MARITAL CONCILIATION AND SEPARATION

The Domestic Proceedings Act 1968

The Domestic Proceedings Act 1968 reconstructs the law dealing with domestic proceedings before the Magistrate's Court. Almost sixty years after its enactment, the Destitute Persons Act 1910 is to be replaced by the new code which comes into force on 1 January 1970.

The new Act functions on what some may argue is a contradictory response to a faltering marriage. It attempts to sustain the marriage bond by imposing on court, solicitor and counsel a duty to promote the reconciliation of warring marriage partners and yet it attempts to loosen the bond by empowering the court to grant a separation order where the marriage has irretrievably broken down, irrespective of fault in either partner.

This article will examine the conciliation and separation provisions of the Act. It will become apparent that the bases of these provisions are not in fact contradictory but rather complementary. They complement each other according to the viability of a marriage. Where there is a viability, conciliation will sustain, where there is no viability, separation will be merciful. Here is an attempt to bring the law into line with human reality.

Conciliation

Part II of the Act contains the conciliation provisions. A general duty to promote conciliation is created and procedures and machinery designed to provide remedial measures for a troubled marriage are established. The emphasis is on the use of the law as a saving agent.

New Zealand law is no stranger to conciliation requirements. The Domestic Proceedings Act 1939 was the first New Zealand recognition that the law has a role in effecting conciliation of disputing marriage partners. Section 5 of that Act required that on the filing of any proceedings for separation, maintenance, or guardianship the matter was to be referred to a conciliator. These provisions remained in force until repealed by the 1968 Act.[1]

Legal practitioners will be aware that the 1939 provisions failed to have any significant effect in achieving reconciliations. There were at least three major weaknesses in the system.[2] Firstly, the conciliation requirement could only come into effect on application for separation, maintenance, or guardianship. Any such application generally increased antagonism and bitterness, working against the prospect of reconciliation. Secondly, in many instances, the magistrate's discretion to dispense with conciliation came to be used (if not abused) on the most casual basis. Thirdly, at the time proper facilities and personnel with the necessary qualities and training were not available.

1. Section 131 and the Second Schedule.
2. Refer *Family Law Centenary Essays.* Eds. B. D. Inglis and A. G. Mercer. Hana, "The Future of Family Law" at p. 9 and Inglis "The Hearing of Matrimonial and Custody Cases" at p. 39.

The new provisions should bring some improvement. Section 13 reads:

> In all proceedings under this Act between a husband and wife, it shall be the duty of the Court and of every solicitor or counsel acting for the husband or wife to give consideration from time to time to the possibility of a reconciliation of the parties, and to take all such proper steps as in its or his opinion may assist in effecting a reconciliation.

In submissions to the Statutes Revision Committee, the Law Society criticised this section arguing it imposed a duty that conflicts with a lawyer's duty to his client. If, for example, a client insists on obtaining a separation order, how can a solicitor respond to his duty to take the necessary action on behalf of his client and still respond to his duty to promote reconciliation? There is a certain substance in this criticism, but on analysis, it fades. The duty imposed is in the first instance to consider reconciliation and in the second instance to form a personal opinion as to what steps are proper. Having done this, a solicitor is to act accordingly. The determination of what is proper is for the solicitor himself. He may decide that where his client is set on separation the only proper step is to apply for an order. Where his client is not so adamant, the only proper step may be to urge conciliation. What the section does is to emphasise the lawyer's duty to look not merely to the immediate interests of his client, but to the interests which may extend over a life time. This is a process of balancing interests—a function which should be familiar to the legal profession.

Section 14 enables a marriage partner to apply for a court order referring marriage difficulties to a conciliator. This may be done without seeking any other order. Clearly, here is an attempt to overcome the first weakness (as mentioned above) of the 1939 Act, and it is of great potential importance. It is designed to make remedial action available at a much earlier stage in a troubled marriage than when any rift has reached the extremity of a separation application. Its virtue lies in making available the court's authority to set conciliation in motion at a time when it is most likely to be helpful—when damaging differences first arise or at least before attitudes and emotions have become entrenched by instituting separation or divorce procedures. Like the stitch in time conciliation is most effective before the rift becomes great.

