FAMILY LAW

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I. INTRODUCTION

As the last Survey of Canadian Family Law was done in 1971,[1] the period reviewed here is May 1, 1971 to April 31, 1974. Due to the length of the survey period and the large number of reported decisions, the Survey has to be restricted to four areas: marriage, nullity, divorce, and corollary relief including maintenance and custody of children.

II. MARRIAGE

At present, in the United States and England,[2] an engagement to marry has no legal effect because the cause of action for "breach of promise" has been abolished. It does not follow that Canada should adopt legislation similar to that of the United States or England. It may be argued that such cause of action is somewhat antiquarian in the present social conditions in Canada. Nevertheless, there may still be people in Canada to whom such a right would be valuable, and perhaps such persons should not be denied this right. The British Columbia Supreme Court had occasion to consider a suit for breach of promise to marry in *Tuttle v. Swanson.*[3] Mr. Justice Kirke Smith awarded general damages of $2,250 to a widow in her mid-fifties who had lived, at intervals, with the defendant (with a promise to marry) for about fifteen years, on the grounds that whatever prospect of marriage she had at age forty had been *pro tanto* diminished by the "evil" intention of the male who finally jilted her.

Generally, statutory provisions in Canada require that over a certain age (seventeen or eighteen years), consent of a third person is not necessary for a marriage to be solemnized because the parties have full capacity to be married. Conversely, the consent of persons such as parents or guardians *is* required for persons below certain ages (varying from twelve to nineteen years), before the marriage may be solemnized. Such consent is required

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[1] Hughes, *Family Law*, 5 OTTAWA L. REV. 176 (1971).

[2] The Law Reform (Miscellaneous Provisions) Act, c. 33, § 1(1) (1970), in 40 HALSBURY'S STATUTES OF ENGLAND at 781 provides in part: "An agreement between two persons to marry one another shall not . . . have effect as a contract giving rise to legal rights and no action shall lie . . . for breach of such an agreement . . . ."

[3] 9 R.F.L. 59 (B.C. Sup. Ct. 1972).

because an infant in law lacks capacity to enter into a binding contract that is enforceable against him, except in the case of necessaries. The consent of parents or guardians may be dispensed with by the court in exceptional circumstances, as shown in two cases reported during the survey period. In *Re Fox*,[4] the consent of the father seemed to have been unreasonably and arbitrarily withheld. Under such circumstances the court had jurisdiction to dispense with the consent. But a judge may refuse to override a parental objection to marriage. Thus, in Manitoba, the court, without bothering to consider the interests of the unborn child, but after claiming to consider the best interests of the parties to the intended marriage, the interests of the community, the substantial failure rate of such marriages, the maturity level of the parties and their emotional and mental stability, the cultural background and educational level of the parties, and their reason for desiring to marry, came to the conclusion that it should refuse to give its consent to the intended marriage.[5]

In order to constitute a valid marriage, the common law of England required that the *verba de praesenti* be pronounced in the presence, and with the intervention, of an episcopally ordained priest. Accordingly, *Ex parte Cote*[6] shows that *de facto* relationships between Indians living on a reserve do not constitute a valid marriage, if neither the common law requirements, nor the provisions of the Marriage Act are satisfied. It thus seems that the Court of Appeal in Saskatchewan would have been prepared to recognize such "marriages" had they complied with the requirements of the common law. Eekelaar remarked: "If the ancient common law could subsist alongside the statute it is difficult to see why tribal custom should not also do so."[7]

In *Powell v. Powell*,[8] the Ontario High Court had to consider the presumptions of marriage where one of the parties was previously married. It has been held that initially there is a presumption in favour of the validity of the "marriage" between the plaintiff and the defendant, and that the onus of rebutting this presumption is on the plaintiff.[9] Once the plaintiff establishes the prior marriage of the defendant, there arises a presumption of its validity and hence of the invalidity of his marriage to the defendant. However, when the defendant proved the foreign divorce, there arose a presumption that the divorce validly terminated the earlier marriage, and the onus is on the plaintiff to prove the foreign decree invalid. On appeal, Mr. Justice Schroeder[10] pointed out that the evidence required to overcome the presump-

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[4] [1973] 1 Ont. 146, 11 R.F.L. 100, 30 D.L.R.3d 422 (County Ct. 1972).

[5] *Re* K's Application for Consent to Marry, [1971] 3 W.W.R. 316 (Man. Family Ct.); *see also* Tropical Law Reports, C.C.H. § 21-424.

[6] 22 D.L.R.3d 353 (Sask. 1971) (Maguire, Hall JJ.A.).

[7] Eekelaar, *Family Law*, [1972] A.S.C.L. 237, at 274.

[8] [1973] 1 Ont. 497, 31 D.L.R.3d 519 (High Ct. 1972).

[9] *See Re* Spears, 15 D.L.R.3d 494 (N.S. County Ct. 1970), where it was held that the onus of proving the subsistence of the first marriage rests on the person who asserts the nullity of the second one.

[10] Powell v. Cockburn, [1973] 2 Ont. 188, at 190, 11 R.F.L. 248, at 249, 33 D.L.R.3d 284, at 286 (Jessup, Brooke JJ.A.).

tion as to the validity of the marriage between the parties to this action must be of a cogent and convincing character, since the judgment has such a significant bearing on the status of these parties with all the consequences which flow from it. In Saskatchewan, the presumption of marriage arising from evidence of a marriage ceremony followed by cohabitation does not apply where there is no evidence to show that the prior marriage has been dissolved or that the spouse was dead before entry into the second marriage. [11]

It may be of some interest to the constitutional lawyers to note that the Indian Act [12] deprives an Indian woman who marries a non-Indian of her right to registration as a member of her Band, but does not effect a similar result in respect of the marriage of a male Indian to a non-Indian. In the now infamous Supreme Court of Canada decision in the *Lavell* case, an Indian woman unsuccessfully claimed that this provision infringed the Canadian Bill of Rights [13] as being discriminatory on the ground of sex. [14]

III. NULLITY

Few cases have been reported during the surveying period on annulment of marriage. It may be said that, with the liberalization of divorce in Canada by the Divorce Act, 1967-68, [15] actions for annulment can be expected to become even rarer in the future than they have been in the past. [16] In the surveying period, questions were raised as to whether or not the Divorce Act has usurped, by its provisions, the annulment of marriage as part of the law of divorce in Canada. It was held in *Jackson v. Jackson* [17] that, in British Columbia, the law as to annulment of marriage had not been changed by reason of the Divorce Act. The plaintiff was therefore entitled to bring an action for annulment of marriage under the common law, [18] rather than for divorce under section 4(1)(*d*) of the Act wherein lack of consummation may be deemed to be cruelty. Likewise, it has been held in the Alberta case of *Liptack v. Liptack*, [19] that the Divorce Act does not deprive the court of the jurisdiction it had to entertain actions for nullity prior to the existence of the Divorce Act. Upon the enactment of the Act an action for nullity might

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[11] Rosenmeyer v. Dorn, [1973] 4 W.W.R. 709, 37 D.L.R.3d 120 (Sask.) (Culliton C.J., Brownridge, Maguire JJ.A.).

[12] CAN. REV. STAT. c. 1-6, § 12(1)(*b*) (1970).

[13] CAN. REV. STAT. App. 3, § 1(*b*) (1970).

[14] Attorney-General of Canada v. Lavell, 38 D.L.R.3d 481 (Sup. Ct. 1973) (Fauteux, C.J.C., Martland, Judson, Ritchie, Pigeon JJ., *Dissenting* Laskin, Abbott, Spence, Hall JJ.), *rev'g* [1971] F.C. 347, *aff'g* [1972] 1 Ont. 390 (County Ct.).

[15] Divorce Act 1967-68, CAN. REV. STAT. c. D-8, § 23 (1970).

[16] Hahlo, *Nullity of Marriage*, in 2 STUDIES IN CANADIAN FAMILY LAW 651, at 652 (D. Mendes da Costa ed. 1972).

[17] [1972] 2 W.W.R. 321, 23 D.L.R.3d 216 (B.C. Sup. Ct. 1971).

[18] The basis of the law governing nullity in the common law provinces in Canada is generally English law as it stood after the passing of the first Matrimonial Causes Act of 1871. In British Columbia, § 2 of Ordinance 67 (1867) introduced English law as of November 19, 1858, so far as it was not inapplicable to local circumstances.

[19] [1974] 1 W.W.R. 108, 41 D.L.R.3d 159 (Alta. Sup. Ct. 1973).

be brought by statement of claim relying on the Matrimonial Causes Act, 1857, or by petition relying on the Divorce Act. [20] While a decree of divorce dissolves the marriage as from the date when the decree becomes absolute, a decree of nullity, depending on the ground of annulment, either declares there never was a valid marriage or dissolves it with retroactive effect. In *Liptack*,[21] pursuant to Rule 579 of the Supreme Court Rules, [22] a decree nisi was granted to the plaintiff. Such decree need not be made absolute for one month after entry and service thereof. In British Columbia, [23] it has been held that the nullity decree operates from pronouncement or entry for purposes other than re-marriage, such as succession.

In Saskatchewan, [24] in an action for annulment of marriage on the ground of lack of consent by a woman in a distressed condition, the court reluctantly came to the conclusion that she had failed to establish a case which would fall within the principles enunciated by the authorities. Mental reservation on the part of one or both of the parties to a marriage does not affect its validity. In British Columbia, [25] the Supreme Court had to determine whether the marriage had been entered into in good faith, and whether it was therefore valid. It held that a marriage entered into solely for immigration purposes and for a fee on the part of the plaintiff cannot be said to have been entered into in good faith "as required by section 21 of the Marriage Act." [26] Accordingly, where the three-day notice requirement of section 19 of the Act has not been complied with, such a marriage is invalid. However, in *Deol v. Deol*, [27] the Supreme Court of British Columbia followed its earlier decision of *Gardner v. Gardner*, [28] and held that a marriage entered into with the *sole* purpose of giving one party immigration status is a valid marriage. Surely, if the parties had freely consented to the marriage contract with the intention of becoming man and wife, the marriage was perfectly valid and could not be affected by any mental reservations. This is in keeping with the English decision of *Silver v. Silver*, [29] and it would be difficult to defend any other view.

In Ontario, the plaintiff in *D. v. D.* [30] was not successful in her action for annulment on the ground of non-consummation due to her own physical

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[20] *See* D. v. D., [1973] 3 Ont. 82, 36 D.L.R.3d 17 (High Ct.) where the question of jurisdiction for nullity of marriage was discussed. *See also* Rose v. Rose, [1970] 1 Ont. 193, 8 D.L.R.3d 45 (High Ct.).

[21] *Supra* note 19.

[22] It reads as follows:

> In an action to annul a voidable marriage the court shall, in the first instance, grant a decree nisi not to be made absolute for three months, or such shorter time as the Court may direct, from entry thereof . . . .

[23] *Re* Bradley Estate, 11 R.F.L. 256 (B.C. Sup. Ct. 1973).

[24] Thompson v. Thompson, [1971] 4 W.W.R. 383, 19 D.L.R.3d 608 (Sask. Q.B.).

[25] McKenzie v. Singh, 8 R.F.L. 228, 29 D.L.R.3d 380 (B.C. Sup. Ct. 1973).

[26] B.C. REV. STAT. c. 232, § 21 (1960).

[27] 23 D.L.R.3d 223 (B.C. Sup. Ct. 1971).

[28] 75 W.W.R. (n.s.) 667, 2 R.F.L. 41, 13 D.L.R.3d 250 (B.C. Sup. Ct. 1970).

[29] [1955] 2 All E.R. 614 (P.D. & Adm. Div.).

[30] D. v. D., *supra* note 20.

disability. The refusal of the wife to have her disability corrected by minor surgery precluded the court from exercising any discretion it might have had. The same case also held that repudiation of the marriage by the innocent spouse is only an element to be considered, and does not give the other spouse a remedy to which he or she is not otherwise entitled. In *Manitoba*,[31] the husband who had elected to accept an otherwise "voidable" marriage, due to his wife's inability to consummate, and who paid maintenance to support his wife with her disability during the eleven-year term that he chose to have the marriage continue was estopped from completely repudiating the marital contract. His only remedy, then, was divorce.

IV. DIVORCE

A. *Jurisdiction*

Section 5 of the Divorce Act provides that the court of any province has jurisdiction in divorce if the petitioner is domiciled in Canada, and either the petitioner or the respondent has been ordinarily resident in the province for a period of at least one year immediately preceding the presentation of the petition, and has actually resided in the province for at least ten months of that period. This section reflects a fundamental change from the past basis of jurisdiction which was premised upon proof of domicile within the jurisdiction wherein proceedings were instituted. Under the Divorce Act, in divorce cases, the federally-appointed judges sitting in courts throughout Canada exercise jurisdiction over the cause of action (the divorce suit) through the parties if the parties satisfy the double-barrelled test of domicile and residence stipulated by sections 5 and 6.[32] The problem arose in Ontario where the legislature extended to local judges of the High Court the jurisdiction of the judiciary of the Supreme Court in administering the Divorce Act, 1967-68.[33] The

[31] Faircloth v. Faircloth, [1973] 4 W.W.R. 740, 11 R.F.L. 67, 37 D.L.R.3d 260 (Man. Q.B.).

[32] See M. MASTER, REPORT OF RESEARCH IN CANADIAN FAMILY LAW chs. 6, 9 (1970) (University of Manitoba).

[33] The Judicature Amendment Act, 1970 (No. 4), Ont. Stat. 1970 c. 97, § 11 provides as follows:

> 11. (1) Subsection 1 of section 115 of The Judicature Act is amended by striking out "Except in the County of York" in the first line, so that the subsection shall read as follows:
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> (1) Every judge of a county court is a local judge of the High Court for the purposes of his jurisdiction in actions in the Supreme Court, and may be styled a local judge of the Supreme Court, and has, in all causes and actions in the Supreme Court, subject to the rules, power and authority to do and perform all such acts and transact all such business in respect of matters and causes in or before the High Court as he is by statute or the rules empowered to do and perform.
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> (2) The said section 115 is amended by adding thereto the following subsection:
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> (3) Without limiting the generality of subsections 1 and 2, the jurisdiction of the local judges of the High Court extends to the exercising of all such powers and authorities and the performing of such acts and the transacting of all such business as may be exercised, performed or transacted by the Supreme Court or a judge thereof under the Divorce Act (Canada).

Ontario Court of Appeal held this extension to be valid [34] on the ground that no constitutional impediment exists preventing the legislature from reorganizing the administration of the High Court of Justice. But the Judges of the County Court of York will be without power to exercise such divorce jurisdiction unless and until the Governor-General sees fit to appoint by patent some or all of the County Court of that county to the office of Local Judge. This does not affect the validity of the legislation, but only its implementation.

The Canadian courts have been concerned over the meaning of the phrase "ordinarily resident." One explanation is given in *Marsellus v. Marsellus* [35] where the British Columbia Supreme Court applied the test of the "real home" to determine what was "ordinary residence" in the province. A person who is ordinarily resident in one province may leave and actually reside elsewhere for a specific purpose and yet remain ordinarily resident in the province. For example, a member of the Armed Forces may remain ordinarily resident in British Columbia even though he is posted elsewhere and actually resides elsewhere. In this regard reference may be made to *Lotoski v. Lotoski*, [36] which was decided only a few days after *Marsellus*, and which does not, therefore, refer to this decision. In *Lotoski*, the petition was presented on October 3rd, 1968. The evidence of the wife-petitioner was that she separated from her husband on January 24th, 1956. In 1960 she commenced to live with another man as his wife in British Columbia. In 1963 this man was transferred by the company which employed him to Montreal, where the two of them lived together until their return to British Columbia near the end of February, 1968. The wife testified that it was always her intention to return to Vancouver. This petition was, however, dismissed, the court holding that the petitioner had not been ordinarily resident in British Columbia for a period of at least one year immediately preceding the presentation of the petition. On the other hand, it has been held in Nova Scotia that, [37] where the petitioner moved to Ontario from Nova Scotia for a week for the purpose of reconciliation, her residence in Ontario was regarded as extraordinary residence and therefore did not break the continuity of her Nova Scotia residence for the requisite period.

The test laid down in *Marsellus* comes close to the definition of domicile, and is to be preferred. What is the difference between "permanent home" for the purpose of determining domicile, and "real home" for determining "ordinary residence"? It is submitted that this test raises a distinction without a difference. As was said by the Nova Scotia Supreme Court:

> In the acquisition of this concept, it may be that intention should not be disregarded: but apart from cases of special circumstances, a consideration

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[34] *Reference re* Constitutional Validity of Section 11 of Judicature Amendment Act, 1970 (No. 4), [1971] 2 Ont. 521, 18 D.L.R.3d 385 (Gale C.J.O., per curiam).

[35] 75 W.W.R. (n.s.) 746, at 748, 2 R.F.L. 53, 13 D.L.R.3d 383 (B.C. Sup. Ct. 1970).

[36] 2 R.F.L. 64 (B.C. Sup. Ct. 1971).

[37] Graves v. Graves, 11 R.F.L. 112, at 114, 36 D.L.R.3d 637, at 638 (N.S. Sup. Ct. 1973).

