or resume cohabitation. No doubt an applicant for a separation order must be able to point to an adverse state of affairs common to the two spouses. Beyond that, one simply asks: is it reasonable to require these spouses to live together? One does not look for matrimonial fault or responsibility for the marital breakdown, but asks what are the effects of it. Perhaps some help may be derived from the cases under the previous legislation whereunder a man could be made to maintain his wife, even though she was living apart from him, if the Court was of the opinion that she could not reasonably be required to cohabit with him, whether or not because of any wrongful conduct on his part: Domestic Proceedings Act 1968, s.29. There was, indeed a forerunner to this section in s.17(7) of the Destitute Persons Act 1910. This provided that, where spouses were living apart, and the wife had, in the Court’s opinion, reasonable cause for refusing or failing to live with her husband, he should not be deemed to have provided her with adequate maintenance merely by reason of the fact of his willingness and readiness to support her if and so long as she lived with him.

It was established that a wife could establish “reasonable cause” without proving that her husband had been persistently cruel to her in the strict sense then required by the law: see Murray v Smith [1927] N.Z.L.R. 513; Kelly v Kelly [1939] G.L.R. 462 (abnormal and undue sexual demands not amounting to cruelty). More recently, in Wilson v Wilson [1965] N.Z.L.R. 625, Wilson J. defined “reasonable cause” as meaning “reasonable in all the circumstances of the case”.

It was not necessary that the defendant be shown to have been at fault, and the “reasonable cause” mentioned in the 1910 Act could be inferred from the age, physical and mental health and the past conduct of the parties. In Robottom v. Robottom [1922] N.Z.L.R. 1038, for instance, the husband had repeatedly refused to eat food or use serviettes handled by his wife. He suggested she was uncleanly in her habits. This was not true, but the suggestion was made without malice. The husband had an obsession that everyone but himself was uncleanly. In consequence, the wife, a highly-strung nervous woman, became a
nervous wreck. If she returned to cohabitation, she might have lost her reason. It was held that the Magistrate had rightly ordered the husband to maintain the wife and it is submitted that a Family Court could today properly make a separation order on these facts at the suit of either spouse.

In the 1950s indeed, it was put simply that a wife should not be compelled to return to a life of disharmony, unhappiness and distress: Hutton v Hutton [1955] N.Z.L.R. 973, at p.975, per Finlay J., and that "reasonable cause" might exist where all that was established with regard to the marriage was that a hopeless position had been reached where the parties were both miserable: Rolfe v. Rolfe [1959] N.Z.L.R. 1227.

It was also accepted that the use of the expression "reasonable cause" was considered to make the test referable to the wife's position in the home and thus to eliminate any inquiry into the intention of the husband in his conduct towards the wife: see Fodie v. Fodie [1959] N.Z.L.R. 721, at p.724, per Henry J. Thus it would seem that there is no defence open to a spouse who is truly able to say he or she could not help the conduct relied on because he or she could not help it. In Crump v. Crump [1965] 2 All E.R. 980, the husband claimed that his health had been injured by his wife's ritual cleaning of everything in the house to kill "cancer germs". She required him to join in with her in these exercises and screamed when he objected. The wife's conduct was due to an obsessional psychoneurosis over which she had no control. She had every excuse for it, therefore, but the husband was nevertheless granted a decree of divorce on the ground of cruelty. Doubtless he could have obtained a separation order in this country. Similarly in P. (D.) v. P. (J.) [1965] 1 W.L.R. 963; [1965] 2 All E.R. 456, the wife refused to permit sexual intercourse and to have children because she had a deep-rooted fear of child bearing. She attempted to defend herself when the husband petitioned for divorce on the ground of cruelty by saying that she could not help it and did not mean it. It was held that this was no answer. Doubtless again, this husband could today obtain a separation order upon such facts.


CHAPTER THREE

DISOLUTION OF MARRIAGE UNDER THE FAMILY PROCEEDINGS ACT 1980

1 So said the English Law Commission in The Field of Choice (Law Com. No. 6 (1966), Cmdn. 3123, at para. 19). It was also there said that a good divorce law should aim "to buttress rather than to undermine, the stability of marriage".

2 We have to accustom ourselves not to use the term "divorce" any more.

3 There will undoubtedly be those who will continue to deplore that adultery ceased to be a ground per se for an "instant divorce". The answer to such objectors is that it is always open to a spouse who complains of his or her spouse's adultery to seek a separation order as a stepping-stone to ultimate dissolution of the marriage. There will, no doubt, also be those who consider the new law to be wanting in that speedy dissolution is not to be had for cruel or violent conduct, but, again, a separation order can be obtained, along with a non-molestation order. There may, even, be those who regret the abolition, by s.190 of the Act, of enticement actions.


5 W. v. W. [1956] N.Z.L.R. 779. She was "at fault" because she would clearly have forsaken her husband for an indefinite time and have left it to him to bear the brunt of repairing the marriage bond, which she had broken, by resuming cohabitation in Wellington. The case is discussed further below.