Section 15 requires the court, on an application for a separation order, to refer the case to a conciliator. There is, however, a proviso enabling the court to dispense with such reference where it is satisfied that an attempt at reconciliation would be inexpedient. In exercising this discretion, the court is to regard "the facts on which the application for a separation order is based, the length and circumstance of any separation of the parties, any prior attempts at reconciliation, and such other matters as the court thinks fit. . . . " The proviso aims at an efficient use of limited resources, at relieving conciliators from wasting time on cases having no possibility of reconciliation. While

this is a worthwhile aim, doubts remain that conciliation may continue to be dispensed with on a casual basis. The specific matters set down for the court's regard do not appear in the 1939 Act and these may lead the court to be more stringent before foregoing conciliation. Much will depend on the attitudes of magistrates and counsel. If conciliation is to be given a chance to do its work, those who administer the law need be sympathetic toward it.

On an application for a maintenance or custody order or an order under Part V of the Act (which deals with the matrimonial home) the court may under section 15 (2) refer the case to a conciliator. Where a case has been so referred to conciliation, the court has a discretion under section 15 (4) to proceed with the hearing for the relevant order on the application of any party. Parties will be encouraged to spend at least twenty-eight days on conciliation; only where the court considers there are "special circumstances" may the hearing be resumed before the expiration of twenty-eight days after the date of referral to conciliation.

Any conciliator to be appointed by the court shall be in accordance with section 16 (2) "some person with experience or training in marriage counselling or conciliation" and only in "special circumstances" shall he be some other person. This is a clear recognition of the need for expertise on the part of conciliators. Whether there will be enough qualified conciliators available to deal with all the referrals remains a question for future answer. At least there is some cause for optimism since the late Minister of Justice, the Hon. J. R. Hanan, was aware of the need to "strengthen the conciliation resources available to the Court"[3] and Professor B. D. Inglis assured the 1969 New Zealand Centennial Law Conference that "many trained and highly effective conciliators have become available".[4]

Once appointed to a case the conciliator may under section 16 (3) make suitable arrangements to meet the parties and may write to either party requesting his or her attendance. The conciliator may "request" attendance implying that duress is to be avoided where possible. Should a spouse get the idea that officialdom is forceably entering his most personal affairs he will often resent the official impudence and be antagonistic toward conciliatory efforts. In contradistinction, there is that type of spouse who, as much as he may secretly desire conciliation, feels he cannot attend for reasons of pride or principle or from a desire not to admit of any wrong. A little prodding is needed. A letter phrased in subtle terms may be sufficient: the spouse can be left to infer that the "request" is in fact an order with the court's backing. There will be the exception who still refuse to respond. The conciliator is thus given by section 16 (4) access to coercive powers; he may, where a party has failed to attend as arranged, request a magistrate to issue a summons requiring attendance.

3. Hansard. Second Session Thirty-Fifth Parliament 1968 No. 26 at 3362.
4. Inglis, "Family Law" [1969] N.Z.L.J. 325 at 316.

The conciliator is require by section 16 (6) to furnish the court with a report of the conciliation endeavour, making such recommendations as he thinks proper. A copy of this report is to be given to the parties involved (section 16 (8)). Even where the conciliator reports the attempted reconciliation to be unsuccessful he may still state his opinion as to whether the parties are likely to become reconciled (section 16 (7)). As we shall see, this could have significant effect on an application for a separation order.

Where a reconciliation is effected, the conciliator may find it helpful to express any agreement reached in a written document. Such a practice is followed in Los Angeles where reconciled parties are invited to sign a Husband and Wife Agreement which may be varied according to the circumstances and has been described as "a concise course in how to make a marriage successful".[5] Should there be an agreement reached (whether written or oral) in the conciliation endeavour, the conciliator may under section 17 recommend that the court approve such agreement. The court then has a discretion to approve notwithstanding that the agreement may not be binding in law. Any approval given shall not render the agreement binding in law nor will failure to seek approval derogate from any effect the agreement would otherwise have.