> that has been held to be of more importance than intention is the fact of arrival in the place where the new abode is to be; that is, if such arrival is the result of a determination to remain in the new place for a considerable time. [38]

The phrase "actually resided" also is not defined in the Divorce Act, and the problem of determining what constitutes actual residence was considered in *Norton v. Norton*, and *Cuzner v. Cuzner*. [39] In *Norton v. Norton*, it was held that the petitioner had been actually resident in Nova Scotia for the prescribed period, while he was serving on a ship which was at sea, and had no permanent or temporary base at any place other than Halifax. The result obtained was a desirable one in that the petitioner had no residence which could be considered his "actual residence", other than the high seas. But it is difficult to reconcile that case with *Cuzner v. Cuzner* where the petitioner, a sailor, returned to his mother's home in Nova Scotia when his ship "tied up" for winter in 1968 and 1969, and returned to his ship in the spring. The petition was dismissed for lack of jurisdiction, on the basis that the petitioner had not actually resided in Nova Scotia for the prescribed period. It is not easy to justify this case, when one considers that actual residence in the province should not be affected by temporary absences for the purpose of holidays or business trips.

The Divorce Act, 1967-68 has not changed the common law rules concerning the determination of domicile except as regards the wife. It was held in *Dimitrijevic v. Dimitrijevic* [40] that, pursuant to section 6(1) of the Divorce Act, the domicile of the wife had to be determined as if she were unmarried. During the surveying period, the Canadian courts have confirmed [41] that, for the purpose of determining whether the husband-petitioner is domiciled in Canada, the court must apply the common law rules concerning domicile of origin, domicile of choice or domicile of dependency (if the husband is a minor or lunatic). In *Jablonowski v. Jablonowski*, [42] the question before the court was whether there is any conflict between the use of the expression "Canadian domicile" in the Immigration Act [43] and "domicile" as it is considered as a matter of common law under the Divorce Act. Under the Immigration Act [44] a person who is an immigrant in Canada acquires a Canadian domicile only after he has completed five years of residence in Canada. It was held that a person can acquire a domicile of choice in Canada for the

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[38] Nowlan v. Nowlan, 2 R.F.L. 67 (N.S. Sup. Ct. 1970), *quoted in* D. Mendes da Costa, *supra* note 16, at 937.

[39] Norton v. Norton, 2 N.S.2d 788, 2 R.F.L. 59, 14 D.L.R.3d 489 (N.S. Sup. Ct. 1970); Cuzner v. Cuzner, 2 R.F.L. 65, 15 D.L.R.3d 511 (N.S. Sup. Ct. 1970).

[40] [1972] 3 Ont. 335, 28 D.L.R.3d 177 (High Ct.).

[41] Armstrong v. Armstrong, [1971] 3 Ont. 544, 5 R.F.L. 165, 21 D.L.R.3d 140 (Sup. Ct.); Khalifa v. Khalifa, 19 D.L.R.3d 460 (N.S. Sup. Ct. 1971), where it was held that a person's domicile depends in no way on his nationality or citizenship; Jablonowski v. Jablonowski, 8 R.F.L. 36, 28 D.L.R.3d 440 (Ont. Sup. Ct. 1972); and Powell v. Powell, *supra* note 8, on loss of domicile of origin.

[42] *Id.*

[43] CAN. REV. STAT. c. I-2 (1970).

[44] *Id.* § 4(1).

purposes of the Divorce Act even if his entry into Canada and his residence thereafter are unlawful under the Immigration Act. The definition of domicile contained in the Immigration Act is restricted in use for the purpose of that Act and is not intended to be applied under other Dominion statutes. Accordingly, domicile is to be established for divorce purposes by the common law determinants of domicile, namely, *animus manendi* and *factum*. Section 5(1) of the Divorce Act does not stipulate the date on which it must be established that the petitioner is domiciled in Canada. The British Columbia Supreme Court in *Weston v. Weston*, [45] followed the Canadian decisions prior to 1967-68, [46] and held that jurisdiction is not ousted by a change of domicile during the proceedings. In other words, it followed the view that is expressed in the "once competent always competent" rule, whereby the relevant date is the date on which the petition is presented. Accordingly, the court refused leave to discontinue divorce proceedings on the petitioner's allegation that she had changed her domicile during the proceedings.

Section 5(2)(*a*) of the Divorce Act provides in part that: "if petitions were presented on different days and the petition that was presented first is not discontinued within thirty days after the day it was presented, the court to which a petition was first presented has exclusive jurisdiction." This provision is provided in the Divorce Act in order to avoid possible difficulties arising from jurisdictional rule where petitions for divorce are pending in two courts. It has been made clear in *Barlow v. Barlow* [47] by the British Columbia Supreme Court that the language of the section should be restricted to cases where one petition is commenced by one spouse and a second petition is commenced by the other spouse in another province, since the object of the section is to prevent more than one contest between the parties. Accordingly, where one spouse had issued petitions in Edmonton and then in Vancouver, the court in British Columbia, after the Alberta action had been discontinued, permitted the spouse to re-issue her petition. Immediately after the re-issuing of the petition, the court, with the consent of all parties, dispensed with service of the petition, set the matter down for trial, and granted a decree.

B. *Grounds for Divorce*

1. *Adultery*

During the surveying period, no less than a dozen adultery cases are reported. Most of these cases are related to the standard of proof that is required to prove adultery. Since matrimonial causes are civil suits, the standard of proof in a divorce proceeding is for most purposes (i.e. where no question regarding legitimacy of offspring arises) the same as in other civil proceedings. This was decided by the Supreme Court in *Smith v. Smith* [48]

[45] 24 D.L.R.3d 109 (B.C. Sup. Ct. 1971).

[46] Blum v. Blum, [1965] 1 Ont. 236, 47 D.L.R.2d 388 (Porter, C.J.O. per curiam); Pearson v. Pearson, [1951] Ont. 344, [1951] 2 D.L.R. 851 (High Ct.) (Gale J.).

[47] [1972] 4 W.W.R. 122, 7 R.F.L. 129, 26 D.L.R.3d 379 (B.C. Sup. Ct.).

[48] [1952] 3 D.L.R. 449 (Sup. Ct.).

before 1968, and the courts in Canada have affirmed it [49] after 1968, since the Divorce Act has not changed the standard of proof. The rule of "preponderance of probability" is thus applicable. In British Columbia [50] it has been held that, for certain purposes, *e.g.*, where a finding of adultery would have the effect of bastardizing a child, a heavier burden of proof is laid on the petitioner: in such circumstances adultery must be proved beyond a reasonable doubt, on the criminal standard of proof. Mr. Justice Kirke Smith held that it was sufficient to satisfy that standard where the wife constantly refused to accede to repeated requests of her husband for blood tests of the child and herself.

Mere suspicion of adultery without preponderance of credible evidence is not enough. [51] Thus, in *Dion v. Dion*, [52] the petitioner was unable to prove adultery for the evidence went no further than to establish that the respondents had spent one or more nights in the male respondent's apartment. Defence evidence was given that there were two bedrooms in the apartment, and that there had been no sexual activity between the parties during the period of sharing occupancy. The evidence created a suspicion of adultery but not a sufficient base to create an inference of adultery. In *Mossing v. Mossing*, [53] statements by the respondents to the petitioner admitting adultery, buttressed by evidence of opportunity, antecedent letters clearly expressing the mutual passion the respondents held for each other, and subsequent intimate association of the respondents, were held to constitute sufficient evidence of adultery upon which to found a divorce petition. The cases of *Handy v. Handy* [54] and *Olson v. Olson* [55] illustrate the principle that corroborative evidence of adultery is required under the Act as a matter of precaution. In *Hayes v. Hayes*, [56] the Nova Scotia Supreme Court, due to exceptional circumstances, permitted affidavit evidence of adultery. Such exceptional circumstances were found to exist where the petitioner was a university student, supported by her parents and without means, and the respondent and co-respondent resided in South America.

In Canada, by section 9(1)(*a*) of the Divorce Act, the sole admission

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[49] *See* MacCurdy v. MacCurdy, 4 N.B.2d 10, 8 R.F.L. 125 (1972); Jablonowski v. Jablonowski, *supra* note 41; Mossing v. Mossing, 9 R.F.L. 292, 31 D.L.R.3d 770 (Sask. Q.B. 1973); Dion v. Dion, [1973] 3 W.W.R. 202, 9 R.F.L. 276 (Sask. Q.B.); Drew v. Drew, 12 R.F.L. 20 (Ont. 1974) for the standard of proof of adultery in maintenance applications under the Deserted Wives and Children Maintenance Act, ONT. REV. STAT. c. 128 (1970), and for review of case law.

[50] Loewen v. Loewen, 2 R.F.L. 230 (B.C. Sup. Ct. 1971), followed two cases on the standard of proof: Preston-Jones v. Preston-Jones, [1951] A.C. 391; and Irish v. Irish, 24 W.W.R. (n.s.) 671 (B.C. 1958).

[51] Dion v. Dion, *supra* note 49; Shaw v. Shaw, 4 R.F.L. 392 (N.S. 1972); MacCurdy v. MacCurdy, *supra* note 49 where it was held that evidence of the husband being at a motel fell short of the strict requirement necessary to prove that adultery had been committed.

[52] *Supra* note 49.

[53] *Id.*

[54] 40 D.L.R.3d 485 (Ont. 1973).

[55] [1971] 3 W.W.R. 506, 4 R.F.L. 86 (Sask. Q.B.).

[56] 20 D.L.R.3d 214 (N.S. Sup. Ct. 1971).

(or confession) of either or both parties is not always sufficient evidence for finding of adultery. It has been made clearer in *Veysey v. Veysey*[57] that the word "admission" as used in section 9(1)(*a*) of the Divorce Act means a voluntary statement against interest. It does not refer to a sworn statement in court of a compellable witness. The word "parties" refers to the parties to the action and not to the parties to the act of adultery complained of. Accordingly, the sworn testimony of a co-respondent admitting adultery is sufficient to support the granting of a decree. *Veysey v. Veysey* was followed in *MacCurdy v. MacCurdy*,[58] where it was held that statements by the husband of his affection for another woman were not admissions of adultery but voluntary statements made against interest. The issue of adultery is to be determined by evidence of facts indicative of the commission of adultery by the respondent and not by admissions of the respondent. On the other hand, in *Morice v. Morice*[59] the wife succeeded in obtaining a decree in an undefended divorce action, where the husband, who began disappearing on weekends and other occasions without explanation, admitted having committed adultery. The trial judge failed to give proper consideration to the evidence which lent credence to the husband's admission of adultery. The Court of Appeal took into consideration the fact that the adultery occurred during a pattern of life that the husband had established during the marriage. The fact that he had re-established a personal association with the co-respondent (whom he had known prior to his marriage) during the period of separation, and the fact that he had given the name and address of the co-respondent were other considerations in determining his credibility.

The fact that the petitioner-spouse has also committed adultery used to be a discretionary bar to a petition based on adultery. It is uncertain whether this bar continues after the Divorce Act, 1967-68, since the present Act is silent on this point. But it seems from *Kalesky v. Kalesky*,[60] that it does not preclude the court from granting a decree where it finds that the marriage has irrevocably broken down and should be dissolved. Likewise, the discretionary bar of the petitioner's delay or laches does not seem to continue after 1968, as seen in *Handy v. Handy*[61] where the petitioner successfully brought an action for divorce 18 months after he learned of the adultery. Although the trial judge in that case took the view that the petitioner's delay did weaken his case somewhat, this point was not taken into consideration on appeal.

2. *Sexual Offences*

Prior to 1968, the "unnatural offences" of rape, sodomy, and bestiality were available as grounds for divorce to a wife, but not to a husband, in the Prairie Provinces and British Columbia, and after 1930 in Ontario, where the Matrimonial Causes Act, 1857, was in force. These unnatural offences now

[57] 3 N.B.2d 415, 8 R.F.L. 123, 16 D.L.R.3d 239 (1972).
[58] *Supra* note 49.
[59] 26 D.L.R.3d 375 (Sask. 1972).
[60] [1973] 3 Ont. 761, 10 R.F.L. 298, 38 D.L.R.3d 181 (High Ct.).
[61] *Supra* note 54.

constitute grounds for divorce under the Divorce Act, 1967-68 [62] at the instance of an innocent husband or wife. The question was raised recently in Manitoba in *S. v. S.* [63] whether relief under section 3 (*b*) is available only where the respondent has been charged and found guilty, in criminal proceedings, of the offence in question—in this case rape. The answer to this question was given squarely against the respondent in *T. v. T.* [64] in Ontario, where Mr. Justice Lacourciere held that, in a wife's petition under section 3(*b*), it is not necessary to prove that the husband had been convicted under the Criminal Code, but only that he has committed an act of rape. The later case of *G. v. G.*, [65] decided by the Nova Scotia Supreme Court, may also be referred to where Chief Justice Cowan held that a certificate of conviction at a criminal trial is insufficient proof. The matrimonial offence must be established by *viva voce* evidence before the judge who hears the divorce petition.

The Divorce Act is not clear on the meaning attached to the term "has engaged in a homosexual act." In *C. v. C.*, [66] the Ontario Court did not indicate whether transvestitism was included within the meaning of the term. The definition of homosexuality suggested in *Countway v. Countway* [67] is a restrictive one confined to "acts between members of the same sex which involve the surrender of sexual organs." It is clear that lesbianism [68] is included within the definition of section 3(*b*) of the Divorce Act.

3. *Cruelty*

It has been shown in the last Survey of Family Law [69] that the case of *Zalesky v. Zalesky* [70] has become the leading authority for the proposition that Canadian judges are free to reshape the law on cruelty under the Divorce Act, 1967-68, without being bound by the English law on cruelty as enunciated in *Russell v. Russell.* [71] This trend has been continued during the surveying period, and *Zalesky* has been followed or approved in every province in Canada. [72] Canadian courts have indicated that both the ingredient of cruelty

[62] *Supra* note 15, § 3(*b*).

[63] 41 D.L.R.3d 621 (Man. Q.B. 1973); *followed* T. v. T., [1970] 2 Ont. 139, 1 R.F.L. 23, 10 D.L.R.3d 125 (High Ct. 1969).

[64] *Id.*

[65] 3 N.S.2d 630, 2 R.F.L. 243, 16 D.L.R.3d 107 (1970).

[66] [1969] 2 Ont. 786, 2 R.F.L. 128, 7 D.L.R.3d 35 (High Ct.).

[67] 70 D.L.R.2d 73 (N.S. 1968) in which homosexual conduct by a husband was held to constitute cruelty within the test set out in Russell v. Russell, [1897] A.C. 395. *See also* C. v. C., 2 N.B.2d 187 (1969).

[68] *See* M. v. M., 2 Nfld & P.E.I. 465, 24 D.L.R.3d 114 (P.E.I. Sup. Ct. 1972), where the respondent-wife's engaging in mutual fondling with another woman to the point of orgasm was held to fall within section 3(*b*) of the Divorce Act.

[69] *Supra* note 1, at 180.

[70] 67 W.W.R. (n.s.) 104, 1 R.F.L. 36, 1 D.L.R.3d 471 (Man. Q.B. 1968).

[71] Russell v. Russell, *supra* note 67.

[72] Feldman v. Feldman, 75 W.W.R. (n.s.) 715, 2 R.F.L. 173, 14 D.L.R.3d 222 (Alta. 1970) (McDermid, J.A., per curiam); Goldstein v. Goldstein, 15 D.L.R.3d 95 (Alta. Sup. Ct. 1970); Zunti v. Zunti, 15 D.L.R.3d 369 (B.C. 1970); Pettigrew v. Pettigrew, 27 D.L.R.3d 500 (Man. Q.B. 1972); Vogt v. Vogt, 1 R.F.L. 123 (N.B.Q.B. 1969); Goudie v. Goudie, 2 R.F.L. 128 (Nfld. Sup. Ct. 1969); Hiltz v. Hiltz, 2 R.F.L. 178 (N.S. Sup. Ct. 1970); Mayberry v. Mayberry, [1970] 2 Ont. 602, 2 R.F.L. 140, 11 D.L.R.3d 532 (High Ct.); Durant v. Durant, 22 D.L.R.3d 488 (P.E.I. Sup. Ct. 1971); Wyman v. Wyman, 2 R.F.L. 190 (Sask. Q.B. 1971).

and the element of intolerability are requisite in order to obtain a divorce on the ground of cruelty. The very nature of the two requirements indicates that, to be cruelty within the ambit of section 3(*d*), the conduct and acts complained of by the petitioner must be conduct or acts of a grave and weighty nature, and not frivolous or merely indicative of incompatibility of temperament. The key element in the definition is the intolerability of continued cohabitation. Conversely, in the absence of such evidence of intolerability, a divorce petition under section 3(*d*) will fail even if the "doctrine of danger" is satisfied. [73] Therefore, the test as to whether one spouse has treated the other with cruelty is, to that extent, objective. Nevertheless, the reported cases during the survey period indicate that there has been some confusion as to whether the degree of intolerability is to be judged objectively or subjectively. [74] In *Austin v. Austin* [75] and *Durant v. Durant*, [76] the courts laid down the rule that the test is subjective: what has to be determined is the *effect* on a *particular* person, of certain conduct or acts, rather than the *nature* of the acts committed. It is submitted that if cruelty is established in the first sense, (that is, if the conduct is grave and weighty in an objective way), then the effect of the respondent's conduct upon the petitioner must then be considered in order to determine whether the cruelty is such as to render intolerable the continued cohabitation of the spouses in the particular case. The conclusion of Mr. Justice Pearce in *Lauder v. Lauder* [77] that, "in a cruelty case the question is whether *this* conduct by *this* man to *this* woman, or vice versa is cruelty," has received support in several cases. In *this* sense the test of cruelty must be applied subjectively. The facts of each case must be considered in a subjective way. [78]

Canadian courts have also emphasized that the cruelty ground must not be made a short-cut to early divorce for the adolescent, the incompatible, the disappointed or the unhappy. The acts complained of must therefore be more than those which merely illustrate the breakdown of the marriage and the incompatibility of the parties. Such cases must await the passage of the years prescribed under section 4(1)(*e*) of the Divorce Act. Hence, the courts have resisted the temptation of opening the door of cruelty too widely.