6 Matrimonial Proceedings Act 1963, s.21(1)(m), but fault could creep in by virtue of s.29(2).

7 Matrimonial Proceedings Act 1963, s.21(1)(o).

8 Cf. Matrimonial Causes Act 1973 (U.K.) s.3; Family Law Act 1975 (Com.) s.14. If one wishes to find something to be shocked about, it should be about the fact that about one in every four marriages appears to be ending up in dissolution.
9 It is, in the writers' view, wholly wrong that there is no remedy, as such, for spouses whose marriages have not been consummated.
10 It would seem from Black, *Dissolution of Marriage* [1980] N.Z.L.J. 402, that a number of people seem to think that irretrievable breakdown of the marriage is the sole ground for dissolution. As is pointed out there, this is not the case, for there also has to be the two years' living apart. If clients have made this confusion in their minds, they must be abused.

12 See *Ash v. Ash* [1972] Fam. 135. at p.141; [1972] 1 All E.R. 582, at p.586; *Katz v Katz* [1972] 3 All E.R. 219, at p.223. Compare, however, the views of Sir Jocelyn Simon P. in *The Riddell Lecture* (1970) set out in the eleventh edition of Rayden on Divorce at p.3232. It may well be that the position in New Zealand will prove to be that, once the two years' living apart is established to the Court's satisfaction, the order for dissolution of marriage will follow because the Court will say that the matter of irreconcilable breakdown is a case of *res ipso loquitur*.

17 At pp.1118-1119.
18 At p.1121.
21 At p.920.
22 At p.921.
23 At p.924.
24 At p.924.
25 At p.934.

In *Marriott v. Marriott* [1956] N.Z.L.R. 125 the wife had been committed to a mental hospital on December 1, 1927, and was discharged as recovered, after a month's probation, in August 1928. On six later occasions she was a voluntary boarder in the institution for periods of 6 months, 10 months, 2 years and 8 months, 1 year and 5 months, and, finally, for over 7 years from January 24, 1947, to August 19, 1954, when she was discharged recovered at the behest not of her husband but of her friends. When the wife entered the hospital in 1947 the husband made up his mind that he could not live with his wife again and he never did so. He never communicated his decision to his wife. Indeed it would have probably been both cruel and unwise to do so. Insofar as the husband had visited, his wife in the institution he had done so as a duty. Hutchison, J. held, applying the *McRostie* case, that the husband had an *animus deserendi* in 1947 and still had it in 1954 and that a decree should be granted on the ground of seven years' living apart. Insofar as the husband had kept on the matrimonial home for a short while, he had done it for his daughters' sake.

30 (1932) 146 L.T. 406 (D.C.).
32 One possible view was that where both spouses were being obstinate each might be said to be in desertion. However, while certainly it used to be said that mutual desertion was not possible, the matter now appears to be academic, since the point is simply: are the spouses "living apart"?

No doubt also a New Zealand Court would agree with *In the Marriage of Franks* (1976) 1 Fam. L.R. 11, 341, where the husband had been arrested and later convicted of murder. He
was sentenced to imprisonment for life. A month after his arrest the wife decided she would not live with him again. It was held that the marriage ended at that point.


In England a divorce may be had on the grounds of living apart for a continuous period of at least two years immediately prior to the petition being presented if the respondent consents to a decree being granted: s.1(2)(d) of the Matrimonial Causes Act 1973 (U.K.). Section 1(2)(c) enacts that a divorce may be had where the respondent has deserted the petitioner for a continuous period of at least two years immediately prior to the presentation of the petition. Section 1(2)(e) enables a divorce to be granted where the parties to a marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition. Strictly speaking there is only one ground of divorce viz. irretrievable breakdown, but such breakdown can be proved by satisfying the court that one or more of five events, of which the above are three, have occurred. In England it has been necessary to say that “living apart” in s.1(2)(d) must mean the same as in s.1(2)(e) and that s.1(2)(d) and s.1(2)(e) do not require fault to be imputed whereas s.1(2)(c) does: Santos v. Santos [1972] Fam. 247, 256; [1972] 2 All E.R. 246, 250 (C.A.). In England, therefore, care has to be taken not to equate “living apart” with “has deserted”: ibid., per Sachs L.J. delivering the judgment of the Court of Appeal.

41 (1888) 13 P.D. 97.

Much to the same effect is the case of Biddle v. Biddle, [1921] G.L.R. 632 where it was held that where desertion had begun it continued notwithstanding the fact that the respondent husband had been prevented from returning home by his service overseas in the forces. An interned enemy alien is also capable of maintaining the necessary animus during his captivity; Johnson v. Johnson, [1944] N.Z.L.R. 330. For a case of particular difficulty, see Beeken v. Beeken [1948] P.302 (C.A.).

45 (1903) 23 N.Z.L.R. 386.