On first encounter it may seem odd and pointless that the court should specifically be given a discretion to indulge in an official exercise that appears to be bereft of legal effect. What the provision seeks is a means to confer a solemnity on the agreement helping the parties strive to achieve a lasting reconciliation. Approval does not have pervasive legal effect since judicial coercion is to be avoided in this most intimate of human relationships. The provision tries to balance sufficient prompting with minimum intrusion in private matters. But the court's act of approval may not be entirely bereft of legal effect. If the agreement is breached the deviant spouse may be at a disadvantage in later proceedings. For example, in a later custody dispute the court may consider that the welfare of an infant will not be well served by a parent who is in breach of a judicially approved agreement.

As a final protection and inducement to reconciliation all statements made to the conciliator in the course of a conciliation attempt are, by section 18, privileged and not admissible as evidence in any court or before any person acting judicially.

Separation

Separation is dealt with in Part III of the Act. The influence of the breakdown principle, under which a separation is viewed as a means of legally recognising that a marriage has lost its sustaining substance, is strong. At the same time elements of the fault principle, under which separation is viewed as a remedy available to one party as a result of offences committed by the other party, are retained.[6]

5. Inglis and Mercer. Eds. op. cit. n. 2 at 45.
6. Lord Morton's Royal Commission on Marriage and Divorce reported in 1956 and adopted a fault breakdown distinction in relation to divorce.

As long ago as 1920, the breakdown principle was admitted to divorce law when three years' separation by agreement became a ground for divorce.[7] Now history teaches that the 1968 Act provides the first New Zealand intrusion of the principle into the law relating to separation orders. Before 1858, a decree of divorce *a mensa et thora*[8] was available in the Ecclesiastical Courts. This decree was adopted by the Matrimonial Causes Act (England) 1857 which came into effect in 1858. Divorce *a mensa et thora* was renamed, a decree of separation being obtainable on the grounds of adultery, cruelty, or desertion without cause for two years. In 1867, the New Zealand legislature enacted the Divorce and Matrimonial Causes Act importing in sections 6 and 7 the English decree of separation. Section 22 of the Destitute Persons Act 1894 made it possible for a wife to be freed of her duty to cohabit with her husband where he had been convicted of aggravated assault upon her. After 1896, a wife's duty to cohabit was further negated by section 3 of the Married Persons Summary Separation Act. Grounds of wilful neglect to provide reasonable maintenance and less serious assault were added. With the enactment of sections 17 and 18 of the Destitute Persons Act 1910 the law assumed the form that lasted for almost sixty years. A separation order could be available where there was failure that was wilful and without reasonable cause to provide adequate maintenance, persistent cruelty, habitual inebriacy, or where within six months before the making of a complaint a husband had been convicted of any assault or other offence of violence against wife or children and had been sentenced for that offence to imprisonment or to a fine exceeding five pounds. As a result of section 8 of the Domestic Proceedings Act 1939 a separation order became available to a husband against his wife on the above grounds.

It can be seen that a separation order historically has been available only where fault was established by one spouse against another. The predominant policy has been to make a separation order available only where a wife needs protection from her husband.[8]

The 1968 Act underlines a new philosophy. By section 19 (1) a separation order may be sought on the grounds:—

(a) That there is a state of serious disharmony between the parties to the marriage of such a nature that it is unreasonable to require the applicant to continue or, as the case may be, to resume, cohabitation with the defendant, and that the parties are unlikely to be reconciled; or . . .

(c) That since the marriage any act or behaviour of the defendant affecting the applicant has been such that in all the circumstances the applicant cannot reasonably be required to continue or, as the case may be, resume cohabitation with the defendant.

7. Divorce and Matrimonial Causes Amendment Act 1920 s. 4. The following year an amendment made it possible for a respondent to prevent the decree being made where it was shown the separation was due to the wrongful act or conduct of the petitioner, s. 2 of 1921 Amendment Act.

8. *Bulman* v. *Bulman* [1958] N.Z.L.R. 1097.

Common to these grounds is the idea that considerations of guilt or innocence are to be excluded; they look to the reality of a human situation. In this respect the language of (c) is unusual, it is phrased in adversary terms yet there is nothing specifically requiring an applicant to establish that a defendant's conduct is blameworthy. It is sufficient that such conduct affects the applicant.