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[73] Jordahl v. Jordahl, 5 R.F.L. 189 (Sask. Q.B. 1971); Horne v. Horne, [1972] 3 W.W.R. 153, 5 R.F.L. 394 (B.C. Sup. Ct.); Clark v. Clark, 6 R.F.L. 6 (Ont. High Ct. 1971); Goudie v. Goudie, *supra* note 72; Marks v. Marks, 3 R.F.L. 339 (N.S. Sup. Ct. 1971); Burton v. Burton, 2 Nfld. & P.E.I. 450, 8 R.F.L. 272 (P.E.I. Sup. Ct. 1972); Hattie v. Hattie, [1971] 2 W.W.R. 556, 18 D.L.R.3d 383 (B.C. Sup. Ct.). *See also* 1 STUDIES IN CANADIAN FAMILY LAW 454 (D. Mendes da Costa ed.).

[74] Eekelaar, *supra* note 7, at 308.

[75] 13 D.L.R.3d 498 (Sask. 1971).

[76] *Supra* note 72.

[77] [1949] P. 277, at 308.

[78] Lacey v. Lacey, [1970] 1 Ont. 279 (1969); Ashraff v. Ashraff, 73 W.W.R. (n.s.) 321 (Man. Q.B. 1970); Grandy v. Grandy, 3 N.S.2d 750, 7 R.F.L. 69, 26 D.L.R.3d 359 (N.S. 1972) (Coffin, J.A. per curiam); M. v. M., 3 R.F.L. 350, 18 D.L.R.3d 667 (Ont. 1971) (Gale C.J.O., Schroeder, Arnup JJ.A.); Ebenal v. Ebenal, 15 D.L.R.3d 242 (Sask. Q.B. 1970); Durant v. Durant, *supra* note 72.

Otherwise many spouses would not be disposed to wait three years before seeking a divorce. [79]

The reported cases during the survey period have indicated that the courts have, with some irreconcilable exceptions, [80] set fairly severe standards as to the degree of hardship that must be suffered before the cohabitation becomes intolerable. Refusal to have sexual intercourse has been held both to constitute and not to constitute cruelty. [81]

In *Whittstock v. Whittstock*, [82] the Ontario Court of Appeal awarded a divorce decree under section 3(*d*), on the grounds of cruelty in the form of chronic alcoholism. On the other hand, "there is a growing weight of opinion that conduct need not be morally culpable to satisfy the provision." [83] For example, note the approach taken by Mr. Justice Manning in *Goldstein v. Goldstein* [84] where he considered himself bound to accept the mere assertion by the petitioner that she found the situation intolerable. This approach cannot be justified in light of the standards, set by most courts, as to the degree of hardship that must be suffered before the cohabitation becomes intolerable. Cases have been reported over the survey period which held that intention on the part of the respondent to injure, or proof that the conduct was "aimed at" the petitioner is not an essential requisite of cruelty. Any course of conduct intentionally pursued, provided it has some impact on the petitioner, may, in appropriate circumstances, justify a finding of cruelty. [85] It has also been held that, in general, the cruelty must be established by proven and corroborated facts and must not be merely the subjective evidence and hurt feelings of the injured spouse. [86]

In Ontario, the narrow principle enunciated in *Russell v. Russell* [87] on cruelty has been followed in an action for alimony. [88] This court has taken the view that the issue of cruelty in an alimony action is a different one from the issue of cruelty in a divorce action; and the principle of res judicata or estoppel has no application in subsequent divorce proceedings. [89] The Mani-

[79] Lacey v. Lacey, *id.*; Anderson v. Anderson, 8 R.F.L. 299, 29 D.L.R.3d 587 (Alta. 1972) (Johnson, Kane, Clement JJ.A.), *aff'd*, 10 R.F.L. 200 (Sup. Ct.) (Fauteux, C.J.C. per curiam); Durant v. Durant, *supra* note 72; Wittstock v. Wittstock, 3 R.F.L. 326, 18 D.L.R.3d 264 (Ont. 1971) (Aylesworth, Evans, Brooke, JJ.A.); Hiltz v. Hiltz, 11 R.F.L. 35 (N.S. 1973) (Coffin, J.A.); Marks v. Marks, *supra* note 73.

[80] Struk v. Struk, 14 D.L.R.3d 630 (Sask. Q.B. 1971).

[81] Delaney v. Delaney, [1972] 1 Ont. 34, 22 D.L.R.3d 149 (1971); Struk v. Struk, *id.*; Ebenal v. Ebenal, 3 R.F.L. 303, 20 D.L.R.3d 545 (Sask. 1971) (Brownridge, J.A. per curiam); Markus v. Markus, [1971] 2 W.W.R. 35, 16 D.L.R.3d 520 (Sask. Q.B. 1970).

[82] *Supra* note 79.

[83] Eekelaar, *supra* note 7, at 309; Hattie v. Hattie, *supra* note 73 (hypochondria); Goldstein v. Goldstein, *supra* note 72.

[84] Goldstein v. Goldstein, *id.*

[85] Hattie v. Hattie, *supra* note 73; Grandy v. Grandy, *supra* note 78; Burton v. Burton, *supra* note 73; Saxton v. Saxton, [1973] 3 W.W.R. 219, 12 R.F.L. 135 (B.C. Sup. Ct.).

[86] Marks v. Marks, *supra* note 73; Durant v. Durant, *supra* note 72.

[87] *Supra* note 67.

[88] Mildon v. Mildon, 5 R.F.L. 34, 15 D.L.R.3d 420 (Ont. 1970).

[89] Marsh v. Marsh, 40 D.L.R.3d 524 (Ont. High Ct. 1973).

toba Court, on the other hand, took the view [90] that the statutory definition of cruelty found in section 3(*d*) of the Divorce Act is a fresh and complete one and should be used in determining whether cruelty has occurred on a petition of judicial separation. The court remarked that it would be the height of incongruity to grant a divorce on the basis of the new definition but to refuse judicial separation because of the more onerous requirements established by *Russell v. Russell.*

It may be of value to examine the fact-situations which arose during the survey period to determine when cruelty was or was not found to exist.

(a) *Where Cruelty Found*

Category #1: Physical Violence

(i) A husband assaulted his wife with his fists and threatened her life, after having correctly surmised that the unusual attraction his wife showed to another man was symptomatic of adultery. He also admitted to harassing her and asking her to move out of the house. It was held that, although the wife's adultery had provoked the husband's attacks, her conduct did not give him "carte blanche" authority to treat her as he wished. The beating and continued harassment were held to constitute cruelty making it intolerable for her to live with him. The fact that the husband had refused to marry the petitioner for some seventeen years after commencing to live with her was conduct prior to marriage, and while a divorce could not be founded upon it, it could be legitimately used to determine the respondent's attitude towards marriage. The court took this fact into consideration when dealing with the husband's explanations for the assault. [91]

(ii) A domineering husband continually beat his wife who tolerated, but never acquiesced in, this ill-treatment which caused in her a neurotic depressive reaction. It was held that cruelty was established sufficient to make continued cohabitation intolerable. [92]

(iii) Cruelty was found to exist when a husband, on various occasions, beat his wife, clawed at her abdomen leaving a large scar, kept two butcher knives in the bedroom, and pushed his wife out of doors at night and without sufficient clothing. [93]

(iv) Lack of communication between spouses is not an element of cruelty except to a neurotic person. The court should therefore not grant a decree of divorce on evidence of merely distasteful or irritating conduct on the part of the offending spouse. The word "cruelty" denotes excessive suffering, severity of pain, mercilessness, and not mere displeasure, irritation, anger or dissatisfaction. But when there was evidence of shaking and threats to kill the petitioner, followed by an episode of slapping, physical (but not

[90] Pettigrew v. Pettigrew, *supra* note 72.
[91] Feldman v. Feldman, *supra* note 72.
[92] Nelles v. Nelles, 2 R.F.L. 153 (Ont. High Ct. 1970).
[93] Vogt v. Vogt, 3 N.S.2d 225 (Sup. Ct. 1970).

mental) cruelty was established. Had there been anything less, the court would have ruled that there was no basis for divorce on the ground of cruelty. [94]

Category #2: Mental Cruelty Only

(i) The wife's repeated reference to her husband's "drinking problem", and her belittling his business activities induced depression in the husband. It was held that cruelty was established, for the cumulative effect of the wife's attitude toward her husband had the effect of making continued cohabitation intolerable. [95]

(ii) As a result of constant tension and continued harassment, the husband's health deteriorated. On numerous occasions he was "brought to his knees shaken"; and he felt himself unable to attend to his work. This situation required him to get away by himself in attempts to recover and be able to resume his duties at work. It was held that the conduct of the wife towards the husband, affecting his well-being, health and mind amounted to mental cruelty. [96]

(iii) The wife's ridicule of her husband at every opportunity had an injurious effect on his health. Medical evidence was adduced that the husband had episodes of confusion and marked depression, and was visibly nervous and agitated as a result of acute tension and anxiety. On one occasion he was found wandering aimlessly around town. It was held that the wife had treated her husband with mental cruelty that had rendered continued cohabitation of the spouses intolerable. She had acted either deliberately, or recklessly as to the effect of her conduct on her husband. [97] Cruelty was also established in *Chorny v. Chorny*, [98] where the husband suffered a nervous breakdown as a result of the wife's physical and mental abuse of him.

(iv) The wife developed an ulcer requiring surgery, as a result of the husband's excessive drinking, refusal to discuss marital problems and refusal to assist in disciplining the children. Further, he expected her to maintain a full-time job in addition to looking after the home. Such persistent conduct, causing danger to the wife's health which, if she were to return to the same domestic climate, would be aggravated, renders continued cohabitation intolerable and constitutes cruelty. [99]

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[94] Baker v. Baker, 5 R.F.L. 398 (Alta. Sup. Ct. 1972); *cf.* Joell v. Joell, 9 R.F.L. 285 (Man. Q.B. 1973), where it was held that a lack of communication on the part of a taciturn husband does not amount to cruelty. In *Joell*, the petitioner had exaggerated the effect of her husband's taciturnity in order to justify the divorce proceedings. Moreover she had failed to prove that her husband had created a build-up of emotional problems which finally became intolerable.

[95] Ells v. Ells, 2 R.F.L. 186 (N.S. Sup. Ct. 1970).

[96] Powell v. Powell, 5 R.F.L. 194 (Sask. 1971) (Brownridge, Maguire, Hall, JJ.A.).

[97] Burton v. Burton, *supra* note 73.

[98] Chorny v. Chorny, [1971] 5 W.W.R. 732, 4 R.F.L. 347 (Alta. 1971) (McDermid, J.A. per curiam).

[99] Edwards v. Edwards, 12 R.F.L. 35, 30 D.L.R.3d 629 (B.C. 1972) (Branca, Robertson, Nemetz, JJ.A.).

(v) An atmosphere of conflict and marital discord was created by the husband's failure to understand the limitations of his wife's physical condition. He demanded physical labour on the part of his wife including the carrying of water, heavy cleaning and other household duties that were beyond her physical ability to perform. He discharged the domestic help whom his wife had engaged, and he sought independence to carry out his own personal pursuits, absenting himself from the home at times when it would be expected that he remain to assist and console his wife. As a result of her husband's deliberate pattern of conduct to obtain, maintain and illustrate dominance, the sensitive wife suffered mental illness, described as a state of severe anxiety and not a mere emotional state or condition. The court was satisfied, upon the evidence, that the husband's conduct over a long period of time did have the effect of rendering intolerable the continued cohabitation of spouses, and had amounted to mental cruelty. [100]

(vi) The husband was an exacting, perfectionist-type of an individual, particularly with respect to his wife. His feelings of superiority prompted his finding fault with the wife in general, and especially with her housekeeping and handling of the children. During most of the marriage, the wife was of a dependent nature and craved affection and approval. The attitude of the husband so undermined her self-confidence that it began to seriously affect her health in the form of severe depression. Again it was held that the husband's conduct was cruel, which cruelty was grave and weighty to such an extent that it made intolerable the continued cohabitation. [101]

(vii) The parties lived a normal married life for about fifteen years, at which time the husband sold his successful business and became a very wealthy man almost overnight. The wife seemed unable to adjust to her new-found prosperity, and relations between the spouses began to deteriorate. In an effort to achieve independence and security for herself, the wife embarked on a course of conduct which seriously affected the husband's physical and mental health, described by a doctor as "tense and frightening". Some of her antics included taking extended trips, alone and with her children, without the knowledge of her husband; cancelling plans which he had made; availing herself of every opportunity to embarrass and denigrate him; and accusing him of being mean and stingy. Despite this demeaning treatment, the husband gave her large sums of money and continued to live with her. The husband succeeded in his petition for divorce based on cruelty. The court remarked that, while it was not necessarily cruelty for a wife to seek independence from any real or fancied domination by the husband, whether such domination be mental, physical, spiritual, moral, or even financial, the means and methods employed to achieve that independence could, as in this case, well amount to cruelty. [102]

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[100] Zwicker v. Zwicker, 3 R.F.L. 333 (N.S. Sup. Ct. 1971).

[101] Farden v. Farden, 3 R.F.L. 315 (Sask. Q.B. 1970), *aff'd*, 8 R.F.L. 183 (Sask. 1972).

[102] Saxton v. Saxton, *supra* note 85.

(viii) The husband compelled his wife to seek welfare, by leaving her destitute when he had a reasonable sum of money in the bank. He refused to pay alimony or give the wife custody of their two children, although ordered to do so by a competent court. He even obtained a decree of divorce in Hungary, making it plain that he had fully rejected his wife. While the Hungarian divorce decree had no legal effect, the Ontario High Court held that the husband's actions constituted cruelty under Canadian law. [103]

(ix) The wife's responsibilities included caring for two children of a former marriage, two children of the existing marriage, and running a business. The couple had many serious altercations, the most recent concerning a matter in her business, which resulted in several separations. The wife insisted that she found the situation intolerable, which assertion the court accepted. The court remarked that the most important element in deciding whether the conduct justifies dissolution of the marriage, is that of intolerability. [104] With respect, it is submitted that, for a decree of divorce to be granted on the grounds of cruelty, the conduct complained of must be not only intolerable, but also grave and weighty.

(x) The incompatibility of personality and temperament between the parties was such as to make it inevitable that the marriage would break down. The wife had a history of chronic depression, and the medical treatment which effected relief of the depression also created changes in her personality and behavior. The marriage consequently deteriorated because of the husband's inability to tolerate those changes. The husband's conduct, as a result of this inability, amounted to cruelty. [105]

(xi) The wife complained that her husband did not respond sufficiently to her demands for sexual intercourse. The husband's complaint was that her demands were excessive and that they precipitated his psychosomatic illness. The marital discord which arose, aggravated his conditions with each passing week. The court held that the persistent and strong advances made by the wife for the sexual act could not amount to cruelty. But continuing to make her demands despite knowing, from his pleas, that he had not yet adjusted himself to them, and ridiculing and belittling his performances in comparison with her experiences with "former men" and "one of her previous lovers", put a definite and unequivocal stamp of cruelty on the conduct of the wife. [106]

(xii) Cruelty was established where the husband made repeated unjustified accusations, hallucinatory in origin, of his wife's infidelity with numerous men. [107]

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[103] Kralik v. Kralik, 12 R.F.L. 246, 36 D.L.R.3d 193 (Ont. High Ct. 1973).

[104] Goldstein v. Goldstein, *supra* note 72.

[105] Westmacott v. Westmacott, 10 R.F.L. 377 (Man. Q.B. 1973).

[106] Hock v. Hock, [1971] 4 W.W.R. 262, 3 R.F.L. 353, *sub nom.* L. H. v. H., 20 D.L.R.3d 190 (B.C. 1971) (Maclean, Branca, Robertson, JJ.A.).

[107] Ivany v. Ivany, 2 R.F.L. 172 (B.C. Sup. Ct. 1970).