50 This section deals with the discharge of separation orders upon the spouses’ resuming cohabitation.

54 (1830) 1 Dow & Cl. 519 (H.L.).
62 [1949] N.Z.L.R. 70. That care must be taken in stating correctly what was the date of the agreement to separate is to be seen from Oliver v. Oliver [1980] N.Z. Recent Law 78.
CHAPTER FOUR

MAINTENANCE OF SPOUSES,
FORMER SPOUSES AND OF CHILDREN

2 See ss.110-117.
3 As to the meaning of a child of the marriage, see s.2.
4 The paragraph allows an application for a maintenance order in respect of a child be made by a person having lawful care of the child or by a social worker, against a parent or parents of the child.
5 The term “interim order” in relation to maintenance, means an order made under s.82 of the Act: s.2.
6 This Part deals with overseas maintenance.
7 Defined in s.2 as including an order declaring a person to be a parent of a child (however the order is described, and whether or not it also provides for the maintenance of the child).
8 These provisions are concerned with a Family Court’s powers to order payments by the respondent in respect of the funeral expenses of a dead ex-nuptial child and in respect of expenses reasonably incurred by the mother by reason of her pregnancy and the birth of the child and towards the mother’s support during the pregnancy and for such period after it, not exceeding a month, as the Court specifies.
9 These are proceedings under ss.79, 82 and 90 of the Act. They deal respectively with applications for maintenance orders in favour of unmarried parents in respect of their ex-nuptial children, interim maintenance orders and setting aside and cancelling registered maintenance agreements.
10 The meaning of this generality will have to be explored later.
11 There are, in fact, what are called miscellaneous provisions regarding maintenance which are to be found in ss.91 to 100. These are dealt with below.

“Domestic Benefit” is defined by s.2 as meaning a benefit under s.27B or 27C of the Social Security Act 1964 or one granted under s.61 thereof and corresponds to a benefit granted under s.27B or 27C, and includes a benefit of the above kind as increased by a
child supplement under s.61A of the 1964 Act. This in effect means D.P. Benefits for Solo Parents, D.P. Benefits for Women Alone (i.e. those who have never been married or who have lost their husband’s support) and Emergency Benefits respectively.

Which, it will be remembered, also covers orders declaring a marriage to be void ab initio.

See W.R. Atkin, op.cit., supra, at pp.67-68, where there is an impassioned plea, not fully or wholly answered by the terms of the 1980 Act, by any means, for one system of maintenance to cover all situations. Nevertheless, it must be admitted that the learned author’s strictures have been taken to heart to some extent.


At pp. 503-504.

At p.504. The parties here had lived in comparative luxury during their marriage. The order of the Court below was upheld, Quilliam J. being satisfied that the figure of $10 was not referable to luxuries that the wife had become accustomed to.


18 (1977) 3 N.Z. Recent Law (N.S.) 252.


The provision in para. (c)(ii) appears to repeat the “tit for tat” scheme mentioned previously.


Perhaps this is a rule coming within the rubric with which s.61 ends, viz., “any other rules of law that are not inconsistent with” the principles set out in ss.62-66, and 72 and 73. And see Bunce v. Bunce [1980] 2 N.Z.L.R. 247 (C.A.).


Perhaps this too is preserved by s.61.


30 Supra.


32 At pp.255-256. The parties had married in 1947. In 1968 their marriage was dissolved. The wife had been working since, at least, 1970 and was in a secure financial position. She was reaching the age when she was contemplating retirement, as doubtless was her husband. Her case was therefore not one of a woman suddenly forced out of economic necessity to go out to work, nor of a wife and mother out of the workforce for years when the marriage broke up and thus attracting special considerations. In 1977 a Magistrate cancelled an order in the wife’s favour of $20 per week and the Court of Appeal, in the light of the former law, refused to hold that the Magistrate had erred in the proper exercise of his jurisdiction.

33 Davies v. Davies, noted by Webb, [1970] N.Z.L.J. 315, it was also said there that where a wife has full responsibility for the children, the more practical approach may be to have regard to the overall needs of both wife and children and then to arrive at the individual orders after the total needs have been assessed. See also Lewis v. Lewis [1977] 1 W.L.R. 409; [1977] 3 All E.R. 992 (C.A.); Lane v. Lane [1975] N.Z.L.J. 3.

As to the danger inherent in de facto couples producing joint budgets, see Skelton v. Skelton [1978] N.Z. Recent Law 369 per Chilwell J.