In one sense (c) becomes superfluous for once it is established that in all the circumstances the applicant cannot reasonably be required to cohabit then surely there is "a state of serious disharmony between the parties" to bring the case within the scope of (a). However, there are two differences which could be of vital importance in a few cases. First (a), unlike (c), requires that the parties are unlikely to be reconciled. Where a conciliator reports that in his opinion the parties are likely to become reconciled then a separation order may be sought under (c) and not (a). Second, (c) is available on the basis of "any act" of the defendant. This leaves it open for the court to regard a single instance (perhaps one act of adultery) to qualify as a ground whereas (a) is available only where there is a "state" (which connotes continuity) of serious disharmony.

Exactly what is contemplated by a "state of serious disharmony" and what circumstances would not "reasonably" require cohabitation are far from clear, leaving enormous scope for interpretive variance. This legal vagueness may be socially beneficial; where a solicitor is doubtful as to how to advise his client he has added reason to urge a request for conciliation under section 14; where a magistrate is doubtful as to the making of an order he has added reason to rely on the report of the skilled conciliator.

The provisions of section 19 make a separation order available on untechnical grounds and legal practitioners will no longer have to force a situation within the previous fault limitations. While this is to be recognised as an improvement it must be accepted that a party who is clearly at fault can initiate proceedings and by establishing a state of "serious disharmony" obtain a separation order. Of course, the court has a discretion, but a self-induced breakdown can provide a legitimate ground. Perhaps this is open to abuse, but in the real life situation, it is rare that one party is wholly to blame.

The two further grounds contained in section 19 are based on fault. These are:—

(b) (i) Any assault or other offence of violence against the applicant or a child of the family; or

(ii) Where the applicant is a married woman, any sexual offence against a child of the family.

For these to operate, the defendant within six months preceding the application, needs to have been convicted for that offence and sentenced to imprisonment or a fine of fifty dollars or more.

As a consequence, the separation provisions have not left the old fault principle to be buried in history. Indeed in (b) (ii) there is a fault ground added which has no precedence in New Zealand law. In the writer's opinion, it is unfortunate that the legislature has not seen

fit to rely solely on the breakdown principle. Any assault or sexual offence should be assessed not on the technicalities of the criminal law, but on the actual human effect wrought on a marriage.

In every instance, the court retains its discretion to grant or refuse a separation application. The words of Salmond J. in *Mason* v. *Mason* [1921] N.Z.L.R. 955, 963[9] become of particular relevance. He said that a refusal "must be justified by special considerations applicable to the individual instance and must be consistent with due recognition of the fact that the legislature has expressly enabled either party, innocent or guilty, to [apply for a separation order on a non-fault ground]". Should the court exercise its discretion on the basis of fault, the whole advance of section 19 is endangered.

No longer do the provisions against molesting and harrassing automatically operate on a separation order.[10] This seems equitable since the stigma of quasi criminal sanctions should apply only where need demands. At the same time as it makes a separation order, or where a husband and wife are living apart (whether under a separation agreement or not), the court may under section 23 make a non-molestation order. The court must be satisfied that the order "is necessary for the protection of the applicant or of any child of the family". This will allow the police to act on a non-molestation order whether the parties were originally separated by order, agreement, or otherwise. Police practice in the past has been to act only where the parties were separated by order.

A Comparison

Domestic proceedings before the Supreme Court are governed by the Matrimonial Proceedings Act 1963. It is of some interest to compare the provision relating to conciliation and separation where a case is before the Supreme Court with those where it comes before the Magistrate's Court.

Conciliation requirements under the Matrimonial Proceedings Act may be summarised as follows. By section 4 of the Act where any proceedings for separation, restitution of conjugal rights, dissolution of a voidable marriage or divorce have been instituted the Supreme Court is to consider the possibility of reconciliation and where that possibility appears reasonable the proceedings may be adjourned and the matter referred to a conciliator. Twenty-eight days after any such adjournment either party to the marriage may request that the hearing be proceeded with and it shall be resumed. Any statements made in the course of conciliation are privileged under section 5.

