

DIVORCE COURTS AND CONCILIATION SERVICES: AN INTERFACE OF LAW AND THE SOCIAL SCIENCES

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If marriages are indeed the building blocks of our society, the judiciary is in pathetic shape if it is suited to do no more than sweep up the debris after watching the foundations crumble. Furthermore . . . the marital relationship is such a complex of human needs and its dissolution of trauma of such magnitude that society and its legal system should be required to provide something more sophisticated than our adversary judicial system for dealing with the situation.¹

Before discussing the effect of the formal legal system in the specific area of domestic relations, it might be useful to examine the adversary system; in the abstract, along with general notions of "conciliation" to determine how a beneficial interface between the two can be achieved.

The adversary system, by its very nature, guarantees that at least 50% of the parties leave the courtroom unhappy — it nurtures bitterness and discontent. It is a zero-sum game — one winner, one loser. Although in theory counsel are expected to adduce all relevant evidence so that the Court may have the resources to make the "right" decision, in practice this happens more by accident than by design. The idea becomes "winning" and if harmful evidence must be withheld to ensure that end, so be it. In a rather cynical look at the adversary system, A. Rapoport writes as follows:

. . . [T]he impression cannot be escaped that the goal of 'serving justice' becomes at best a hoped for by-product of typical competitive activity involving mobilization of resources, technical expertise, and ingenuity — activity that does not depend on any conception of justice or any devotion to it except, perhaps, incidentally as an extra motivation.²

Cynicism notwithstanding, these remarks are sadly accurate, particularly in the area of judicial dissolution of marriages. Over the years, however, there have been numerous instances where communities have successfully mitigated the harshness of the formal Court system in contexts other than marriage dissolution.

In a book entitled *So Sue Me!*,³ James Yaffe relates the history and workings of the Jewish Conciliation Board in New York and in passing makes numerous notable comments with respect to the achievement of successful conciliation. He notes that many of the disputes involve parties who sincerely wish to meet their opponents halfway, but do not know how to go about it.⁴ The Board helps them to do just that. In many cases, the litigants are instructed to go off by themselves to attempt their own resolution. Yaffe suggests that the very act of trying to reconcile and the failure to do so seems to make the parties more amenable to constructive suggestions of the Board.⁵ In conclusion, Yaffe sets out three "lessons" which are exemplified by the Board. They are: (a) that justice, under certain circumstances, can be handled more quickly, cheaply, efficiently, and effectively by the communi-

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1. J.V. MacLean, "Marriage Counselling Through the Divorce Courts — Another Look" (1977), 28 South Carolina L. Rev. 687, at 696.
2. A. Rapoport, "Theories of Conflict Resolution and the Law" in *Courts & Trials: A Multi-disciplinary Approach* (M.L. Friedland ed. 1975) 30.
3. J. Yaffe, *So Sue Me!: The Story of a Community Court* (1972).
4. *Id.*, at 13.
5. *Id.*, at 38.

ty than by the state,⁶ (b) that inflexible logic is *not* the only means of dispute settlement,⁷ and (c) that a healthy skepticism — i.e. the realization that human beings are invariably prone to failure when dealing with their own inter-personal problems — must be possessed by anyone wishing to set up a conciliation service.⁸

In a slightly different context, there is the experience of the Citizen Dispute Settlement Centre (CDSC) in operation in Metro-Dade County, Miami, Florida.⁹ The Centre began operations in 1975 to deal with minor criminal offences in ongoing relationships. The Centre received much judicial support in its conciliatory activities and, in its first 18 months of operation, only 110 of 3,890 matters serious enough for formal prosecution were not successfully deactivated by dispute settlement.¹⁰ In addition, in comparison to the formal criminal Courts, the CDSC cut waiting time from 94.3 days to 7.2 days¹¹ and reduced average costs from \$250.00 per case to \$36.14 per case.¹² These results are, to say the least, very impressive and very encouraging.