Category #3: Physical Violence and Mental Cruelty

(i) The husband assaulted his wife several times, once very seriously in the home of some friends. He grabbed her by the neck and knocked her into the bath-tub, permanently injuring her back. When she called for help, he also assaulted the friends. The assault had been brought on by the manner in which the wife danced with other men. The court felt it was unnecessary to go into details of the other assaults and conduct of the husband. It was held that this physical and mental cruelty of a kind that rendered intolerable the continued cohabitation of the spouses, was caused by the ungovernable jealousy and the excessive use of intoxicating liquor by the husband. [108]

(ii) Over a period of twenty-five years the husband, who was a very violent person, had repeatedly slapped his wife, kicked her, locked her out in sub-zero weather, and threatened to kick her all through town and back if he found her home on his return. Many times he had thrown food that she had prepared on the floor or in her face. The decree of divorce was granted on the grounds that the wife had been physically and mentally abused by her husband over the years. [109]

(iii) The husband physically assaulted his wife a number of times, and seriously assaulted their fourteen year old daughter in the presence of the wife. He advised that, if she took any action to enforce maintenance, he would quit his job and leave the country. The wife suffered from nervous tension as a result of the husband's conduct. This again was held to constitute mental and physical cruelty that rendered intolerable the continued cohabitation of the spouses. [110]

(iv) The cumulative effect of the husband's conduct comprising assaults, threats, and "needling", coupled with a deterioration of the wife's health, satisfied the court that physical and mental cruelty existed as required by the Act. [111]

Category #4: Alcoholism as Cruelty

(i) The husband was a chronic alcoholic who lived beyond his means and treated his wife with humiliation. Shortly before a child was born, the wife became so depressed that she attempted to take her own life. When the husband became bankrupt, she returned to work to support the family. The court considered the cumulative effect of the husband's conduct and his chronic alcoholism and granted a decree of divorce on the grounds of mental cruelty. [112]

(ii) The husband had become so grossly addicted to alcohol that the

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[108] Fisher v. Fisher, 14 D.L.R.3d 482 (P.E.I. Sup. Ct. 1970).

[109] McGowan v. McGowan, 2 Nfld. & P.E.I. 413 (P.E.I. Sup. Ct. 1972).

[110] Jaworski v. Jaworski, [1973] 2 Ont. 420, 10 R.F.L. 190, 34 D.L.R.3d 44 (Sup. Ct.).

[111] Horner v. Horner, 5 N.S.2d 757, 40 D.L.R.3d 685 (1973) (Coffin, J.A. per curiam).

[112] Whittstock v. Whittstock, *supra* note 79.

wife developed a nervous condition, and the couple had no social life at all. He made one abortive attempt to overcome the addiction, by becoming a member of Alcoholics Anonymous, but to no avail. Although the court declined to grant the decree under section 4(1)(*b*) of the Divorce Act, because it did not find that there was no reasonable expectation of rehabilitation, it did grant the decree under section 3(*d*). Drunkenness over a long period of time did constitute cruelty. Here the court accepted the testimony of the wife that the relationship was devoid of any social life or sexual intercourse, and her nervous condition was another element in the finding of intolerability. [113]

(iii) The husband had not accepted, for a long time, any responsibility for the welfare of the family. In addition to his drinking, he had assaulted his wife on numerous occasions; and it was held that there was sufficient evidence, given by the wife and a medical witness, to justify a finding of both physical and mental cruelty. [114]

(iv) The husband persisted in a course of conduct of continued drinking and failure to attend work, which caused his wife distress. Once, on being asked by his wife to stop drinking, he resorted to violence with the result of bruising the wife and leaving a mark on her throat from attempted strangulation. It was held that to find cruelty, one had to see conduct aimed by one person at the other, such as that of an habitual drunkard who caused his wife to break-down in health when her justifiable remonstrances provoked unjust resentment on his part. In any event, a husband who is careless or indifferent as to the adverse effect his conduct is having on his wife, especially when this effect is brought to his notice, will be presumed to intend the natural consequences of his acts. Cruelty was therefore established. [115]

Category #5: Sexual Acts

(i) The husband was suffering from transvestitism which, over the course of the marriage, gave rise to continual stress in the wife. It was held that this aberration may not, in many cases, render a situation intolerable, but that it did in this particular case. It was of concern to the court that it had some effect on the health of the wife, and would therefore indirectly affect the health of an infant child. [116]

(ii) Cruelty was established where the petitioner was forced to engage in fellatio against her wishes, to the detriment of her health. [117]

(iii) The husband did not want children and forced his wife, against her will, to give consent to a vasectomy being performed on him. This led to

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[113] Savelieff v. Savelieff, [1973] 2 Ont. 808, 10 R.F.L. 292, 35 D.L.R.3d 364 (High Ct.).

[114] Reddigan v. Reddigan, 9 R.F.L. 322 (Ont. 1972) (McGillivray, Jessup, Brooke, JJ.A.).

[115] Grandy v. Grandy, *supra* note 78.

[116] C. v. C., *supra* note 66.

[117] M. v. M., *supra* note 78.

disputes and finally to the husband's desertion. It was held that the refusal to have children was a grave and weighty matter to the wife. The court held that the husband was extremely cruel to the wife, and that this cruelty made cohabitation intolerable. [118]

(iv) Cruelty was found where the husband's refusal of sexual intercourse resulted in the wife's physical and mental impairment. [119] It seems that the Canadian courts are applying, in this sort of case, the famous test of cruelty in *Russell v. Russell*, [120] which requires that the respondent's conduct should have caused "danger to life, limb or health (bodily or mental), or a reasonable apprehension of such danger". It is submitted that such resulting injury should not be a necessary condition in these cases, because section 3(*d*) requires "physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses". *Slon v. Slon* [121] held that unreasonable refusal of sexual intercourse, even without consequential injury to health, may amount to expulsive conduct and thus constructive desertion. In other words, such refusal amounts to conduct of a grave and weighty nature.

(b) *Where Cruelty Not Found*

Category #1: Physical Violence

(i) A single act of assault does not amount to cruelty; [122] neither does a case of provoked assault. [123]

Category #2: Mental Cruelty (Incompatibility vs. Intolerability)

(i) Complete incompatibility had existed between husband and wife for five years or more, but they continued to occupy the same house. Cruelty was not established because life had not become so intolerable as to force either of them to attempt to quit the domestic establishment. [124]

(ii) The husband had become a self-centered hypochondriac who was unable to think of anyone but himself. The spouses had lived separately under the same roof, and had not had sexual relations for a long time. Neither did they go out together or pursue joint activities. Finally the wife, finding the situation intolerable, left her husband and filed a petition for divorce based on mental cruelty, less than two years later. Her petition was dismissed because, although the situation was understandably intolerable, proof of cruelty was also required for relief under section 3(*d*). Further, cruelty in the subjective sense alone is insufficient. The standard is that the conduct must also be grave and weighty. The wife might have succeeded had she argued that the husband's refusal of sexual intercourse amounted to conduct of a grave and weighty nature. (The report of the case does not

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[118] P. v. P., 4 N.B.2d 525, 7 R.F.L. 311 (Sup. Ct. 1972).

[119] Delaney v. Delaney, *supra* note 81.

[120] *Supra* note 67.

[121] [1969] 2 W.L.R. 375, [1969] 1 All E.R. 759 (C.A. 1968) (Harman, Davies, Sacks, L.JJ.).

[122] Goudie v. Goudie, *supra* note 72.

[123] Egglesfield v. Egglesfield, 9 R.F.L. 140 (Ont. High Ct. 1972).

[124] Cridge v. Cridge, 12 R.F.L. 348 (B.C. Sup. Ct. 1973).

indicate whether that point was argued). This case is a good example of the strict interpretation given to section 3(*d*). Under these circumstances the appropriate remedy would be to apply under section 4(1)(*e*). [125]

(iii) The wife became moody and introspective, lapsing into periods of silence and bouts of weeping lasting for days. Several times she threatened suicide. Often, when these moods came on, she would call her husband home from work, and he would be obliged to stay with her. It was held that this was not a case of cruelty, but just one of incompatibility induced by a fastidious and domineering wife. There was nothing grave and weighty about her conduct. [126] This case supports the view that in order to prove cruelty under section 3(*d*), two elements are necessary, namely, that the conduct not be trivial, but of a grave and weighty nature, [127] and that it be intolerable to the petitioner. A lesser degree of cruelty may have a disproportionate effect on a sensitive person; whereas outrageous cruelty may have little or no effect on an insensitive spouse who merely ignores it.

(iv) The respondent was guilty of lesser misconduct not amounting to cruelty but only to incompatibility, rudeness, and "tit-for-tat" irritations. Acts of lesser misconduct when added together do not lose their essential identity and assume the proportions of grave and weighty conduct. As the court remarked: "Many pilgrims ride asses and camels to Mecca but all the camels and asses together do not make another pilgrim." [128]

(v) The domineering and selfish wife conducted herself in a manner which frustrated and angered her husband. Although the evidence indicated much incompatibility between the parties, it did not support a finding of cruelty. [129]

(vi) The husband was not able to hold a steady job or provide an income sufficient to even modestly maintain his family. It was held that this made it intolerable for the wife to continue living with him, but that, for the purposes of section 3(*d*), cruelty was not established, because his failure to provide for the family arose solely from his inherent inability to settle down to a steady job coupled with his lack of financial responsibility. [130]

(vii) The husband, who had not been able to stay at jobs for any length of time, decided to study and work part-time, but was not conscientious at either. The family continued in debt despite the wife's two jobs. It was held that physical cruelty was not established for there was no evidence what-

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[125] Hattie v. Hattie, *supra* note 73.

[126] Jordahl v. Jordahl, *supra* note 73.

[127] *See also* Malkinson v. Malkinson, 2 R.F.L. 152 (B.C. Sup. Ct. 1970).

[128] Wyman v. Wyman, *supra* note 72, at 196. *See also* Mayberry v. Mayberry, *supra* note 72, where mutual irritations were held not to be grave and weighty, but where divorce was granted on appeal, [1971] 2 Ont. 378, under section 4(1)(*e*)(*i*).

[129] Hiltz v. Hiltz, *supra* note 72, *aff'd*, 4 N.S.2d 547 (1970).

[130] Peppard v. Peppard, 2 R.F.L. 162 (N.S. Sup. Ct. 1970). Mr. Justice McLellan implied that some element of intent on the part of the repondent would have to be found in order to support a finding of cruelty in the circumstances of the case at bar.

ever of any physical violence or bodily harm to the wife. The petitioner also failed to meet the burden of proof for mental cruelty since it had not shown that the husband's conduct rendered cohabitation intolerable. She had merely asserted that she could not be an adequate mother in view of the tensions to which she was submitted. [131]

(viii) Following the evening meal, the husband would leave the home and return in the early hours of the morning. There was no evidence as to the effect of the conduct of the husband on the mind of the wife. No doubt it caused the wife to become depressed and produced a state of tension, but that did not suffice to establish cruelty. The court remarked: "It may be that the actions of the husband in staying away from home would cause a more sensitive person than this particular wife great mental distress. Such is not the case here." [132] There were also alleged episodes of physical violence which were rather minor in character; and the most recent of them had occurred two years earlier, so no physical cruelty was found to exist.

(ix) Neither selfishness, lack of consideration for the other spouse, nor ineptitude in home management could of themselves be conduct of a grave and weighty nature so as to satisfy section 3(*d*). [133]

(x) Cruelty which does not render it intolerable for the petitioner to continue to cohabit with the respondent should not be made a shortcut to an early divorce. The conduct does not render cohabitation intolerable, where the wife is living separate and apart because the husband refuses to live with her, and not because she finds it intolerable to live with him. [134]

Category #3: Physical Violence and Mental Cruelty

(i) The wife continued to live in the same house as her husband, but refused to have sexual intercourse or perform domestic services for him because of his abusive conduct, threats and assaults. Cruelty on the part of the husband was not found here. This does not mean that a wife who continues to live in the matrimonial home is precluded from benefiting by a finding of cruelty under section 3(*d*). The presence of young children needing her care might cause a mother to tolerate otherwise intolerable conduct. Similarly a wife who is without funds or the possibility of earning any, and who is living in a remote area far from friends and help, might have no alternative but to be subjected to intolerable conduct. But in the present case, the petitioner was childless and had a considerable fortune in her own right, and could easily have removed herself from an intolerable situation. By electing to remain, the court found that she had failed to show that the conduct complained of rendered continued cohabitation intolerable. [135]

Category #4: Alcoholism as Cruelty

(i) After a few months of marriage, the husband began to drink ex-

[131] Durant v. Durant, *supra* note 72.
[132] Cooper v. Cooper, 10 R.F.L. 184, at 189 (Ont. High Ct. 1972).
[133] Edwards v. Edwards, 5 R.F.L. 226 (B.C. Sup. Ct. 1971).
[134] Clark v. Clark, *supra* note 73.
[135] Horne v. Horne, *supra* note 73.

cessively, beat his wife and abuse her with profanity. Nonetheless she stayed with her husband. Cruelty was not found because the court did not accept as being valid, the suggestion that a young woman in this modern age, who was not tied down with children, who was gainfully employed, and who had no home to lose, would unwillingly endure for more than a few weeks a drunken and brutal husband. [136]

Category #5: Sexual Acts

(i) The husband was incapable of accompanying acts of intercourse with a sufficient demonstration of affection to satisfy his wife. Psychiatric counselling failed to help the husband effect a change in his behaviour. It was held that cruelty was not established simply by a failure on the part of the husband to change his behaviour. The marriage had broken down by reason of sexual incompatibility, but that alone does not constitute cruelty under the Divorce Act. [137]

(ii) The husband would read "girlie" magazines and masturbate, as privately as circumstances permitted. There was no intention to hurt or scorn his wife. These acts were held, in themselves, not to be essentially cruel. [138]

(iii) The wife refused to have sexual intercourse with the husband after the marriage was consummated, telling him that the reason was a lack of love for him. The court did not find that cruelty was established where the refusal to have intercourse was unaccompanied by anything else. [139]

(iv) Cruelty was not established where the wife frequently refused the husband's requests for intercourse and also, despite his objections, attended social affairs without him. [140] Clearly the frequency of refusal is relevant in determining cruelty.

4. *Permanent Breakdown of Marriage*

(a) *Other Grounds*

Section 4(1)(*a-d*) of the Act sets out additional grounds for divorce on the basis of permanent marriage breakdown due to the respondent's imprisonment, gross addiction to alcohol or narcotics, disappearance, or incapacity or refusal to consummate the marriage.

In Ontario [141] it has been held that the term of imprisonment stipulated in section 4(1)(*a*)(*i*) does not include the term of parole. In Nova Scotia, [142] an application for divorce based on section 4(1)(*c*) of the Divorce Act, namely, lack of knowledge of the whereabouts of a spouse for a period

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[136] Marks v. Marks, *supra* note 73.
[137] Anderson v. Anderson, *supra* note 79.
[138] A. H. v. A. C. H., 5 R.F.L. 185 (B.C. Sup. Ct. 1971).
[139] Ebenal v. Ebenal, *supra* note 81.
[140] Markus v. Markus, *supra* note 81.
[141] Peacock v. Peacock, [1972] 2 Ont. 531, 7 R.F.L. 94, 26 D.L.R.3d 135 (High Ct.).
[142] Thompson v. Thompson, 5 R.F.L. 249, 25 D.L.R.3d 623 (N.S. Sup. Ct. 1971).

of not less than three years prior to bringing the action, was dismissed because the petitioner had made no effort to locate the respondent in that period. In New Brunswick [143] it was held that the words "grossly addicted to alcohol" contemplates something more than the habitual use of alcohol as a ground for divorce; "otherwise a person could obtain a divorce from a spouse who habitually consumed one martini every night before dinner but never drank on any other occasion." The connotation of being dependent on alcohol applied in the same sense as in drug addiction. Under section 4(1)(*b*) of the Divorce Act, the addiction must be such that there is no hope of a possible reconciliation of the spouses: viz., there should not be a reasonable possibility that in the foreseeable future the respondent could be cured. The decree of divorce was granted in *Power v. Power* [144] where the petitioner established that there was no "confident belief" for good and sufficent reasons that rehabilitation would occur at all.

Section 4(1)(*d*) of the Divorce Act requires both that the marriage has not been consummated and that the respondent, for a period of not less than one year, has been unable to consummate the marriage. The petition for divorce under this section was refused in the following cases:—(i) in Ontario where the petition was launched less than six months following the civil marriage; [145] (ii) in Quebec where the initial refusal to consummate the marriage might have been due to the respondent, but the action in separation that the petitioner instituted *within* one year after the marriage put an effective end to all attempts to consummate it; [146] and (iii) in Ontario where there was no evidence to suggest that the petitioner was ready and willing to have intercourse with the respondent. [147] In *Knowles v. Knowles*, [148] it was held that a wife who left her marriage after two months had constructively refused to consummate it over the rest of the required period. In *Deol v. Deol*, [149] a petition based on refusal to consummate was dismissed because the petitioner had never been willing to consummate. In *G. v. G.*, [150] it was held that the fact that the parties had engaged in sexual intercourse before the marriage was irrelevant. Consummation required sexual intercourse after the ceremony of marriage and one act of intercourse was enough.

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[143] Lyman v. Lyman, 5 R.F.L. 359, 20 D.L.R.3d 549 (N.B. 1971) (Limerick, Hughes, Bugold, JJ.A.).

[144] 3 R.F.L. 386 (N.S. Sup. Ct. 1971); *See* Savelieff v. Savelieff, *supra* note 113, where the decree was refused because the court could not say that there was no reasonable expectation of rehabilitation, in view of the respondent's affiliation with Alcoholics Anonymous.

[145] Fortese v. Fortese, [1973] 2 Ont. 143, 10 R.F.L. 281 (High Ct.).

[146] Lavoie v. Lavoie, [1972] Que. C.A. 606, 26 D.L.R.3d 127 (Montgomery, J.A.).

[147] Goodman v. Goodman, [1973] 2 Ont. 38, 9 R.F.L. 261, 32 D.L.R.3d 688 (High Ct.).

[148] [1970] 3 Ont. 722, 1 R.F.L. 251; *See also* Schmidt v. Schmidt, 11 R.F.L. 302 (B.C. Sup. Ct. 1973).