Unlike the Domestic Proceedings Act the above provisions of the Matrimonial Proceedings Act, (i) do not impose a duty on solicitor or counsel to promote or even consider the possible reconciliation of the

9. The learned Judge was discussing a similar discretion then existing in separation agreement cases.
10. Under the Destitute Persons Act 1910 s. 19 non-molestation provisions operated automatically on a separation order.

parties; (ii) do not direct that all proper steps be taken to effect a reconciliation, and (iii) do not allow the Supreme Court a discretion to reject a request that a hearing be resumed once the minimum adjournment for conciliation has elapsed.

To avoid the duty to promote conciliation under the Domestic Proceedings Act a solicitor may bring an application for a separation decree under section 10 of the Matrimonial Proceedings Act. But under the latter Act, fault must be established, the grounds being adultery, cruelty, desertion without cause for not less than two years, or failure to comply with a decree for restitution of conjugal rights, and on no other ground. Perhaps the breakdown principle embodied in the Domestic Proceedings Act together with the greater speed, less cost and specialised courts[11] will prove more attractive to solicitors and clients inducing an acceptance of the duty to promote reconciliation and of the more stringent conciliation requirements.

Conclusion

The Domestic Proceedings Act 1968 does try to focus the law's attention on the viability of a marriage. Where marriage offers the prospect of warmth and understanding, the law will offer its protection. Law will provide a channel to expert advice so that a viable marriage may continue to perform a highly important social function. Where marriage offers the prospect of antagonism and perhaps hatred so that the spouses are irreconcilably estranged the law will offer a means to end the misery. It will offer to do this not on the basis of looking for guilt, but of human understanding.

Nevertheless, the evolution from fault to breakdown is somewhat illusory. If a separation order later forms the ground for a divorce the respondent spouse may frustrate the petition by showing the separation was due to the wrongful conduct of the petitioner.[12] In strict point of law the only two non-fault grounds for divorce are insanity and four years separation.[13]

In the writer's opinion, the law will be much improved when it admits the breakdown principle as the sole ground for separation and divorce. There is little point in trying to determine where fault lies once a marriage has broken down. Who is guilty? Who is innocent? These questions appeal as righteous, but can they ever be truly answered?[14] What on the surface appears to be the casual factor (the marital offence) may only be symptomatic of the prior breakdown. The small inconsiderations, the bitter remark, the aloofness may be all part of a total marriage experience which the court is not attuned to assess. Where there is a breakdown let the law do its utmost to heal by promoting conciliation. Where it cannot heal, let it end the misery, without the vain search for fault, and in a manner that preserves what amicability remains.

11. Section 7 provides for the setting up of specialised domestic courts. It would seem initially this will only be done in the main centres.
12. Matrimonial Proceedings Act 1963 s. 29 (2).
13. Matrimonial Proceedings Act 1963 s. 21 as amended in 1968.
14. [1969] N.Z.L.J. 340, comments by Miss Shirley Smith.

Opponents of this view may argue that the law should not compromise the moral standards of the great majority and so declare (by setting down specified marital offences with consequent remedies) marital duties and obligations, especially those owed to the children of a marriage.[15] There is strength in this argument, but four points will be made in rebuttal. First, a child's welfare is not likely to be well served where his parents live in counterfeited harmony, where they are forced to cohabit merely because the majority so decrees. Second, if it is conceded that the child's interest will not be well served then the law should be wary of trespassing on the private marital morals of adults. Third, it may even be that the majority of the community regards the breakdown principle as the only tenable ground for separation and divorce. Fourth, the law would not grant a separation or divorce merely because the parties felt so inclined, it would need to be assured by an expert conciliator that the marriage had in fact broken down and that the parties were unlikely to be reconciled.

However, our law does *not* admit the breakdown principle as the sole ground for separation and divorce. It sets down a complex set of marital offences[16] and at the same time admits elements of the breakdown principle. In doing this, it lacks a coherent philosophy, it has an uncomfortable foot planted firmly on either side of the fence.

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15. For example, Inglis [1969] N.Z.L.J. 325.
16. For example, s. 21 Matrimonial Proceedings Act 1963.