Although the CDSC operates in a criminal context, several observations made with respect to it are easily transferable to a family context. First, it was noted that a presiding Judge often has good ideas on how to best handle the "human" elements of the case before him but is bound, by court rules and procedure, to deal with it in a "legal" fashion.¹³ The inevitable result is that the underlying problems are not properly dealt with and the same parties reappear again and again in Court.¹⁴ Perhaps the most important observation, however, is set out as follows:

Surprisingly, most persons in mediation sessions are not at all reluctant to bare their souls as long as they are reassured that nothing adverse is going to happen [to them] . . . [P]eople can and will discuss their motivations if just given the opportunity.¹⁵

It is this *opportunity* to settle problems extra-judicially that is too often lacking for Canadian couples experiencing marital difficulties.

One final point which seems to pervade all of the literature on successful conciliation is that it is vital that "neither arbitrators nor conciliators point the finger of guilt; both try to stress both good and bad acts by both persons."¹⁶ This theory underlies all of the comments and observations which follow herein.

The Adversary System and Domestic Relations

The Law Commission of England once stated that a good divorce law has two objectives, namely, (1) it should buttress rather than undermine the

6. *Id.*, at 265.

7. *Id.*, at 267.

8. *Id.*, at 268.

9. See F.M. Dellapa, "Citizen Dispute Settlement: A New Look at an Old Method" (1977), 51 Florida B.J. 516.

10. *Id.*, at 517.

11. *Ibid.*

12. *Id.*, at 518.

13. *Ibid.*

14. *Id.*, at 519.

15. *Id.*, at 520.

16. S. Conn and A.E. Hippler, "Conciliation and Arbitration in the Native Village and the Urban Ghetto" (1974-75), 58 *Judicature* 229, at 234 n.

17. Address by J.C. MacDonald, Q.C. at the Vanier Institute of the Family, *Seminar on the Impact and Implications of the Reconciliation Provisions of the Divorce Act of 1968* (January, 1973) 1.

stability of marriage as an institution, and (2) when the marriage has nevertheless disintegrated, it should allow the empty shell to be destroyed with the maximum fairness and minimum bitterness, distress and humiliation.¹⁷ It is arguable that the 1968 *Divorce Act* has had dubious success with the first objective and practically none with the second. It appears these problems were recognized in the law prior to the *Divorce Act*. In their 1967 report, the Special Joint Committee of the Senate and the House of Commons on Divorce stated: ". . . [T]here is no doubt, that the law as it stands at the moment, does little to promote the reconciliation of couples contemplating divorce, and some of the provisions actually tend to discourage it."¹⁸ However, the enactment of specific provisions regarding reconciliation in 1968 has done little to correct the problem.

The reconciliation sections of the *Act* (i.e. ss. 7 and 8) were undoubtedly intended to support marriage as an institution by forcing an inquiry, albeit a cursory one, into the status of a marriage which the partners are seeking to have dissolved. It appears that these clauses are directed toward "impulse divorces"; that is, the person approaching the lawyer for a divorce is really seeking help to save their marriage. They may be unaware of the available services or may be simply too proud to go without some encouragement from someone like a lawyer.¹⁹ However, if this is the intent of the sections, the focus is far too narrow. The sections as drafted have the potential to provide a meaningful support to marriage in Canada, but the implementation of the provisions has simply not met expectations. In 1973, the Vanier Institute, in a background paper regarding an upcoming interdisciplinary seminar on these provisions, suggested several reasons for the lack of effectiveness: (1) the late stage at which attempts to reconcile are expected to occur, (2) the lack of counselling facilities in many locations, (3) the delays in service caused by the overworking of existing facilities, (4) the absence of standards for counsellors, (5) the failure of the legal profession to recognize the value of counselling, and (6) the absence of counselling facilities within the legal system.²⁰

In 1975, the Law Reform Commission of Canada summarized the situation in the following manner:

Experience has shown that these statutory provisions have failed to achieve their objective of promoting reconciliation. This is not surprising. They are superimposed on an adversary and fault-oriented divorce process and very little has been done to provide adequate counselling services in the court or the community to implement them. It is evident that counselling facilities must be available to spouses in the early stages of marital conflict and cannot be expected to save the disintegrating marriage when the conflict has become so entrenched as to warrant recourse to the present divorce process. The expertise of the lawyer and of the judge is in the law and not the social or behavioural sciences. Neither can be expected to discharge the functions of the marriage or family counsellor. The most conscientious and well-meaning legal practitioner can do little more than encourage the petitioner to seek

18. *Report of the Special Joint Committee of the Senate and House of Commons on Divorce* (June, 1967), at 152.

19. For example, in an article entitled "The Family Court — An Obstacle Race?" 19 U. Pitt. L. Rev. 602 at 608, Judge-Paul Alexander states:

Plaints of all sorts greet the judges of the family courts. Some are so common they seem to ring in our ears: "I didn't want no divorce, I was just tryin' to bring him to his senses;" "all I wanted was him to quit drinkin' and come home;" "divorce won't do me no good, I want him to bring his paycheck home;" "If you'd only make her quit that factory job we'd get along swell;" "Judge, will you help me get back my refrigerator?"

See also H.H. Irving and B.G. Irving, "Conciliation Counselling in Divorce Litigation" (1974), 16 R.F.L. 257, at 261.

20. Vanier Institute of the Family, *Background Paper for the Seminar on the Impact and Implications of the Reconciliation Provisions of the Divorce Act of 1968* (January, 1973) 3.

help from counselling services in the community. Even this limited goal may be exceedingly difficult to accommodate insofar as it conflicts with the stated expectations and demands of the client.

It appears obvious, in retrospect, that effective implementation of statutory reconciliation provisions requires a de-emphasis of adversary procedures and the provision of adequate counselling services. Active steps must be taken to ensure that legislative, judicial and administrative policies buttress the stability of marriage by encouraging people in marital difficulty to seek help with their problems at the earliest possible time. Governments cannot rest content with legislation that merely restricts or facilitates divorce.²¹

In short, while the reconciliation provisions were drafted in the spirit of the first objective outlined above, they failed to provide an adequate mechanism for giving effect to their intent.

With respect to the second objective, it almost appears as if the *Act* was drafted with the opposite goal in mind. The retention of "fault" grounds in general and of formal court proceedings in an adversary context as the *only* means of divorce has created fertile ground in which the growth of bitterness can flourish. The parties are forced to dredge up as much evidence as possible to put their spouse in the worst possible light in the eyes of the Court. Many old wounds are re-opened; many skeletons are dragged out of the closet. In short, the system seems to dictate that divorce must be a painful and destructive experience. While it is generally conceded that it will inevitably be painful, experience has shown that good conciliation counselling provided at the proper time can put the divorce into proper perspective and can make it into an adventure in growing rather than a nightmare in hurting.

The Goal of Conciliation Services

There is no reason to suggest that the sole goal of conciliation counselling should be to "save" the marriage. It is openly and readily admitted that in many cases the couple would fall apart.²² This notion of having the counselling service encompass both reconciliation and preparation for divorce ("closing the book gently" counselling²³) is perhaps best expressed by Judge Marjorie M. Bowker as follows:

What do we mean by 'conciliation'?