35 Ibid.

Wachtel v. Wachtel [1973] Fam. 72; [1973] 1 All E.R. 829 (C.A.) seems to have restarted this ball rolling in the divorce Courts.
40 [1971] Recent Law 238. There may be the occasional spouse who can raise money by borrowing it or who receives a voluntary allowance which is likely to continue and could be used towards the other’s maintenance. There is also the spouse who sees fit to take a low-paid job although trained and equipped for a better paid one.
41 As to intermittent maintenance payment by a very small wage, see Wright v. Wright [1976] N.Z.L.J. 316, 317.
43 J. v. J. [1955] P.215; [1955] 2 All E.R. 617 (C.A.). Account has been taken, too, of free board and lodging provided by a husband’s mistress and business partner: see Ette v. Ette [1964] 1 W.L.R. 1433; [1965] 1 All E.R. 341. But it is certainly not right to make an order which indirectly requires a de facto wife to pay maintenance in respect of her de facto husband’s former wife and children: Skelton v. Skelton [1978] N.Z. Recent Law 369. If the law were otherwise, as Chilwell J. there remarked, a pauper could marry a wealthy woman and one would find orders made against him payable by his new wife.
45 See Grigg v. Grigg [1943] G.L.R. 6; cf. Attwood v. Attwood [1968] P.591; [1968] 3 All E.R. 385 (D.C.). This effectively prevents a young, childless wife from claiming maintenance to keep her in idleness on the excuse that she has had no training for any occupation. It also prevents a trained young and childless wife from claiming maintenance on the ground that, though trained, she does not see why she should go out to work.
48 Cf. Williams v. Williams [1965] P.125; [1964] 3 All E.R. 526 (C.A.). This would be relevant under s.65(1)(d) as well, as being a financial responsibility of the husband.
52 Cf. C. v. C. [1970] 13 M.C.D. 209; Webb [1970] N.Z.L.J. 510. Presumably s.65(1)(e) relates to the matters already discussed arising under s.63 or s.64, bringing them into the balance on the exercise of the Court’s discretion as to the amount and duration of the order itself, as well as being necessarily present to provide jurisdiction. Sometimes these two matters will be inextricably woven together as, for example, when the Court determines that it should exercise its discretion under s.64(3).
55 Letica v. Letica [1976] 1 N.Z.L.R. 667 (the Court should recognise that the de facto relationship carried with it responsibility on the part of the husband to maintain the de facto wife and her two children when assessing the maintenance payable to the wife, who had obtained a decree of separation); Roberts v. Roberts [1974] 2 N.Z.L.R. 654 (maintenance on divorce.)
58 Had Casey J. found the relationship to be a fleeting one, no doubt the conclusion would have been different. A careful sifting of the facts of these cases seems to be called for. See also Crawford v. Crawford [1979] N.Z.L.J. 202; Taylor v. Taylor [1974] 1 N.Z.L.R. 52.
Cf., e.g., *Williams v. Williams* [1965] P.125; [1964] 3 All E.R. 526 (C.A.). The second wife's maintenance was reduced on appeal by £100 from £600 per annum to £500.

This is clearly more generous to the recipient than s.69(1)(a). It is to be noted that s.71 lays down a time limit (12 months from the grant in New Zealand of administration of the deceased's estate with limited power to the Court to extend time in certain circumstances) for applying for an order against the estate of the deceased party. As this is relevant to administration of deceased's estates, it will not be pursued here.

Other than an order referred to in s.69(1)(c) (lump sum for past maintenance of a husband or wife).


The matter is thus at discretion. The Court is not obliged to have regard to these matters.


*His Lordship*, taking a broad view of the matter and remembering that the former wife still had a contribution to make by bringing up the daughter of the marriage until the completion of her education, and that the husband was badly in arrears with payments due under an order made in 1972 and that the wife would probably be unable to recoup them, held that he would neither vary that order upwards from the £1000 less tax (as the wife had asked) nor reduce it (as the husband had sought) to a nominal amount. He would thus leave the periodical payments at £1000 per annum, payable without deduction of tax, since an order for that sum would now be a small maintenance order in English law. £1000 per annum gross in 1979 is chicken feed compared to £1000 less tax at the end of 1972.


*Mahon J.* refused an order under the previous law because of the wife's conduct and her apparent ability to take up well-paid employment. He was much influenced by *Mitchell v. Mitchell* [1975] 2 N.Z.L.R. 127, at pp.129-130, per White J.

Cf. *Iverson v. Iverson* [1967] P.134; [1966] 1 All E.R. 258, at pp.138-139; 260 respectively, per Latey J. Clearly a wife who deliberately conceals from the Court that she had herself had an adulterine child lest that fact should adversely affect her maintenance cannot be heard to complain if her application is thrown out neck and crop, as in *M. v. M.* [1962] 1 W.L.R. 845; [1962] 2 All E.R. 895.


Cf. *Bateman v. Bateman* [1979] Fam. 25; [1979] 2 W.L.R. 377 (wife twice inflicted wounds of considerable gravity on the husband, who had his shortcomings; wife had made valuable contribution to marriage; held wife's entitlement should be reduced but not extinguished).
Cf. Gow v. Gow (1976) 2 N.Z. Recent Law (NS) 258, where the wife, having applied for maintenance in the Supreme Court, then proceeded to register a previous maintenance agreement in the Magistrate’s Court pursuant to s.55 of the Domestic Proceedings Act 1968 and also sought a variation in that Court. Sir Richard Wild C.J. held that the wife had deliberately elected to have her case decided in the Magistrate’s Court notwithstanding that she had earlier made an application in the Supreme Court. She therefore lost the more generous powers of that Court to award maintenance for a term not exceeding her life.

Quaere: how should the Family Court proceed where there is an application under s.99 of the Act to vary a maintenance order in favour of a spouse when there has been a supervening dissolution of the marriage? Presumably the emphasis should shift from s.63 to s.64.


At p.386. In the Supreme Court, $4000 was ordered to be paid to the wife. The trustees of her husband’s estate could not have paid it out of residue. The order was vacated, but the periodical payments were increased.

See s.21 of that Act as to contracting out.


Cf. Brett v. Brett [1969] 1 W.L.R. 487; [1969] 1 All E.R. 1007 (C.A.), where the Court ordered a very well-off husband to pay his wife a further £5000 if he did not obtain a gett which would permit her to remarry by Jewish law.

Brett v. Brett, supra.

Hakluyt v. Hakluyt [1968] 1 W.L.R. 1145; [1968] 2 All E.R. 868 (C.A.), where the wife was given £500 to carry out repairs to her house after judicial separation. In practice, this would, no doubt, be put right under the matrimonial property claim as the lump sum would be likely to be matrimonial property.


See ss.83-90.