[149] [1972] 2 W.W.R. 407, 5 R.F.L. 225, 25 D.L.R.3d 223 (B.C. Sup. Ct. 1971).

[150] [1974] 1 W.W.R. 79, 13 R.F.L. 84 (Man. Q.B. 1973).

(b) *Separation*

Section 4(1)(*e*) of the Divorce Act provides for divorce due to permanent marriage breakdown where the parties have lived "separate and apart" for a stipulated period (either three or five years depending on whether the "innocent" or deserting spouse, respectively, brings the petition). The words "separate and apart" are not defined in the Act. It has been said that, "separate means divided, withdrawn from society or intercourse, shut from access. 'Apart'—away from, removed from." [151] Except for the isolated opinion of Mr. Justice Bastin in *Kallwies v. Kallwies*, [152] the weight of judicial opinion is that there must be both an *animus separandi* and a *factum* of separation. [153] Thus, Mr. Justice Macfarlane said:

> The physical separation of husband and wife is one of the factors which must be taken into consideration in cases of this kind, but there may be physical separation of the parties without there being a finding that the parties are living 'separate and apart.' For instance, a serviceman may be posted overseas and be away from his wife for over three years without the parties living 'separate and apart' within the meaning of the Act. The evidence in any given case must be examined to determine upon what date the parties were not only living apart but also on what date did the matrimonial relationship cease to exist. [154]

The time prescribed by section 4(1)(*e*) begins to run when these two conditions (*i.e., animus separandi* and a *factum* of separation) are met. It may be satisfied if the required period elapses before the counter-petition is prescribed by the respondent, notwithstanding that the time period had not run prior to the institution of the initial petition. [155] In *Dorchester v. Dorchester*, [156] it was held that the matrimonial relationship was not destroyed until the time when the husband decided to and did, file the petition, although his wife had been hospitalized for more than three years prior to the presentation of the petition. The court in *Burt v. Burt* [157] did not accept the husband's argument that permanent marriage breakdown occurred when he ceased sexual relations with his wife in spite of his evidence that he did not leave the matrimonial home earlier due to financial reasons. In *Foote v. Foote*, [158] it was held that the separation period was interrupted when the parties engaged in an isolated act of sexual intercourse within that period.

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[151] Foote v. Foote, [1971] 1 Ont. 338, at 341-42, 15 D.L.R.3d 292 (High Ct.).

[152] 75 W.W.R. (n.s.) 158, 1 R.F.L. 241, 12 D.L.R.3d 206 (Man. Q.B. 1970), where he said at 160: "There is no reason to give the words 'living separate and apart' any meaning other than the literal one. By themselves they describe a physical state of affairs and not a state of mind. I see no reason to qualify them by requiring proof of intent as well as proof of the physical facts."

[153] Smith v. Smith, 74 W.W.R. (n.s.) 462, 2 R.F.L. 214 (B.C. Sup. Ct. 1970); Dick v. Dick, [1971] 2 W.W.R. 138, 2 R.F.L. 225 (B.C. Sup. Ct. 1970).

[154] Dorchester v. Dorchester, [1971] 2 W.W.R. 634, at 636, 19 D.L.R.3d 126 (B.C. Sup. Ct.).

[155] Boyce v. Boyce, [1973] 2 Ont. 868, 10 R.F.L. 393 (Sup. Ct.).

[156] *Supra* note 154.

[157] 7 R.F.L. 155, 24 D.L.R.3d 497 (N.S. Sup. Ct. 1972).

[158] *Supra* note 151.

Mr. Justice Donnelly relied upon New Zealand decisions [159] rigorously interpreting section 21(*m*) of the Matrimonial Proceedings Act 1963 (N.Z.) which establishes, as a ground of divorce, the fact that the spouses were parties to a separation agreement which has been "in full force" for two years. Eekelaar remarked: "But these decisions were concerned in ascertaining when agreements remain in full force and they cannot provide any guidance on the correct interpretation of the Canadian separation provision." [160]

Likewise in *Dimaggio v. Dimaggio* [161] the wife's petition for divorce under section 4(1)(*e*)(*i*) of the Divorce Act was dismissed when she had sexual intercourse with her husband on about ten occasions without any view of reconciliation during the time they were separated. Mr. Justice Lieff held that the acts of intercourse indicated that they were not "living separate and apart" within section 4(1)(*e*) of the Divorce Act. Eekelaar has criticized this decision [162] and Mendes da Costa has rightly said:

> [T]he validity, however, of a general principle that an occasional act of intercourse will necessarily interrupt the running of the period prescribed by s. 4(1)(e) is open to question. For the occurrence of sexual intercourse would seem to be no more than one piece of evidence, the effect of which should be assessed in the light of evidence as a whole. It may be, therefore, that a temporary and infrequent liaison can be looked upon only "as a 'liaison' or an 'affair' by two married participants" of such a kind as not to render s. 4(1)(e) without application. [163]

It is submitted that the better view seems to be that an isolated act of intercourse does not interrupt the separation period. The fact that the parties have had sexual intercourse is relevant but not conclusive; and other evidence must also be taken into consideration. The important question to be decided is at what point the parties have resumed cohabitation and whether there has been mutual, full and complete reconciliation.

The fact that both spouses reside under the same roof need not preclude a finding of living apart under section 4(1)(*e*). During the survey period there have been further decisions of parties being held to be living separate and apart while under the same roof. Generally speaking, a finding that parties in such a situation were living separate and apart from each other has been made where the following circumstances were present: [164]

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[159] Sullivan v. Sullivan, [1958] N.Z.L.R. 912 (C.A.) (3-2 decision).

[160] *Supra* note 7, at 312.

[161] 4 R.F.L. 3 (Ont. Sup. Ct. 1971).

[162] *Supra* note 7, at 284: "Since the parties had not resumed cohabitation, it is difficult to see how the wording of the statute compels this conclusion, nor what is achieved by it."

[163] *Supra* note 73, at 491.

[164] Cooper v. Cooper, *supra* note 132, at 187. The spouses may still be living separate and apart if the matrimonial relationship has been destroyed: *see* Smith v. Smith, *supra* note 153; Mayberry v. Mayberry, [1971] 2 Ont. 378, 3 R.F.L. 395, 18 D.L.R.3d 45; Kobayashi v. Kobayashi, [1972] 3 W.W.R. 221, 6 R.F.L. 358, 26 D.L.R. 3d 119 (Man. Q.B.). For cases where the courts held that the matrimonial relationship had not been destroyed: *See* Dick v. Dick, *supra* note 153; Foote v. Foote, *supra* note 151; Burt v. Burt, *supra* note 157; Cridge v. Cridge, *supra* note 124.

(i) Spouses occupying separate bedrooms.

(ii) Absence of sexual relations.

(iii) Little, if any, communication between spouses.

(iv) Wife performing no domestic services for husband.

(v) Eating meals separately.

(vi) No social activities together.

It is clear that section 4(1)(*e*)(*i*) applies where each party intends to destroy the matrimonial consortium,[165] as where parties separate pursuant to mutual agreement. However, there are two views as to whether an intention to terminate matrimonial consortium is *necessary* before a finding that the spouses have lived separate and apart can be made. In *Kallwies v. Kallwies*,[166] the Manitoba Queen's Bench stated that the intention was not a requirement, and was irrelevant under section 4(1)(*e*)(*i*). Thus, the section is applicable if the physical separation is due to circumstances beyond the control of the spouses. The British Columbia case of *Brinnen v. Brinnen*[167] achieved the same result as that in *Kallwies* but utilized different reasoning. In *Brinnen* the respondent was hospitalized in May, 1967 as a multiple sclerosis patient. In August of that year her condition was determined to be permanent. At that time the petitioner advised his wife of the nature of her illness, and did not see her thereafter. The husband's application for a decree of divorce under section 4(1)(*e*)(*i*) for three years separation was successful for he was found not to be guilty of desertion. Mr. Justice Macfarlane said:

> It seems to me that the petitioner has done nothing here to cause him and his wife to live separate and apart. The cessation of cohabitation has not been brought about by the fault or act of the petitioner. There has been no intention on the part of the petitioner to wrongfully bring the cohabitation to an end in this case. Cohabitation has been brought to an end here by the incurable and fragile state of the respondent's health. The circumstances which have destroyed the matrimonial consortium between these two people were completely beyond the control of either of them.[168]

During the last survey period, one of the more interesting issues that arose was whether the *factum* of separation must occur by a mutual rejection of the matrimonial consortium for the spouses to seek relief under section 4(1)(*e*)(*i*) or whether a unilateral abandonment is sufficient.[169] In *Kennedy v. Kennedy*,[170] the court stated that marriage breakdown must be evidenced by the intention of both spouses to terminate conjugal consortium; the intention of only one spouse is insufficient. This requirement creates problems in situations where the separation of the spouses is caused by circumstances

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[165] Reid v. Reid, 9 R.F.L. 44, 31 D.L.R.3d 120 (Man. Q.B. 1972); Plant v. Plant, 9 R.F.L. 229 (Ont. Sup. Ct. 1972); Burke v. Burke, 7 R.F.L. 244 (Ont. Sup. Ct. 1972).

[166] *Supra* note 152.

[167] [1972] 4 W.W.R. 464, 7 R.F.L. 113, 28 D.L.R.3d 110 (B.C. Sup. Ct.).

[168] *Id.* at 468.

[169] See Hughes, *supra* note 1, at 182.

[170] 67 W.W.R. (n.s.) 91, 1 R.F.L. 217, 2 D.L.R.3d 405 (B.C. Sup. Ct. 1968).

beyond the control of either, as for example in a situation where one spouse is mentally ill and hospitalized. Subsequent to the *Kennedy* decision, the majority of Canadian Courts dealing with the problem have taken the view that a spouse who has deserted the separated or committed spouse must seek a divorce pursuant to section 4(1)(*e*)(*ii*) and, thus must await the expiration of five years from the discontinuance of their association. [171] The meaning of this section is not yet settled and there are indications that the interpretation may change. Thus, in *Lachman v. Lachman*, [172] the question of intention and three years separation was considered for the first time in the Ontario Court of Appeal. Mr. Justice Jessup disagreed with the *Kennedy* decision and held that the unilateral abandonment of the matrimonial consortium is sufficient under section 4(1)(*e*)(*i*) if it results in the breakdown of the marriage. The *Lachman* case was referred to and followed in Saskatchewan, [173] Manitoba, [174] Nova Scotia, [175] and New Brunswick. [176] In *Eamer v. Eamer*, [177] the respondent-wife suffered from multiple sclerosis and had been hospitalized since 1966. The court, however, considered that the petitioner-husband had made out his case under section 4(1)(*e*)(*i*). This was notwithstanding that he had still visited her from time to time, had contributed to her maintenance and had encouraged their two children to visit. The court held that, from the time when the wife had entered hospital in 1966, the petitioner had treated their marriage as at an end. Likewise, in *Norman v. Norman*, [178] it was held that the application of section 4(1)(*e*)(*i*) should not turn upon whether or not the petitioner—by his occasional visits—showed compassion towards his wife who was hospitalized for incurable multiple sclerosis.

Few cases have been reported on desertion. Under the Divorce Act, section 4(1)(*e*)(*ii*), desertion is not treated as a matrimonial fault which can be used as a ground for divorce by the innocent spouse but rather as evidence of marriage breakdown. Thus, if the "wrongdoing" spouse can show that, for the past five years, he has continually committed this "act", he can obtain a divorce which will dispense him from any obligation to live with the "innocent spouse". In *Felix v. Felix*, [179] the husband's divorce petition was dismissed as premature as the required period of five years had not elapsed at the time when the divorce proceedings were commenced. In *Naumoff v.*

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[171] Rowland v. Rowland, [1969] 2 Ont. 615 (High Ct.); Gladman v. Gladman, 6 D.L.R.3d 350 (B.C. Sup. Ct. 1969); Hills v. Hills, 1 N.S.2d 405 (Sup. Ct. 1969).

[172] [1970] 3 Ont. 29, 2 R.F.L. 207, 12 D.L.R.3d 221 (Jessup, J.A. per curiam).

[173] Derrick v. Derrick, [1972] 5 W.W.R. 18, 7 R.F.L. 251 (Sask. Q.B.).

[174] Eamer v. Eamer, [1971] 5 W.W.R. 183, 5 R.F.L. 205, 21 D.L.R.3d 221 (Man. Q.B.).

[175] Norman v. Norman, 5 N.S.2d 857, 12 R.F.L. 252 (1973).

[176] McDorman v. McDorman, 11 R.F.L. 83 (N.B. Sup. Ct. 1972).

[177] *Supra* note 174.

[178] *Supra* note 175.

[179] [1973] 2 Ont. 424, 34 D.L.R.3d 48 (High Ct.); *See also* Affleck v. Affleck, [1974] 1 W.W.R. 341 (Sask. Q.B.); Burt v. Burt, *supra* note 157, where the petitioner deserted his family without providing adequate means for the wife's survival, and so had to wait five years.

Naumoff, [180] it was held that the wife had constructively deserted the husband where she ordered her husband from the matrimonial home because of his financial irresponsibility, and he complied. In *March v. March*, [181] the husband set up separate domestic arrangements after his wife left him. He subsequently petitioned for divorce on the ground of a three-year separation. It was held that he was not necessarily guilty of constructive desertion. The petitioner's living with another woman, in itself, did not prevent the operation of section 4(1)(*e*)(*i*). Furthermore, the petitioner must negative desertion but need neither allege nor prove desertion by the respondent. [182]

C. *Financial Safeguards*

The Divorce Act, as a condition precedent to granting a divorce decree, imposes a duty on the court to ensure that reasonable arrangements for maintenance for both spouses are made. The court must refuse the decree where divorce would be unduly harsh or unjust to either spouse. [183] There is a similar bar if the divorce would prejudicially affect the maintenance of the children. [184] No new principle in regards to section 9(1)(*e*) or (*f*) has been added during the survey period. In Alberta, Mr. Justice Sinclair applied the earlier decision of *Davies* v. *Davies* [185] in *Wallace v. Wallace.* [186] It was held that the court must, of its own initiative, concern itself as to the effect of the divorce on the child in the circumstances of the case. Accordingly, the court ordered an adjournment of the proceedings for divorce so that the position of the child could be further considered.

As early as 1969 in *Johnstone v. Johnstone*,[187] the Ontario High Court interpreted the phrase "unduly harsh or unjust" as one imposing a subjective standard. If a divorce decree would cause undue hardship or injustice to one of the spouses, the court should refuse to grant it. Further, the test of undue hardship or injustice connotes real and substantial detriment to the respondent beyond the normal consequences of the granting of a decree. The British Columbia Supreme Court in *Smith v. Smith* [188] stated that the onus is on the respondent to prove that it would be unduly harsh or unjust to him or her to grant the relief sought. But it is the duty of the court to determine that the decree is not harsh or unjust to either spouse. A divorce decree may be refused under section 9(1)(*f*) after a review of all relevant factors. In *Suriano v. Suriano*, [189] the court stated that the petitioner's solicitor, although

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[180] [1971] 2 Ont. 676, 5 R.F.L. 141, 18 D.L.R.3d 680 (Aylesworth, Jessup JJ.A.; *dissenting* Arnup J.A.).

[181] [1971] 2 Ont. 278, 4 R.F.L. 1, 17 D.L.R.3d 530 (McGillivray, J.A. per curiam).

[182] Lindblad v. Lindblad, 9 R.F.L. 201 (Ont. Sup. Ct. 1972).

[183] § 9 (1)(*f*).

[184] § 9 (1)(*e*).

[185] 3 D.L.R.3d 381 (N.W.T. Territorial Ct. 1969).

[186] [1973] 2 W.W.R. 763, 9 R.F.L. 393 (Alta. Sup. Ct.).

[187] [1969] 2 Ont. 765, 1 R.F.L. 363, 7 D.L.R.3d 14 (High Ct.).

[188] [1971] 1 W.W.R. 409, 2 R.F.L. 251 (B.C. Sup. Ct.).

[189] [1972] 1 Ont. 125, 6 R.F.L. 100, 22 D.L.R.3d 377 (1971) (Kelly, J.A. per curiam).

retained by the petitioner, is an officer of the court and has duties as such. These duties are not discharged by the solicitor withholding from the court knowledge of circumstances which are relevant to the carrying out, by the court, of its duties under section 9(1)(*f*). The Ontario Court of Appeal in *Raffin v. Raffin* [190] made it clear that section 9(1)(*f*) of the Divorce Act should not be so narrowly construed as to limit the court's ability to make a fit and just decision with respect to the method or methods of payment of maintenance. In all the cases, with the exception of one, the respondent failed to establish that the granting of a decree would be unduly harsh or unjust. For example, the *Johnstone* case was applied in *Smith v. Smith*, [191] where the problem of loss of pension arose for consideration. Mr. Justice McKay held that, while the loss of pension rights might in certain circumstances be a ground for refusing to grant a decree under section 9(1)(*f*), the deprivation of pension rights was the *normal* consequence of the grant of a decree of divorce and as such was not unduly harsh. The decree was granted, and the result might be justified on the ground that the wife was generously provided for under a separation agreement. *Smith v. Smith* was applied in *Bigelow v. Bigelow*, [192] where it seems the only justification for granting the decree was that the parties had been separated for over twenty years. The wife in this case was sixty years old and in poor health. She objected to the divorce on the ground that she would lose part of her husband's disability pension on the granting of a decree. The decree was, however, granted. Mr. Justice Deniset said:

> If the decree is granted the husband will receive his award as a single man; the divorced wife will receive nothing, and this would appear to be unduly harsh and possibly unjust. But, of course, she would then qualify for welfare assistance. In today's society it is not only quite acceptable but recommended that a woman of 60 years of age, without assets and without income, in poor health and practically unemployable, should receive public assistance. And when she does, her situation will not be harsh or unjust. To argue the contrary would be to say that a decree will not be granted because these persons are too poor. Surely reasonable arrangements can be made for the wife as are necessary in the circumstances. [193]

The question of pension also arose in *Savage v. Savage*, [194] where the marriage had lasted twenty-two years, and the wife stood to lose her benefits as a widow in her husband's army pension. A decree nisi was granted conditional upon one-half of the benefits to which the husband was entitled under the Public Service Superannuation Act being assigned irrevocably to the respondent wife. The court expressed the opinion that, if such an arrangement was not made, it would be unduly harsh or unjust to the respondent to grant the

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[190] [1972] 1 Ont. 173, 5 R.F.L. 274, 22 D.L.R.3d 497 (1971) (Brooke, J.A. per curiam).