[1979] A.C. 593; [1979] 1 All E.R. 79 (C.A.). In practical terms it means that it can be held that an application for maintenance, after a consent order, made by a wife must be dismissed and that an application to vary a consent order for maintenance made by a wife, after a consent order cannot be entertained. See also Wright v. Wright [1970] 1 W.L.R. 1219; [1970] 3 All E.R. 209 (C.A.); Re: Minter [1968] P.174; [1967] 3 All E.R. 412.


As inserted by the First Schedule to the Family Proceedings Act 1980.

Rushion v. Rushton [1979] N.Z. Recent Law 14. The Court seems to have been influenced by Buckthout v. Buckthout [1977] 2 N.Z.L.R. 223; by the fact that the husband could pay a modest sum towards the maintenance of his first wife without reducing the standard of living of his second family, thus having regard to Gaspar v. Gaspar [1972] N.Z.L.R. 175; Spanjerdt v. Spanjerdt [1972] N.Z.L.R. 287; that the husband had entered into the deed in good faith when the wife was not working and that he had the legitimate expectation that she would not seek maintenance as soon as she in fact did. As the wife, being unable to work, was on social welfare and family benefits, the sum of $14 weekly which the Court ordered the husband to pay did, to some extent, relieve the taxpayer.


Overseas decisions such as this are, of course, helpful but it must always be remembered that they have been decided pursuant to differently drafted legislation, in pari materia with our own though it may be. It can, indeed, be dangerous to substitute for the codified words of the 1980 Act the general observations of an overseas judge on the facts of a case before him: cf. Frazer v. Frazer [1967] N.Z.L.R. 856, 857. Consider also s.65(2).

This philosophy appears to be reflected, indeed, in the provisions of s.62 and s.63(3) and, perhaps, in those of s.74(b).


See especially at pp.250-251, per Richardson J., where the point is made that benefits granted as of right, such as family benefit and national superannuation, do not attract the same considerations.


In Bunce v. Bunce [1980] 2 N.Z.L.R. 247 (C.A.), at p.253, Richardson J., speaking for the Court, emphasised that Mrs Lindsay had “been found to be clearly in need of maintenance”.

In Warren v. Aldrich [1980] N.Z. Recent Law 213 the marriage broke down after a few weeks, it having been celebrated in an ill-starred attempt to cement a foundering de facto relationship. The wife was able to take up employment whether her and her former husband’s child was in her care or not. The Magistrate refused an order in favour of the wife and his decision was upheld by White J. In McBreen v. McBreen (1979) 14 M.C.D. 364, maintenance was also refused to a wife of six weeks’ standing who could have worked but for her child by a previous union because the Court considered that it would be both unreasonable and unjust to create a maintenance obligation solely because of the child’s presence. In both cases the wives were in receipt of social welfare benefit.

This, of course, involves distinguishing Gaspar v. Gaspar [1972] N.Z.L.R. 174 and Spanjerdt v. Spanjerdt [1972] N.Z.L.R. 287 especially, and, e.g., Letica v. Letica [1976] 1 N.Z.L.R. 667 where the husband’s de facto union was recognised, but along with his obligation to the general taxpayer, and he was ordered to pay his wife $10 weekly.

This part of the text deals, therefore, with children not born out of wedlock.

This also is discussed later. Note, however, s.72(3)(b).
See s.60(1)(c) as to the definition of parent.

S.75. And note the restriction in s.76(2) as to step-parents’ liability.


The wife obviously did not appreciate the wide meaning of “guardianship” in s.3 of the Guardianship Act 1968 or that her first husband’s joint guardianship of the children with her survived their divorce.


Subsection (3) provides that orders made for the payment of a lump sum may provide that the sum shall be payable (a) at a future date specified in the order; or (b) by instalments specified in the order; or (c) on such terms and conditions as the Court thinks fit.

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The expression “proper” maintenance is not defined by the Act. “Adequate” maintenance may be less than “proper” maintenance: see Scott v. Scott [1974] 1 N.Z.L.R. 219, at p.222.


S.74(b) states that an application for a maintenance order in respect of a child may be made by a person who has lawful care of the child, or by a Social Worker, against a parent or parents of the child. A step-parent may, of course, bring himself or herself within s.72(3)(f), for he or she will not be a natural or adoptive parent of the child.


He also held that the husband could not be the “foster-father” of the child for the purposes of s.35(3) of the 1968 Act because the wife was not the child’s foster-mother. The present Act does not refer to foster parents at all as such, although a foster-parent could be liable for maintenance by reason of the extended definition of “child of the marriage” in s.2.

[1974] 1 N.Z.L.R. 686. There were cases where husbands were ordered to maintain step-children under the 1968 Act even though their natural father was paying their mother all he could afford for their maintenance: see Park v. Park [1979] N.Z. Recent Law 246. There were also, it is fair to say, cases where the Courts refused to order step-fathers to maintain their step-children at all: see, e.g., Warren v. Aldrich [1980] N.Z. Recent Law 213; McBreen v. McBreen (1979) 14 M.C.D. 364.


See Sheehan v. Sheehan (1942) 2 M.C.D. 376. Dissolution may be a basis for varying an order in appropriate circumstances.


It has been held that an order made before the payer’s death may be implemented by his personal representatives who may therefore be called upon to carry it out: Hyde v. Hyde [1948] P.198; [1948] 1 All E.R. 362; Mosey v. Mosey [1956] P.26; [1955] 2 All E.R. 391. Barker v. Barker [1952] P.184; [1952] 1 All E.R. 1128, at pp.194-5; 1134 respectively. It was also said there that the security must be on specific assets and not a general charge on all the payer’s property. It is doubtful whether reversionary interests should be charged because they cannot be used to secure present payments: Allison v. Allison [1927] P.308; [1927] All E.R. Rep.671; but see Harrison v. Harrison (1887) 12 P.D. 130 (C.A.). The applicant could apply for a variation of the order when the interest fell in. Capital held on protective trusts should not be secured for the order will automatically terminate the interest: cf. Re Richardson’s Will Trusts [1958] Ch. 504; [1958] 1 All E.R. 538. For a case where the Court ordered payments to be secured on a party’s sole asset, the former matrimonial home, see Aggett v. Aggett [1962] 1 W.L.R. 183; [1962] 1 All E.R. 190 (C.A.).


CHAPTER FIVE

PATERNITY ORDERS UNDER THE FAMILY PROCEEDINGS ACT 1980

2 The Governor-General is empowered by subs.(2) from time to time, by Order in Council, to declare that s.73 applies to orders made by a specified Court or public authority in a specified country outside New Zealand.
5 Viz., ss.47-49, 51 or 52.
10 Cracknell v. Smith [1960] 1 W.L.R. 1239; [1960] 3 All E.R. 569 (D.C.), also authority for the rule that opportunity without more does not constitute corroboration.
See s.60(1)(c) as to the definition of parent.

And note the restriction in s.76(2) as to step-parents' liability.

The wife obviously did not appreciate the wide meaning of "guardianship" in s.3 of the Guardianship Act 1968 or that her first husband's joint guardianship of the children with her survived their divorce.


Subsection (3) provides that orders made for the payment of a lump sum may provide that the sum shall be payable (a) at a future date specified in the order; or (b) by instalments specified in the order; or (c) on such terms and conditions as the Court thinks fit.

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He also held that the husband could not be the "foster-father" of the child for the purposes of s.35(3) of the 1968 Act because the wife was not the child's foster-mother. The present Act does not refer to foster parents at all as such, although a foster-parent could be liable for maintenance by reason of the extended definition of "child of the marriage" in s.2.

134 [1974] 1 N.Z.L.R. 686. There were cases where husbands were ordered to maintain step-children under the 1968 Act even though their natural father was paying their mother all he could afford for their maintenance: see *Park v. Park* [1979] N.Z. Recent Law 246.

There were also, it is fair to say, cases where the Courts refused to order step-fathers to maintain their step-children at all: see, e.g., *Warren v. Aldrich* [1980] N.Z. Recent Law 213; *McBreen v. McBreen* (1979) 14 M.C.D. 364.


See *Sheehan v. Sheehan* (1942) 2 M.C.D. 376. Dissolution may be a basis for varying an order in appropriate circumstances.

See *Turczak v. Turczak* [1969] 3 W.L.R. 1046; [1969] 3 All E.R. 317 and compare the position under s.70 of the Act. No doubt a pre-existing maintenance order could be varied against a former spouse in appropriate circumstances, as in *Wood v. Wood* [1957] P.254; [1957] 2 All E.R. 14 (C.A.)

139 It has been held that an order made before the payer's death may be implemented by his personal representatives who may therefore be called upon to carry it out: *Hyde v. Hyde* [1948] P.198; [1948] 1 All E.R. 362; *Mosey v. Mosey* [1956] P.26; [1955] 2 All E.R. 391. *Barker v. Barker* [1952] P.184; [1952] 1 All E.R. 1128, at pp.194-5; 1134 respectively. It was also said there that the security must be on specific assets and not a general charge on all the payer's property. It is doubtful whether reversionary interests should be charged because they cannot be used to secure present payments: *Allison v. Allison* [1927] P.308; [1927] All E.R. Rep.671; but see *Harrison v. Harrison* (1887) 12 P.D. 130 (C.A.). The applicant could apply for a variation of the order when the interest fell in. Capital held on protective trusts should not be secured for the order will automatically terminate the interest: cf. *Re Richardsons Will Trusts* [1958] Ch. 504; [1958] 1 All E.R. 538. For a case where the Court ordered payments to be secured on a party's sole asset, the former matrimonial home, see *Aggett v. Aggett* [1962] 1 W.L.R. 183; [1962] 1 All E.R. 190 (C.A.).