[191] *Supra* note 188.

[192] [1972] 1 W.W.R. 624, 22 D.L.R.3d 729 (Man. Q.B.).

[193] *Id.* at 627.

[194] [1971] 1 Ont. 557, 16 D.L.R.3d 49 (High Ct.).

divorce. In *Derrick v. Derrick*,[195] the court awarded a lump sum of $7,000 plus monthly maintenance payments as compensation in view of the fact that the respondent would lose her rights in the matrimonial home under The Homesteads Act,[196] when she ceased to be the wife of the petitioner on a decree of divorce being granted. Accordingly, a lump sum payment as well as periodic payments of maintenance was awarded by the court. Only one case has been reported where the court refused the decree pursuant to section 9(1)(*e*) and (*f*) of the Divorce Act. This happened in *Williston v. Williston*[197] where an innocent respondent-wife would have been deprived of benefits paid to her under the War Veterans Allowance Act[198] by the granting of a divorce decree in favour of her husband. Moreover, the granting of the decree would have prejudicially affected the making of reasonable arrangements for the maintenance of a daughter for whose support the husband was liable. The decision can be justified on the ground that the husband was fifty-three years of age and was unemployable as the result of a car accident in 1965.

D. *Other Bars*

1. *Condonation*

Condonation under the Divorce Act, 1967-68, has been made a discretionary bar. Over the review period, many cases have been reported relating to this bar. In *Leaderhouse v. Leaderhouse*,[199] Mr. Justice Disbery has been said to have "contributed a most thorough review of the law of condonation as it relates to the Divorce Act. As far as the case itself is concerned, the review might be said to be obiter dictum since he chose to grant a decree based on acts of cruelty that could not be said to have ever been condoned."[200] The discretion is to be exercised when it is in the public interest that the marriage be dissolved. The term "public interest" is not defined in the Act. Professor Payne's view[201] is that, in determining whether the public interest would be better served by granting a decree notwithstanding condonation on the part of the petitioner, the court will have regard to the criteria established in *Blunt v. Blunt*.[202] This has been adopted in *Saxton v. Saxton*.[203] In *Blunt v. Blunt*, where the discretionary bar of the petitioner's adultery was in issue, the House of Lords held that the following circumstances were to be considered in deciding whether to exercise the discretion in favour of the petitioner:

(a) the position and interest of any children of the marriage;

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[195] *Supra* note 173.
[196] SASK. REV. STAT. c. 118 (1965).
[197] 5 N.B.2d 136, 10 R.F.L. 357, 30 D.L.R.3d 746 (1972).
[198] CAN. REV. STAT. c. W-5 (1970).
[199] [1971] 2 W.W.R. 180, 4 R.F.L. 174, 17 D.L.R.3d 315 (Sask. Q.B. 1970).
[200] *Id.*, Editor's note in 4 R.F.L. 174.
[201] Payne, *The Divorce Act (Canada), 1968*, 8 ALTA. L. REV. 1, at 26 (1969).
[202] [1943] A.C. 517, [1943] 2 All E.R. 76.
[203] *Supra* note 85.

(b) the interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of marriage;

(c) whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife;

(d) the interest of the petitioner, and in particular, that he or she should be able to remarry and live respectably; and

(e) the interest of the community at large, which is to be judged by maintaining a true balance between respect for the binding sanctity of marriage, and the special considerations which make it contrary to public policy to insist on maintaining a union which has utterly broken down.

The reported cases indicate that the courts generally grant a decree under section 9(1)(*c*) where the marriage has completely broken down. There are, however, other factors in addition to marriage breakdown which the courts have taken into consideration in granting a decree under this section. Thus, in *Nielsen v. Nielsen*,[204] the court stated that, even if condonation had been found, the public interest would be better served by the granting of a decree since the court was of the opinion that positive harm would otherwise result to the parties. The court believed that the children would in all probability be harmed if the parties resumed cohabitation, and reconciliation appeared to be impossible because of the respondent-husband's intention to remarry. *Nielsen v. Nielsen* was followed in *Jaworski v. Jaworski*[205] where it was stated that, even if there had been condonation of the previous offences, which the court doubted, and even if the subsequent offences were to be deemed insufficient to constitute mental or physical cruelty within the words of the Divorce Act, the decree of divorce would still be granted as best serving the public interest. In *Allan v. Allan*,[206] despite condonation, the decree was granted where the husband had eventually left the home as a result of the wife's cruelty nearly two years before the action. In the same case the court held that no benefit to the public would result from keeping the parties bound together in marriage; but on the contrary, the public interest required that the marriage be dissolved as it had caused the parties a great deal of unhappiness, and had even disrupted life in the neighbourhood. Moreover, a continuance of the marriage bonds would benefit no one. On the other hand, in *Blue v. Blue*[207] it was held that it would not be in the public interest to grant the decree, for the matrimonial offences complained of arose from the youthful irresponsibility of the parties, and might still be overcome with the passage of time. Similarily in *Kratko v. Kratko*,[208] the court refused to make the decree

[204] [1971] 1 Ont. 393, 2 R.F.L. 109, 15 D.L.R.3d 423 (Sup. Ct. 1970). *See also* Getson v. Getson, 2 N.S.2d 65, 2 R.F.L. 91, 12 D.L.R.3d 525 (Sup. Ct. 1970); Harasyn v. Harasyn, 2 R.F.L. 105, 13 D.L.R.3d 635 (Sask. Q.B. 1970).

[205] *Supra* note 110. *See also* Davidiuk v. Davidiuk, 4 R.F.L. 170 (B.C. Sup. Ct. 1971).

[206] 7 R.F.L. 96, 25 D.L.R.3d 253 (B.C. 1971).

[207] [1971] 2 W.W.R. 238, 5 R.F.L. 31, 17 D.L.R.3d 226 (Sask. Q.B. 1970).

[208] [1972] 3 W.W.R. 158, 6 R.F.L. 10, 24 D.L.R.3d 501 (Alta. Sup. Ct.).

absolute, where the parties nad resumed cohabitation for seven months after the decree nisi had been granted on grounds of cruelty. This can be justified on the basis that the parties had reconciled, and it would have been unfair to the respondent to make the decree absolute. [209]

By section 9(2) of the Divorce Act, the doctrine of revival has been abolished, but this provision does not circumscribe the discretionary bar of condonation established by section 9(1)(*c*). The question of condoned acts of cruelty being revived creates a special problem under section 9(2), and this was considered in *Jaworski v. Jaworski.* [210] It was held that, although condoned acts of cruelty cannot be revived so as to constitute grounds for divorce, a past history of cruelty may help to explain the reaction of the petitioner to similar conduct occurring after condonation. Accordingly, a divorce decree was granted under section 3(*d*).

The Divorce Act does not define condonation. Section 2 sets out certain circumstances which have been decided by Parliament *not* to amount to condonation. (The section provides that any attempted reconciliation for a period of up to ninety days should not be considered reconciliation for the purpose of barring the petition on the ground of condonation). The Act does not say what acts or conduct *will* amount to condonation. In *Neilson*, Mr. Justice Galligan stated that condonation should be given the meaning that it was given by the courts prior to the passing of the Act, namely, forgiveness of the matrimonial offence to the point of reconciliation. [211] In *Grandy v. Grandy*, [212] it was held that, if the petitioner-wife can show that there was no element of forgiveness in respect of an act of intercourse which occurred after a matrimonial offence, that intercourse is not sufficient to result in a finding of condonation. *Nielsen v. Nielsen* [213] shows that, if the attempt at reconciliation is no more than an attempt, such cohabitation cannot in turn raise an inference of condonation. Accordingly, in that case, acts of intercourse after knowledge of the offence did not constitute condonation for there was a continuation or resumption of cohabitation within the meaning of section 2. In *Brown v. Brown*, [214] it was held that it was not a bar to a decree absolute if the parties had resumed cohabitation after decree nisi with reconciliation as the primary and only purpose. But such conduct will not come within section 2 where the parties have no thought of reconciliation. Thus, in *Stevenson v. Stevenson*, [215] the court held that the resumption of marital relations pursuant to a reconciliation agreement (i.e. *after* reconciliation, and not for the purpose of reconciliation), did not come within the

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[209] Eekelaar, *supra* note 7, at 284.

[210] *Supra* note 110. *See also* Olson v. Olson, *supra* note 55; Crosby v. Crosby, 6 R.F.L. 8 (Ont. Sup. Ct. 1971); Raney v. Raney, 1 Ont.2d 491, 40 D.L.R.3d 675 (High Ct. 1973).

[211] *Supra* note 204, at 397.

[212] *Supra* note 78. *See also Leaderhouse, supra* note 199; *and contrast with* Sergeant v. Sergeant, 33 D.L.R.3d 734 (N.S. Sup. Ct. 1972).

[213] *Supra* note 204.

[214] [1971] 1 W.W.R. 236, 2 R.F.L. 116, 15 D.L.R.3d 382 (Sask. Q.B. 1970).

[215] 2 R.F.L. 89 (Alta. Sup. Ct. 1970).

meaning of section 2, and therefore constituted condonation. On the other hand, even if the prescribed period is exceeded, it does not necessarily follow that, on the facts, a court will find condonation, for condonation requires full and mutual reconciliation. Thus, in *Einarson v. Einarson*, [216] the court did not find condonation so as to bar the wife from a decree absolute where she had returned to her husband for a period of more than a year. In *Kratko v. Kratko*, [217] the petition for a decree absolute was dismissed, and the counter-application to have the decree nisi set aside was granted where the parties had reconciled, and had lived together for seven months after which they separated. This case was distinguished from the *Einarson* case, where the evidence disclosed that there was no mutual and complete reconciliation. The wife had gone back to her husband on her own suggestion that they reconcile for the sake of the children, and in hopes that the experiment would be successful. The court accordingly held in the *Einarson* case that there was, in fact, no condonation of the cruelty which had led to the granting of the decree nisi. There had only been an attempt at reconciliation which had failed. Section 9(1)(*c*) permits the granting of the decree nisi notwithstanding the condonation, but there was no evidence in *Kratko* to support the opinion that the public interest would be better served by granting the decree.

During the reviewing period, another problem arose over the interpretation of section 2. There was some disagreement as to the meaning of "any single period of not more than ninety days." In *Cherniski v. Cherniski*, [218] Mr. Justice Deniset held that condonation did not include the situation wherein the parties resume cohabitation during several separate periods, of not more than ninety days each. But in *Armstrong v. Armstrong*, [219] Mr. Justice Grant took the view that there could only be one period of cohabitation. No other meaning could be given to the words "single period". Thus, a second attempt at reconciliation by cohabitation may amount to condonation even though the sum total of all periods of cohabitation is less than ninety days. This is the better view as far as "plain English" is concerned, but to further the purpose of this provision and to forestall hardships, opinions were expressed that the interpretation of the court in the *Cherniski* case is to be preferred. [220] *Armstrong* was followed in Saskatchewan in *Busch v. Busch*. [221]

2. *Connivance*

Under the Divorce Act connivance is now a discretionary bar. It applies not only to adultery but also to all matrimonial offences which constitute grounds for divorce under section 3 of the Divorce Act, 1967-68. Over the reviewing period, only two cases have been reported relating to connivance. In *Fleet v. Fleet*, [222] the petitioner arrived at the scene where her spouse's

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[216] [1971] 5 W.W.R. 478, 4 R.F.L. 355, 20 D.L.R.3d 126 (B.C. Sup. Ct.).
[217] *Supra* note 208.
[218] [1971] 1 W.W.R. 764, 2 R.F.L. 118, 16 D.L.R.3d 606 (Man. Q.B. 1970).
[219] *Supra* note 41.
[220] *Supra* note 7, at 285. *See also* Mendes da Costa, *supra* note 73, at 394.
[221] [1973] 3 W.W.R. 402, 10 R.F.L. 104, 35 D.L.R.3d 158 (Sask. Q.B.).
[222] [1972] 2 Ont. 530, 7 R.F.L. 355, 26 D.L.R.3d 134 (Gale, C.J.O. per curiam).

adultery was in progress, but she did not make her presence known immediately. It was held that her conduct did not amount to connivance for a petitioner is not obligated to stop an act of adultery. On the other hand, in *Yanoshewski v. Yanoshewski*, [223] the husband's counter-petition for divorce on the ground of adultery was dismissed for it was found that he had encouraged and connived at the *commencement* of the adulterous relationship of the petitioner.

E. *Decrees Nisi and Absolute*

The court has jurisdiction to shorten the three-month waiting period between the decree nisi and the decree absolute only where special circumstances exist making it in the public interest to do so, and where the parties have agreed and undertaken that no appeal be taken from the decision in the case. Reported cases indicate that the courts strictly require "special circumstances". [224] In *Macko v. Macko*, [225] a request for abridgment was refused because there was no evidence that the petitioning wife was—as had been alleged—pregnant and anxious to marry the father as soon as possible so that the child could be born in wedlock. Where the special circumstances exist, however, the court can pronounce a decree nisi and immediately make the decree absolute as held in *Grant v. Grant*. [226] The two orders, the order nisi and the order absolute, are then duly entered; the order nisi first and thereafter the order absolute.

For the purpose of computing the usual three-month period following the decree nisi, it is not sufficient to refer to the date on which the decree was pronounced. Before a decree nisi can be said to be granted, it must be pronounced, drawn up, initialled by the judge, or on his behalf, signed by the Registrar and sealed. [227] In *Moon v. Moon*, [228] it was held that the fact that a respondent-husband is in arrears of maintenance is an irrelevant consideration in the decision as to making the decree absolute. The delay between the granting of the decree nisi and the making absolute of the decree is prescribed to give the parties an opportunity for reconciliation.

Section 13(1) of the Divorce Act states that every right of appeal has to be exhausted before a decree absolute can be granted. Thus, the decree absolute was held to be a nullity and set aside in *Dusome v. Dusome* [229] where

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[223] 40 D.L.R.3d 461 (Sask. Q.B. 1973).

[224] *See* Hansford v. Hansford, [1973] 1 Ont. 116, 9 R.F.L. 233, 30 D.L.R.3d 392 (High Ct. 1972), where the court held that the respondent-wife's desire to re-marry as soon as possible was not a "special circumstance", but rather the normal situation, and refused to abridge the waiting period; Norton v. Norton, *supra* note 39, where the anticipated absence of the petitioner from the jurisdiction at the end of the three-month period was held not to be a "special circumstance" warranting abridgement of the period.

[225] [1972] 2 W.W.R. 475, 5 R.F.L. 223, 23 D.L.R.3d 224 (B.C. Sup. Ct. 1971).

[226] [1973] 5 W.W.R. 191, 11 R.F.L. 207, 37 D.L.R.3d 639 (B.C. Sup. Ct.).

[227] *See* Sawers v. Sawers, [1973] 1 W.W.R. 287, 10 R.F.L. 198, 30 D.L.R.3d 511 (B.C. Sup. Ct. 1972).

[228] [1972] 1 Ont. 763, 6 R.F.L. 3, 24 D.L.R.3d 155 (Sup. Ct. Chambers 1971).

[229] [1973] 3 Ont. 45, 10 R.F.L. 340, 35 D.L.R.3d 678 (Sup. Ct.).

of any superior court in Canada.[235] Any hearing on the issue of interim alimony is intended to be in the nature of a preliminary hearing. Thus, in *I. H. v. H. H.*,[236] it was held that the merits of the petition are not to be examined on an application for interim alimony as long as the petition is neither frivolous nor vexatious. The award of interim alimony, to the wife in one case, was premised on the assumption that the husband had everything and the wife had nothing; but if it could be proved that she had sufficient means to support herself on the appropriate scale, she would not be entitled to interim alimony.[237] The court has jurisdiction to vary an interim order for alimony but such applications are not to be encouraged.[238] Such an application would be permitted if there was any substantial change in circumstances. The onus is on the person moving the application to establish the need for such a change.

B. *Maintenance of Spouse on Divorce*

The power to award corollary relief in divorce proceedings would now appear to be exclusively regulated by the provisions of the Divorce Act. Both spouses are on equal footing in so far as corollary relief is concerned. In *Cohen v. Cohen*,[239] the Ontario Court of Appeal ordered maintenance to be paid by the wife to the husband in special circumstances, which need to be mentioned. At the time of the divorce proceedings the husband was in ill-health and had no significant income or assets. In fact he was receiving welfare payments, while the wife enjoyed an annual income of approximately $10,000 from rents on properties. However, the Ontario Court of Appeal reduced the award of the husband by the lower court, from 335 dollars per month to 125 dollars per month, because he did have some earning capacity.