144 As in Aggett v. Aggett [1962] 1 W.L.R. 183; [1962] 1 All E.R. 190 (C.A.) (£104 per year unsecured maintenance; £52 per year further secured on matrimonial home upon which the husband was still paying off a loan).
146 See s.99, subss.(7) and (8).
148 Adoption Act 1955, s.16(2)(i).
149 Ibid., first proviso.
150 Maintenance Officer v. Stark [1977] 1 N.Z.L.R. 78. If the father wishes to minimise his liability he should consider seeking an order discharging, varying or suspending the order or agreement under s.99 of the 1980 Act.
   The second proviso to s.16(2)(i) permits the recovery of arrears due under an order or agreement which has ceased to have effect under s.16(2)(i). See also W. v. Y. [1973] 2 N.Z.L.R. 175.
151 Adoption Act 1955, s.16(2)(a).
152 There is thus no jurisdiction to award a lump sum under this section.
153 There is thus no jurisdiction to award back maintenance under this section.
154 See s.82(3). As to variation etc. of orders, see s.99. For a case where a husband unsuccessfully sought a cancellation on the ground that his wife had left, with their children, for England without consulting him or seeking the Court's approval and the wife succeeded in showing that the sum fixed by the Magistrate had placed the burden of housing the children almost wholly upon her, see Wilson v. Wilson [1971] Recent Law 179.
155 S.170.
157 Reynders v. Reynders (Supreme Court; Auckland; 15 July 1975 (No. D.1615/75); Wilson J.).
159 Reference may be made to Murtagh v. Murtagh [1960] N.Z.L.R. 890, esp. at pp.895-8, decided under s.34 of the former Divorce and Matrimonial Causes Act 1928. It was there held that it was enough for the wife to show that the relevant instrument was entered into for one of the purposes specified in the section and that it did not matter that the husband might have had some other motive also, though, if there were two or more motives, she was not required to show which was the more dominant motive. It was further held that the rights which the provision sought to protect were not restricted to those which had arisen in a matrimonial suit already commenced at the date of the relevant instrument, but included rights which had arisen before the commencement of that suit.

CHAPTER FIVE
PATERNITY ORDERS UNDER THE FAMILY PROCEEDINGS ACT 1980

2 The Governor-General is empowered by subs.(2) from time to time, by Order in Council, to declare that s.73 applies to orders made by a specified Court or public authority in a specified country outside New Zealand.
5 Viz., ss.47-49, 51 or 52.
10 Cracknell v. Smith [1960] 1 W.L.R. 1239; [1960] 3 All E.R. 569 (D.C.), also authority for the rule that opportunity without more does not constitute corroboration.
There seems to be no reason why the Court should not call the alleged father as a witness under s.165 of the Act: *Campbell v. Jenkins* (1977) 3 N.Z. Recent Law (N.S.) 314.


14 See, especially, at pp.572-573, per Cooke J. and at p.574, per Chilwell J. It would seem that the only witnesses were the applicant and her mother, the defendant having elected to give no evidence.


16 It was long thought that in paternity suits an admission by the defendant contained in a letter produced by the complainant and sworn to by her as being in the defendant’s handwriting could not constitute corroborative evidence: see, e.g., *Crutchfield v. Lee* [1934] V.L.R. 146 and *Moore v. Hewitt* [1947] K.B. 831; [1947] 2 All E.R. 270 (D.C.). On the other hand, in *Jeffery v. Johnson* [1952] 2 Q.B. 8; [1952] 1 All E.R. 450 (C.A.) it was held that, in such a situation, the complainant could be a competent witness to corroborate herself by saying that the letter produced by her was written to her by the alleged father. In *X. v. Y* [1975] 2 N.Z.L.R. 524 (C.A.) a majority of the Court held that a letter so produced could operate as corroborative evidence, reversing a judgment of Chilwell J. who had said there had not been corroboration.

17 Defined by s.2 of the 1980 act as meaning tests to be carried out for the purpose of ascertaining the inheritable characteristics of blood.

18 See *J. v. J.* [1972] N.Z.L.R. 1089, where Beattie J. suspended payment of maintenance in respect of a child until such time as the mother agreed that the child should have a blood test. The father disputed paternity.


21 See *G. v. H.* [1972] N.Z.L.R. 1012, at pp.1013-1014, per White J.

22 *G. v. H.*, supra.

23 *G. v. H.*, supra.


26 Ibid.

27 [1976 1 N.Z.L.R. 238. See n.9, supra.

28 And to whom, it must be noted, she has never been married or, if she has, the marriage was dissolved before the child’s conception.

29 Adoption Act 1955, s.16(2)(i).


31 Adoption Act 1955, s.16(2)(a).

**CHAPTER SIX**

**SOCIAL SECURITY AMENDMENT ACT 1980**

1 S.3, but see the discretionary provision under s.5(1).

2 Quaere whether the phrase "a beneficiary and any child" must be read to exclude an order or agreement solely for the maintenance of the beneficiary, or solely for the maintenance of a child. Such an interpretation would seem to be contrary to the intention of the Act but a clearer phrase could have been devised.

3 s.27J(2).

4 To advance the imagery of the last preceding paragraph.

5 s.27J(5).

6 s.27N.
CHAPTER SEVEN

GUARDIANSHIP ACT 1968

1 See post.
2 Section 23(3), which states that nothing in the section is to limit the provisions of section 22C of this Act or of ss.64 and 64A of the Trustee Act 1956, is germane to trusts and is not discussed here. The subsection was obviously inserted to ensure that no conflict arose between the 1956 and 1968 Acts. Section 22C deals with the exercise of jurisdiction in respect of a child subject to a registered overseas custody order.


6 A point very thoroughly emphasised by North P. in D v. R [1971] N.Z.L.R. 952 (C.A.) at p.953, where he was speaking of two small girls, was that the “mother principle” was not a rule of law. This was applied in F v. G [1971] N.Z.L.R. 956, 959. See also Re B [1962] 1 W.L.R. 550; [1962] 1 All E.R. 872 (C.A.).  

For a particularly emphatic warning that the “mother principle” is “not a principle or rule of law”, see G v. G [1978] 2 N.Z.L.R. 444 at p.447, per Richardson J.; at pp.448-9, per Woodhouse J. (dissenting). Richardson J. was speaking for himself and Richmond P.  


10 Re McGrath [1893] 1 Ch. 143, 148.  


13 N. v. N. [1978] N.Z. Recent Law 183, from which it will be seen that, while the mother was a good mother and the children happy with her and her de facto husband, she had been far from frank and was distinctly open to criticism in other ways.  


19 Re L (1914) 33 N.Z.L.R. 894.  


28 For a case where a family was so “split”: see Re O. (Infants) [1962] 2 All E.R. 10 (C.A.), where the facts were very far from the common run. Quaere whether Morton v. Morton (1912) 31 N.Z.L.R. 77 would be decided the same way today.  


39 See the judgment of Jeffries J. in B v. B [1978] 1 N.Z.L.R. 285, at p.289. He there awarded custody to a mother (who had committed adultery which led to divorce proceedings) of a girl aged six. The child had only been out of her mother’s care during a period when the father had abducted her. To the same effect, see his judgment in D v. D [1978] 1 N.Z.L.R. 476, esp. at p.479. In both cases, His Honour reversed the decision of the Magistrate’s Court.
41 See S (BD) v. S (DJ) [1977] 1 All E.R. 656 (C.A.) and Re K (minors) (wardship: care and control) [1977] 1 All E.R. 647 (C.A.), both discussed by Webb, The Eclipse of the Unimpeachable Parent in Custody Proceedings [1978] N.Z.L.J. 63. The latter case was particularly strong, for the father was an Anglican priest who considered divorce to be against his religious convictions.
   It may be that, as Ormrod J. observed in the former case, the concept of unimpeachability may have some place in cases where a parent is trying to recover custody from a non-parent or stranger.
48 S. v. S. and O. [1977] N.Z.L.J. 139. Section 20 of the Act, however, would seem to be more efficient and swift.
49 S.9(1).
50 See also s.4(3).
51 S.20(1)(b).
52 S.22A (inserted by Guardianship Amendment Act 1979) deals with the registration in New Zealand and enforcement of overseas orders.
53 S.20(1).
56 M v. L, Supreme Court; Auckland, No. M.86/78; judgment 18 May 1978.
58 By this approach s.33(1) would be seen to apply and the Act as a code having made provision for access, then there is no scope for retaining any inherent amplifying jurisdiction in that particular area.
59 Only if a Court held that such a condition amounted to an order of the Court entitling a person to access could the enforcement procedure of s.19(2) be made available. It is a basic problem of “when is an access order not an access order”.
60 This reservation of power to punish for contempt of court is also specifically preserved in ss.20A(2) and 27A(3)(b).
61 Cf. s.15(1) with ss.15(2) and 16.
62 S.27A.
63 S.27A(2)(a).
64 S.27A(2)(b).
65 S.28A(1).
66 S.28A(2).
67 S.28A(3).
68 Pursuant to s.27B.
69 Pursuant to s.30(1)(a).
70 S.28A(4).
71 S.29(1).
72 S.29(3)(a).
73 S.29(3)(1).
74 S.29(4).
75 S.29(5).
76 S.29(6).
77 S.29(7).
78 Cf. previous s.29(4) with present s.29(7).
79 Gaffney v. Gaffney (as yet unreported). The experts had placed emphasis on stability or constancy in the relations which were most desirable between parent and child. On the facts, there was a clear attachment and identification between three boys aged nine, eight and three and their father. The boys wished to be with him, and it was thought that there might be less harm and emotional disturbance to their children if custody were given to him. Greig J. therefore reversed the Magistrate’s award in their mother’s favour, but reserved liberal access to her. He also made it clear he expected the parents to cooperate and to discuss all the important matters which would affect the children.
80 In H v. H (1977) 3 N.Z. Recent 316.
84 See supra notes on s.29.
85 S.29A(1).
86 S.30(1)(a).
87 S.30(1)(b).
88 The use of the word “counsel” in the old s.30 led to some doubt about the question of the scope of the brief where a barrister was appointed.
89 S.30(3).
91 S.30(3).
92 S.31(1).
93 A.31(1).
94 S.31(2).
96 S.31(4).
97 S.31(7).
98 G v. G [1978] 2 N.Z.L.R. 444 (C.A.) at pp.446-7, per Richmond P. and Richardson J. In that case the Court reviewed the evidence as a whole, and this included oral evidence before it from the parents and other witnesses. A majority upheld the decision of Jeffries J. to let the girls of seven and three and the boy of six to remain in the former matrimonial home in the custody of their father as the learned Judge had not been shown to be wrong. The majority remained (ibid.) that, in cases where the Appeal Court itself has heard new evidence or reheard some or all of the witnesses who gave evidence in the trial Court, the Appellate Court’s assessment of that evidence becomes a further factor to be taken into account, its importance depending on the circumstances of the particular case. The decision was applied in N v. N [1980] 2 N.Z.L.R. 38 (C.A.).