Section 11(1) provides that, "upon granting a decree nisi", the court may make an order for maintenance. The decided cases indicate that the courts may only make ancillary orders on divorce when granting the decree nisi. And it is only an order so made that may be varied or rescinded under section 11(2). An original order for maintenance cannot be made under this section.[240] Hence, the practice has developed of making an award of

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[235] *See* Johnson v. Johnson, [1971] 2 Ont. 516 (Sup. Ct. Master's Chambers 1970), *aff'd*, [1972] 1 Ont. 212, 6 R.F.L. 171 (1970) (Arnup, J.A.).

[236] [1971] 3 Ont. 222, 5 R.F.L. 214, 20 D.L.R.3d 62 (Sup. Ct. Master's Chambers).

[237] Krisman v. Krisman, [1972] 1 Ont. 518, 6 R.F.L. 147, 23 D.L.R.3d 412 (1971) (Schroeder, J.A.).

[238] Lipson v. Lipson, [1972] 2 Ont. 401, 7 R.F.L. 128 (Sup. Ct. Master's Chambers), *aff'd*, [1972] 3 Ont. 403, 7 R.F.L. 186 (Brooke, J.A.).

[239] [1971] 1 Ont. 619, 2 R.F.L. 409, 16 D.L.R.3d 241 (Aylesworth, J.A. per curiam), *varying*, [1970] 2 Ont. 474, 1 R.F.L. 275, 11 D.L.R.3d 264 (Sup. Ct.).

[240] Daudrich v. Daudrich, [1971] 1 W.W.R. 81, 2 R.F.L. 379, 14 D.L.R.3d 245, *aff'd*, [1972] 2 W.W.R. 157, 5 R.F.L. 237, 22 D.L.R.3d 611 (Man. 1971) (Freedman, C.J. per curiam); Radke v. Radke, [1971] 5 W.W.R. 113, 4 R.F.L. 318, 20 D.L.R.3d 679 (Alta.) (Cairns, Allen, JJ.A.; *dissenting* McDermid, J.A.); Zacks v. Zacks, [1972] 5 W.W.R. 589, 6 R.F.L. 364, 29 D.L.R.3d 99 (B.C.) (Robertson, J.A. per curiam), *rev'd* by the Supreme Court of Canada on the Court of Appeal's particular interpretation of "upon", [1973] Sup. Ct. 891, [1973] 5 W.W.R. 289, 10 R.F.L. 53, 35 D.L.R.3d 420 (Martland, J. per curiam).

a nominal sum for maintenance at the time of the granting of the decree nisi. The courts have expressed the view that such a practice should be restricted to cases where the applicant could show both the future likelihood of her (or his) inability to maintain herself (or himself) and that the other spouse has some responsibility in this matter. [241] In *Suriano v. Suriano*, [242] it was held that, although the court may be precluded from granting corollary relief after the granting of a decree nisi in the ordinary case, it is not precluded from substituting—for an order made in the light of an induced mistaken belief of the facts—that order which the court would have made at the time of the impugned order had the party responsible not induced that mistaken belief.

The use of the word "upon" in section 11(1) of the Divorce Act was further clarified by the Supreme Court of Canada in *Zacks v. Zacks*. [243] It was held that the trial judge is not compelled, where he finds a claim for maintenance to be justified, to fix the actual amount at the moment he grants the decree nisi. The legislative intention was simply that the court only acquire the necessary jurisdiction to award corollary relief at the time *when* the divorce is granted. Consequently, the trial judge does not lose jurisdiction to order maintenance payments when he has referred the matter to the Registrar to recommend a proper allowance. In *Robinson v. Robinson*, [244] it was held that such an application to adopt the Registrar's recommendations and for an order of maintenance can only be made to the judge who grants the decree.

Over the reviewing period there have been further decisions as to the effect of a *wife's* misconduct (such as adultery or desertion) on her right to maintenance. [245] It can be said that, in deciding the question of maintenance,

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[241] Marsden v. Marsden, [1972] 3 Ont. 4, 7 R.F.L. 352, 27 D.L.R.3d 277 (Aylesworth, J.A. per curiam); La Brash v. La Brash, 10 R.F.L. 308, 35 D.L.R.3d 147 (Sask. Q.B. 1973); Wong v. Wong, [1972] 6 W.W.R. 161, 8 R.F.L. 345, 30 D.L.R.3d 378 (B.C. Sup. Ct.).

[242] *Supra* note 189.

[243] *Supra* note 240.

[244] 7 R.F.L. 172, 26 D.L.R.3d 252 (B.C. Sup. Ct. 1972).

[245] Wife's adultery: Omelance v. Omelance, [1971] 3 W.W.R. 601, 4 R.F.L. 293, 20 D.L.R.3d 425 (B.C.) (Robertson, J.A. per curiam), where the wife received maintenance in spite of her adultery, because it occurred after the breakdown of the marriage; Clarke v. Clarke, 4 R.F.L. 309 (Ont. Sup. Ct. 1971), where the wife was disentitled to maintenance because she constantly associated with other men during the marriage; Chorny v. Chorny, *supra* note 98, where the court held that it was the wife's mental cruelty towards the husband which caused the marriage to break down, and that, as the wife could support herself, a lump sum award of $15,000 and no maintenance be given, instead of the lump sum of $10,000 and $250 per month awarded at trial; Kesner v. Kesner, [1973] 2 Ont. 101, 9 R.F.L. 314, 33 D.L.R.3d 57 (High Ct.), where, since the breakdown of the marriage was due to the conduct of the husband, the adultery of the wife after the breakdown was not a bar to maintenance.

Desertion: Naumoff v. Naumoff, *supra* note 180, where the wife deserted the husband and was thus the cause of the marriage breakdown, and where it could not be said that the wife would be destitute if no maintenance order were made, the majority held that she should not get maintenance; but the dissenting view was that some maintenance should be granted as little weight should be given to fault or guilt concepts in these matters.

the court must consider, *inter alia*, the conduct of the parties throughout the marriage, the means of each at the time of the divorce and the wife's ability to earn a living. In awarding maintenance, the court in *McGowan v. McGowan* [246] was guided by the principle that the amount of maintenance should not relegate the wife to a significantly lower standard of living than that of her husband who was a well-to-do businessman. The court, in fixing the amount, considered also the assets of both parties and the husband's income. In *Sharpe v. Sharpe*, [247] the Newfoundland Supreme Court took the view that, if a husband had sufficient resources, an innocent wife and the children were entitled to enjoy the same standard of living as they had been accustomed to. The court did not accept the husband's contention, in the absence of evidence of his inability to pay, that the desired living standards of his dependents were unrealistic. There have been decisions which illustrate that the court has the right to alter the separation agreement and to deal with maintenance independently of any contract the parties may have entered into. [248] On the other hand, a financial agreement on separation may be taken into account in deciding what orders should be made. [249] Briefly it may be stated that the following principles have been laid down in connection with private agreements: [250]

(i) The courts have an overriding power to review separation agreements;

(ii) The statutory jurisdiction of the courts to award maintenance as a corollary relief in divorce proceedings cannot be ousted by private agreement between the parties;

(iii) An agreement to pay maintenance does not become an order of the court merely by reason of its approval or sanction of the agreement; the terms of maintenance order contained in a decree nisi should be set out in the order;

(iv) Where maintenance has been granted in an amount to be fixed by the Registrar, the party applying for maintenance will be taken to have elected that remedy and may not thereafter rely on an earlier agreement containing more generous provisions; and

(v) An agreement between a divorced couple by which the ex-wife

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[246] *Supra* note 109.

[247] 1 Nfld. & P.E.I. 628, 4 R.F.L. 241, 18 D.L.R.3d 380 (Nfld. Sup. Ct. 1971).

[248] *See* Snively v. Snively, [1971] 3 Ont. 132, 6 R.F.L. 75, 19 D.L.R.3d 628 (Sup. Ct.); Kowaliuk v. Kowaliuk, 4 R.F.L. 280, 18 D.L.R.3d 116 (Sask. Q.B. 1971); Lee v. Lee, [1972] 3 W.W.R. 214, 7 R.F.L. 140 (B.C. Sup. Ct.). *See also* cases at note 249 *infra*.

[249] *Id.* *See also* Wong v. Wong, *supra* note 241; La Brash v. La Brash, *supra* note 242; Poste v. Poste, [1973] 2 Ont. 674, 35 D.L.R.3d 71 (High Ct.); Bertram v. Bertram, [1974] 1 W.W.R. 499, 41 D.L.R.3d 107 (Sask. Q.B. 1973); Kalesky v. Kalesky, *supra* note 60; McKay v. McKay, [1971] 1 W.W.R. 487, 2 R.F.L. 398, 16 D.L.R.3d 344 (Man. Q.B. 1970).

[250] *Id.* *See also* McClelland v. McClelland, [1972] 1 Ont. 236, 6 R.F.L. 91, 22 D.L.R.3d 624 (High Ct.); Coburn v. Coburn, [1971] 4 W.W.R. 555, 5 R.F.L. 1 (B.C. Sup. Ct.).

released her former husband from his maintenance obligation is not contrary to public policy.

The Manitoba Court of Appeal has stated that the proper way to secure periodic payments is to register the judgment as a charge against an item of the payor's property. [251]

C. *Lump Sum or Periodic Sums*

There have been more decisions against the view taken in *Johnstone v. Johnstone*, [252] that lump sum orders and periodic payments cannot be combined, on the reasoning that, in *Johnstone*, Mr. Justice Lacourciere has given a stringent interpretation which is inconsistent with the wide discretion granted to the court to make maintenance orders pursuant to section 11 of the Act. The words of section 11(1) [253] are broad enough to extend, not merely to matters set forth in subsections (*a*), (*b*) and (*c*), but also to the internal matters contained within each of those subsections. Accordingly, an order under subsection (*a*) for a lump sum payment and for periodic sums can be combined. It was held in *Raffin v. Raffin*, [254] that a lump sum order should not be confined to large estates or special circumstance. It may be the more appropriate way to safeguard the needs of a family where the parties are of modest means. Further, the decisions indicate that the phrase, "sufficient capital assets", is a relative term. The relationship of the value of the capital assets to the style of living is important, for what may appear to be a large capital asset to one person may be quite insubstantial to another. [255]

The manner of charging property so as to secure a lump sum maintenance payment was discussed in Ontario in *Chadderton v. Chadderton*. [256] Under

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[251] *See* Huff v. Huff, 4 R.F.L. 258, 16 D.L.R.3d 584 (Man. 1971) (Guy, J.A. per curiam).

[252] *Supra* note 187.

[253] Section 11(1) of the Divorce Act reads:

11. (1) Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:

(a) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of
  (i) the wife,
  (ii) the children of the marriage, or
  (iii) the wife and the children of the marriage;
(b) an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of
  (i) the husband,
  (ii) the children of the marriage, or
  (iii) the husband and the children of the marriage; and
(c) an order providing for the custody, care and upbringing of the children of the marriage.

[254] *Supra* note 190. *See also* Jankov v. Jankov, 2 R.F.L. 366, 14 D.L.R.3d 88 (Sup. Ct. 1970); Feldman v. Feldman, *supra* note 72; Horner v. Horner, *supra* note 111; Kumpas v. Kumpas, [1971] 2 W.W.R. 652, 4 R.F.L. 228, 18 D.L.R.3d 609 (Man. Q.B.).

[255] *See* Hutchinson v. Hutchinson, [1972] 3 W.W.R. 59, 6 R.F.L. 353, 25 D.L.R. 3d 23 (Man. Q.B.).

[256] *Supra* note 230.

section 11(1) of the Divorce Act, a judge cannot order the transfer of real estate or other specific assets owned by the husband. Mr. Justice Arnup expressed the opinion that such a possibility ought to exist, and a number of interesting attempts have been made to accomplish the result of ensuring that the wife has a suitable place to live.[257] It seems clear that the court can direct that payment of a lump sum of money be secured against the husband's real estate; this obligation may then be satisfied by the transfer of his interest to his wife.[258]

D. *Agreed Terms*

Now it is well-settled that it is against public policy to deny a spouse access to the courts even though she might have agreed to waive her right to bring proceedings therein for maintenance.[259] It is also against public policy to deny her access to the courts if she has gone so far as to agree to refer any dispute over maintenance to an arbitrator.[260] However, in *McClelland v. McClelland*,[261] it was held that an agreement between a divorced couple under which the ex-wife released her former husband from his maintenance obligation was not contrary to public policy. The agreement could only be attacked by proving it to have been obtained by fraud and overreaching, and procured behind the back of, or without the advice of, independent counsel. This decision can be justified on the basis that the court has no special divorce jurisdiction to supervise post-dissolution contractual arrangements.

E. *Variation of Maintenance Orders*

The court's jurisdiction to vary the maintenance order after decree absolute is founded on section 11(2) of the Divorce Act. It has been held in *Scott v. Scott*[262] that the court is not restricted by this section to merely revoking or varying a maintenance order given upon the grant of a decree of divorce prior to the coming into force of the present Act, but also has the power to cancel all or part of any accumulated arrears of maintenance from that order.[263] In *Armich v. Armich*,[264] the British Columbia Court of Appeal

[257] *Id.* *See also* Schulte v. Schulte, 6 R.F.L. 164 (Ont. Sup. Ct. 1972); Ceiko v. Ceiko, 69 W.W.R. (n.s.) 52, 5 D.L.R.3d 360 (Man. Q.B. 1969); J. v. J., 8 D.L.R.3d 760 (Sask. Q.B. 1969).

[258] *Supra* note 230.

[259] Crawford v. Crawford, [1973] 3 W.W.R. 211, 10 R.F.L. 1, 35 D.L.R.3d 155 (B.C. Sup. Ct.); Vinden v. Vinden, [1971] 5 W.W.R. 673, 4 R.F.L. 398 (B.C. Sup. Ct.); Wong v. Wong, *supra* note 242; Kalesky v. Kalesky, *supra* note 60.

[260] Crawford v. Crawford, *id.*

[261] *Supra* note 250.

[262] 23 D.L.R.3d 689 (N.W.T. 1972), *aff'g* Kraft v. Kraft, 56 W.W.R. (n.s.) 309 (Man. 1966).

[263] *See also* The Divorce Act, *supra* note 15, § 25(3). *See* Richards v. Richards, 7 R.F.L. 101, 26 D.L.R.3d 264 (Ont. 1972) where the court did not exercise its discretion to vary a maintenance order as the agreement incorporated into a divorce decree was for a sum to be paid over a fixed period of time.

[264] [1971] 1 W.W.R. 207, 3 R.F.L. 207, 16 D.L.R.3d 624 (B.C. 1970); Hitsman v. Hitsman, [1970] 2 Ont. 573, 11 D.L.R.3d 450 (High Ct.). *But see* Kruchowski v. Kruchowski, 3 R.F.L. 197 (Ont. 1971). *See now* Sinclair v. Sinclair, [1973] 1 Ont. 334, 11 R.F.L. 91 (Sup. Ct. 1972).

confirmed that a maintenance order made during marriage by a provincial court is not extinguished by divorce. The Alberta Supreme Court has further held that the order awarding alimony, made pursuant to section 18 of the Domestic Relations Act, [265] survives the granting of the decree nisi. [266]

Pugh v. Pugh [267] and *Rainey v. Rainey* [268] illustrate circumstances where reduction in maintenance is appropriate. In *Rainey* the court referred to the ten principles enunciated in the English case of *Attwood v. Attwood*, [269] with special emphasis on the rule that, "where cohabitation has been disrupted by the husband's matrimonial offence, the standard of living of the wife and children should not suffer more than is inherent in the circumstances of separation." In *Jankov v. Jankov*, [270] Mr. Justice McLellan doubted the court's power to vary a lump sum award. He observed that use of the variation power could encourage parties to delay payment in the hope of obtaining a favourable variation subsequently. Mr. Justice Seaton [271] does not seem to agree with this proposition. He observed that it is difficult to conceive of a case in which it would be appropriate to vary a lump sum award, but that

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[265] ALTA. REV. STAT. c. 113 (1970).

[266] Radke v. Radke, *supra* note 240. *See also* Chestolowsky v. Chestolowsky, [1973] 4 W.W.R. 681, 11 R.F.L. 194, 37 D.L.R.3d 266 (Sask. Q.B.).

[267] [1970] N.S.2d 409, 4 R.F.L. 213, 16 D.L.R.3d 318 (Sup. Ct.), when the applicant could not meet the basic needs of the respondent.

[268] [1973] 3 W.W.R. 90, 9 R.F.L. 282, 34 D.L.R.3d 606 (B.C. Sup. Ct.). The maintenance order was varied from 500 to 375 dollars.

[269] [1968] 3 All E.R. 385. The ten principles enunciated in *Attwood v. Attwood* are as follows:

> (1) in cohabitation, the wife and children share with a husband a standard of living appropriate to their income;
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> (2) where cohabitation has been disrupted by the husband's matrimonial offence, the standard of living of the wife and children should not suffer more than is inherent in the circumstances of separation;
>
> (3) in general, the wife and children should not be relegated to a significantly lower standard of living than that enjoyed by the husband;
>
> (4) similarly, the wife's standard of living should not be put significantly higher than the husband's;
>
> (5) the reasonable expenses of each party, including the expenses of earning an income and of maintaining any relevant child should be taken into account;
>
> (6) the wife's income or potential earning capacity must be taken into account;
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> (7) the wife's income ought generally to be brought into account unless it would be reasonable to expect her to give up the source of income;
>
> (8) the whole of the wife's income need not, and should not ordinarily, be brought into account so as to enure to the husband's benefit;
>
> (9) the last consideration was particularly potent where the wife's employment was taken up in consequence of the husband's disruption of the marriage, or where, had there been no disruption, she would not reasonably be expected to work;
>
> (10) the court must ensure that the result of its order was not to depress the husband below subsistence level.

[270] 2 N.S.2d 253, 3 R.F.L. 380, 16 D.L.R.3d 556 (N.S. Sup. Ct. 1971), where the husband sought variation on the ground that he was unable to raise the money.

[271] Gomes v. Gomes, [1972] 3 W.W.R. 151, 6 R.F.L. 398, 24 D.L.R.3d 265 (B.C. Sup. Ct.).

difficulty and the reasons varying a lump sum go to the exercise rather than the existence of the jurisdiction. [272] An application to vary an order for periodic payments of maintenance to a lump sum payment was rejected by the British Columbia Supreme Court [273] on the ground that the jurisdiction conferred by section 11(2) of the Divorce Act is limited to varying or rescinding an existing order, as opposed to making a new order.

F. *Duration of Orders*

Section 11(1) of the Divorce Act appears to confer an unfettered discretion upon the court with respect to the duration of orders for maintenance. Decided cases [274] indicate that the discretion is wide enough to order continuance for the lifetime of the wife or until remarriage or until a further order by the court. As far as the argument of public policy is concerned, Parliament, by not enacting a provision to the effect that orders for maintenance terminate with remarriage, has to that extent, proclaimed public policy. [275] Thus, there is nothing in the Act to limit an order of maintenance to the joint lives of the parties. [276]

G. *Custody and Maintenance of Children as Ancillary Relief*

In divorce cases, an order for the custody of children may be sought in every Canadian province under sections 10 and 11 of the Divorce Act. The challenge of the constitutional validity of these sections has continued. During the survey period this challenge has been effectively dealt with in *Gillespie v. Gillespie* [277] and *Armich v. Armich*,[278] where the provincial courts of appeal have stated that sections 10 and 11 of the Divorce Act were *intra vires* of section 91(26) of the British North America Act, 1867. In *Gillespie* the court took the view that, by enacting the corollary provisions respecting the custody of children of the marriage to be dissolved, Parliament had carved out of the general jurisdiction in custody matters (derived from provincial legislation), a segment of that jurisdiction which was limited to the children of the marriage, and had empowered the courts exercising divorce jurisdiction to make orders applicable to any children of the marriage. In *Armich* it was held that, while the Federal Parliament may not legislate as to maintenance and custody as a civil right, it is not prevented from so legislating when these matters arise as a necessary adjunct to the dissolution of a marriage. Further support for the validity of the corollary provisions is to be found in the judg-

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[272] *Id.* at 152.

[273] *Supra* note 271.

[274] Snively v. Snively, *supra* note 248; Richards v. Richards, [1972] 2 Ont. 596, 7 R.F.L. 101, 26 D.L.R.3d 264; *Re* Roberts, [1971] 4 W.W.R. 663, 5 R.F.L. 15, 20 D.L.R.3d 719 (B.C. Sup. Ct.); Neal v. Neal, 29 D.L.R.3d, 254 (B.C. Sup. Ct. 1972); Chadderton v. Chadderton, [1973] 1 Ont. 560, 8 R.F.L. 374, 31 D.L.R.3d 565 (1972).

[275] Richards v. Richards, *id.*, where the obligation to pay was not rescinded on remarriage as the agreement was for a sum certain to be paid over a fixed period. *See* Neal v. Neal, *id.*, where it was rescinded as the parties to the second marriage were neither old nor in any way precluded from supporting themselves.

[276] *Re* Roberts, *supra* note 274; Snively v. Snively, *supra* note 248.

[277] 6 N.B.2d 227, 36 D.L.R.3d 421 (1973).

[278] *Supra* note 264.

ment of the Supreme Court of Canada in *Jackson v. Jackson.*[279] There the court was satisfied that the power to grant an order for the maintenance of the children of the marriage is necessarily ancillary to jurisdiction in divorce, and that Parliament was therefore acting within the legislative competency conferred upon it by the B.N.A. Act, 1867, section 91(26).

The paramountcy of the Federal Parliament over the custody of children was not accepted in *Bray v. Bray,*[280] and *O'Neill v. O'Neill.*[281] According to these decisions, the custody provisions of the Divorce Act are permissive only and are supplementary to existing provincial jurisdictions. The court's discretion should not be exercised in favour of making an order for custody when the child resides in another province and is subject to an existing custody order made in that province. The opposite view was reached in *Gillespie v. Gillespie.*[282] It held that, since a custody order under section 11(1) of the Divorce Act was derived from paramount legislation, it superseded any prior order made under provincial legislation with respect to the same child. According to this view, the court having jurisdiction over an action for divorce is empowered to adjudicate with respect to the custody of the children of the marriage sought to be dissolved wherever they may be. It is generally accepted that the courts will exercise jurisdiction to determine a custody dispute, including a power of variation of that order[283] with respect to a child ordinarily resident or physically present within the jurisdiction. The child's "ordinary residence" is the last place in which the child resided with his parents, and ordinary residence cannot be changed by the surreptitious removal of the child from the place of ordinary residence.[284] Thus, in *Johnson v. Johnson,*[285] the Ontario Court of Appeal held that the jurisdiction to determine custody of the child in a divorce case was not ousted where the husband had absconded with the child to Saskatchewan. Mr. Justice Arnup suggested that jurisdiction under the Federal Divorce Act might in any case not be restricted by Provincial borders.

At common law there is a prima facie right for the father of a legitimate child to be granted custody of the child, which right is displaced under the Divorce Act by the factor of the welfare of the child.[286] It is the duty of the court to decide what is in the best interest of the child. The financial aspects of an infant's maintenance are not usually an overly important consideration in determining the child's welfare.[287] In arriving at a decision as to what is

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[279] [1973] Sup. Ct. 205, [1972] 6 W.W.R. 419, 8 R.F.L. 172, 29 D.L.R.3d 641 (1972), *rev'g* [1972] 1 W.W.R. 751, 4 R.F.L. 358, 22 D.L.R.3d 583 (B.C. 1971).

[280] [1971] 1 Ont. 232, 2 R.F.L. 282, 15 D.L.R.3d 40 (High Ct. 1970).

[281] 4 N.S.2d 640, 5 R.F.L. 98, 19 D.L.R.3d 731 (1971).

[282] *Supra* note 277.

[283] *Gillespie, supra* note 277; O'Neill v. O'Neill, *supra* note 281.

[284] Hegg v. Hegg, [1973] 3 W.W.R. 307, 36 D.L.R.3d 291 (B.C.); Nielsen v. Nielsen, 2 R.F.L. 109, 16 D.L.R.3d 33 (Ont. High Ct. 1970).

[285] *Supra* note 235; *See also* Adams v. Adams, 4 N.B.2d 275, 7 R.F.L. 203 (N.B. Sup. Ct. 1971).

[286] Farkasch v. Farkasch, [1972] 1 W.W.R. 429, 4 R.F.L. 339, 22 D.L.R.3d 345 (Man. Q.B. 1971).

[287] *Re* Goupil, 4 N.B.2d 602 (1972).

best for the welfare of the child, the courts have continued to consider a number of principles: [288] (1) a child of tender years should normally be with its mother; [289] (2) a girl should normally be with her mother and a boy, unless of tender years, with his father; [290] (3) the children of a marriage should normally be kept together; [291] (4) the child's wishes should be considered if he is sufficiently mature; [292] and (5) the parents' plans for the care, maintenance and upbringing of the child should be considered, [293] as well as (6) the conduct and wishes of the parents. [294] In *Gauci v. Gauci*, [295] in determining the custody of the child, the court took into consideration the religion, culture and tradition of the father's closely-knit family. The court was most reluctant to remove the child from the custody of a loving and generous father to place him in a home where he would be dependent upon the generosity of strangers for his support. In *Gelbloom v. Gelbloom*, [296] an order of custody was made with respect to a child over the age of sixteen years, who had been excluded from the matrimonial home by the father sometime prior to the parents' separation, and who had returned to take up residence with the mother. It was remarked that, while in ordinary circumstances a child who had attained years of discretion could not normally be ordered against his wishes into the custody of either parent, the age of the child alone did not nullify the court's power to make an order for the custody of a child coming within the section 2 definition of "children of the marriage". In *Richardson v. Richardson*, [297] custody of the child was awarded to the mother notwithstanding that she was living in adultery. There was no evidence that her relationship with her co-respondent was having a bad effect on the child, and the evidence indicated that she was a good mother. When the courts grant a divorce decree, they make orders for the maintenance of the children under section 11 of the Divorce Act. In *Bogdane v. Bogdane*, [298] an additional award for the maintenance of a child born after the decree being made absolute was refused on the basis of the court's interpretation of the word "upon" in section 11(1), as leaving the court without jurisdiction to make such an award after the granting of the decree nisi. *Hansford v. Hansford* [299] illustrates the type of order that can be made when the divorcing parents bargain away the rights of their children to paternal support, and the money is not needed by the mother. The court issued an order that the payments be made into court to the credit of the child, on notice to the Official Guardian. The funds, as they ac-

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[288] See Hughes, *supra* note 1, at 189.
[289] Rennie v. Rennie, 38 D.L.R.3d 401 (P.E.I. Sup. Ct. 1973).
[290] *Re* Pittman, [1972] 1 Ont. 347, 5 R.F.L. 376, 23 D.L.R.3d 131 (Surrogate Ct. 1971).
[291] Shapiro v. Shapiro, 33 D.L.R.3d 764 (B.C. 1973).
[292] *Id.*
[293] Farkasch v. Farkasch, *supra* note 286.
[294] Hyrhoriw v. Hyrhoriw, 32 D.L.R.3d 646 (Sask. Q.B. 1973).
[295] [1973] 1 Ont. 393, 9 R.F.L. 189, 31 D.L.R.3d 257 (High Ct. 1972).
[296] [1973] 3 Ont. 289, 10 R.F.L. 274, 36 D.L.R.3d 517.
[297] 4 R.F.L. 150, 17 D.L.R.3d 481 (Sask. Q.B. 1971).
[298] 38 D.L.R.3d 767 (Sask. Q.B. 1974).
[299] *Supra* note 224.

cumulated, would be available for the use of the child when needed, and, in any event, were to be paid to the child when she attained majority.

The expression "children of the marriage" is ill-defined in the Divorce Act. The discussion over this term continued over the surveying period. The decided cases indicate that the parent is under no obligation to support the children through an educational career indefinitely extended, and it is in the court's discretion to grant maintenance for children while attending school.[300] Now, the age of majority is lowered in Canada. It is nineteen in British Columbia, Saskatchewan, Nova Scotia and Newfoundland.[301] It is eighteen in Alberta, Manitoba, Quebec and Ontario.[302] Questions have been raised as to whether the new provincial legislation lowering the age of majority has any effect on the meaning to be given to the words "children of the marriage", as they occur in section 11 of the Divorce Act. It has been answered in the negative in British Columbia, Manitoba, and Ontario.[303] Under the Divorce Act, the courts can order a spouse to maintain a child of either the husband or wife "to whom the other of them stands *in loco parentis*."[304] Two cases illustrate where such a relationship is not established and, hence, maintenance in respect of the child was not ordered by the court. In *Hock v. Hock*,[305] a step-father assumed obligations towards his wife's children on a temporary basis, and it was held that he was not *in loco parentis* to those children. In *Bouchard v. Bouchard*,[306] it was held that, where it is established that a husband stands *in loco parentis* to a child adopted into a previous marriage of the wife, maintenance is payable upon the granting of a decree. But in that case the husband had taken no interest at all in the child, and, on the evidence, the wife did not recognize any parental status of the husband. Maintenance then, was not ordered.

VI. Conclusions

As a result of this survey certain observations and conclusions may be made.

It has been noticed that the cause of action for breach of promise to

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[300] Sweet v. Sweet, [1971] 2 Ont. 253, 4 R.F.L. 254, 17 D.L.R.3d 505 (High Ct.); Hillman v. Hillman, [1973] 1 Ont. 317, 9 R.F.L. 392, 31 D.L.R.3d 44 (1972); Clark v. Clark, [1971] 1 Ont. 674, 4 R.F.L. 27, 16 D.L.R.3d 376 (High Ct.).

[301] Age of Majority Act, B.C. Stat. 1970 c. 2; The Coming of Age Act, Sask. Stat. 1970 c. 8; Age of Majority Act, N.S. Stat. 1970-71 c. 10; The Minors (Attainment of Majority) Act, Nfld. Stat. 1971 No. 71.

[302] Age of Majority Act, Alta. Stat. 1971 c. 1; Age of Majority Act, Man. Stat. 1970 c. 91; An Act to Again Amend the Civil Code, Que. Stat. 1971 c. 85; Age of Majority and Accountability Act, Ont. Stat. 1971 c. 98.

[303] Jackson v. Jackson, *supra* note 279; Vlassie v. Vlassie, [1972] 4 W.W.R. 213, 6 R.F.L. 332, 26 D.L.R.3d 471 (Man. Q.B.); Hillman v. Hillman, *supra* note 300. *See* earlier views in Ontario: Bis v. Bis, [1972] 3 Ont. 699, 6 R.F.L. 374, 29 D.L.R.3d 290 (High Ct.); Jensen v. Jensen, [1972] 1 Ont. 461, 6 R.F.L. 328 (High Ct. 1971).

[304] § 2(2).

[305] Hock v. Hock, *supra* note 106.

[306] Bouchard v. Bouchard, [1972] 3 Ont. 873, 9 R.F.L. 372, 29 D.L.R.3d 706 (High Ct.).

marry has been abolished in the United States and England, but that it proved a useful remedy in one reported Canadian case.[307] Hence, it is submitted that such a right should not be abolished. During the survey period, few cases have been reported on annulment of marriage. The paucity of such cases is undoubtedly due in part to the relative facility with which divorces may now be obtained under the Divorce Act, 1967-68; and, in all likelihood, these cases may be expected to become even rarer.

Canadian courts have been concerned with the meaning of the phrase "ordinarily resident", as employed in section 5(1)(*b*) of the Divorce Act. It has been pointed out that the test laid down in *Marsellus v. Marsellus*[308] approaches the meaning of "domicile" and is to be preferred. The phrase "actually resided" is also not defined in the Act, and the problem of determining its meaning has confronted two courts.[309] It is suggested that actual residence should not be considered to be interrupted by temporary absences in the nature of holidays or business trips. The Canadian courts have confirmed that the Divorce Act, 1967-68 has not altered the common law rules regarding the determination of domicile, except as regards the wife.

Most of the dozen or so adultery cases reported during the survey period relate to the standard of proof required to show adultery. Regarding cruelty, it now appears to be widely accepted that the statutory definition of cruelty is complete in itself, and need not be read subject to the earlier criteria enunciated in *Russell v. Russell.*[310] Whether the conduct complained of is cruelty within the meaning of section 3(*d*) is essentially a question of fact to be determined according to the circumstances of each particular case. There are no uniform standards that can be adopted to determine whether the respondent's conduct has rendered cohabitation intolerable. But the courts have set a fairly severe standard as to the degree of hardship that must be suffered before the cohabitation becomes intolerable. The court must determine the effect of the respondent's conduct upon the mind of the petitioner, having regard to the physical and mental conditions of the parties, their characters and their attitudes towards the marital relationship.[311] In addition, the acts complained of must be "grave and weighty", and for lesser conduct, the parties must await the passage of time prescribed by section 4 to obtain a divorce.

The words "living separate and apart" are not defined in the Divorce Act, but the weight of judicial opinion is that there must be both an *animus separandi* and the fact of separation. There have been further decisions to the effect that parties may be living separate and apart under the same roof. No new principles in regards to sections 9(1)(*e*) or (*f*) have been added during the review period.

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[307] Tuttle v. Swanson, *supra* note 3.

[308] *Supra* note 35.

[309] Norton v. Norton, *supra* note 39; Cuzner v. Cuzner, *supra* note 39.

[310] *Supra* note 67.

[311] Knoll v. Knoll, [1970] 2 Ont. 169, at 177, 10 D.L.R.3d 199, at 207 (per Schroeder, J.A.).

The exemption from the meaning of condonation in section 2, of "the continuation or resumption of cohabitation during any single period of not more than ninety days", has given rise to problems of interpretation. In order to forestall hardship, it is desirable to follow *Cherniski v. Cherniski*, [312] where it was held that any number of separate periods were exempted, so long as none exceeded ninety days.

Reported cases also indicate that the courts will shorten the waiting period between the decree nisi and the decree absolute, only in special circumstances. It seems clear now that the courts may only make ancillary orders on divorce, when granting the decree nisi. There have been further decisions as to the effect of a wife's misconduct (such as adultery or desertion) on her right to maintenance. It seems to be settled that the courts may award both a lump sum payment and periodic payments under section 11. The discretion to award maintenance is wide enough to order continuance of the maintenance for the lifetime of the applicant, or until remarriage or a later order by the court.

[312] *Supra* note 218.