- first, helping [the couple] reach the right *decision* concerning the future of their marriage. That decision may be: — 1. to reconcile or
2. to divorce;
- second, helping them *implement* that decision;
- *if it is to reconcile*, then counselling is directed at strengthening the marriage (reconciliation counselling)
- *if it is to divorce*, then 'divorce counselling' aims at helping the parties adjust to a changed life and new responsibilities; overcome emotional problems (bitterness, guilt, failure); and (where there are children) resolving custody and access and helping the parents understand their role as 'separated parents';
- it includes (where necessary) counselling of 'children of divorce' to resolve their confusions and to help them to understand and accept their parents' divorce;
- post divorce counselling when problems arise subsequent to the decree, particularly in regard to visitation.²⁴

21. Law Reform Commission of Canada, *Working Paper 13, Divorce* (1975) 26.

22. *Supra* n. 17, at 7-8. See also the NDP Government submission entitled "Unified Family Court Project-Manitoba" (April, 1977) 4 and *infra* n. 23.

23. M. Elkin, *The Conciliation Court: A Pioneering Approach to the Divorce Problem* (1968, unpublished) 18.

24. Judge M.M. Bowker, *Supportive Services for a Unified Family Court* (1976, unpublished) 17.

In other words, the projected ambit of conciliation counselling runs from the time marital discord first erupts right through the entire formal divorce procedure and beyond (where necessary). According to J.V. MacLean:

If counseling can serve to lessen the trauma of marital breakup, it is valuable even in those cases where a true reconciliation is unrealistic. In the context of societal needs, this value may be measured in children who are not fought over or in adults capable of bringing a greater degree of maturity and wisdom to their subsequent marriages.²⁵

American and Canadian Success Stories

There have been a number of projects instituted both in Canada and in the United States which have attempted to translate the spirit of the above quotation into affirmative action. Two such conciliation services rate slightly closer scrutiny — the Los Angeles Conciliation Court and the Edmonton Family Court Conciliation Service.²⁶ The former is noteworthy because of the successful pioneering approach and its longevity (it has been in operation since 1939) and the latter is of interest because of its success, and, perhaps more importantly, its Canadian content.

By way of statistics, in 1967, the Los Angeles service successfully reconciled 69.1% of the families who completed the counselling process. A follow-up one year later (with approximately 95% coverage) showed that 75% of the couples were still together and had experienced improvement of varying degrees in their marriages.²⁷ With respect to the Edmonton service, approximately 34% of the couples using the service between 1975 and 1977 reconciled or did not separate because of the counselling and a further 55% benefitted from divorce counselling directed at custody, access and/or personal adjustment problems. A "year after" follow-up survey taken in 1975 indicated "a high degree of permanence in the decisions reached by the parties at the conclusion of counselling."²⁸

Since the thrust and aim of both of these services is very similar (the latter being heavily based upon the former), it would be profitable to briefly comment upon their similarities. First, since many people are in desperate crisis situations when they come to seek help, both services are short-duration (three sessions or less) and crisis-oriented.²⁹ People are apparently more susceptible to counselling at these times and are often more positively motivated to help themselves.³⁰ Second, the services are entirely voluntary and are free of charge; a filing fee is considered to be a barrier to service.³¹ The procedures of both are simple and direct and the services are available quickly. Also, *either* partner may petition for help.³² Third, both services are well-integrated into the formal Court system and there is evidence to

25. *Supra* n. 1, at 700.

26. For other Canadian examples see *infra* n. 33 (Toronto); Canadian Bar Association *National*, July-August, 1979, at 13 (St. John's Nfld.); and *National*, December, 1979, at 15 (Halifax). For other American examples see *supra* n. 1, at 688 and Irving and Irving, *supra* n. 19, at 263.

27. *Supra* n. 23, at 17.

28. *Edmonton Family Court Marriage Conciliation Service, Five Year Summary of Operations 1972-77* (January, 1978) 12-13.

29. J.M. Hope, Q.C., *Final Report on Edmonton Family Court Conciliation Project — Volume 1* (1975) 138.

30. *Supra* n. 23, at 4.

31. *Id.*, at 7 and *supra* n. 29, at 7.

32. *Supra* n. 23, at 5.

suggest that the practicing bar considers this desirable. Irving and Gandy write:

They [the practicing judges and lawyers] emphasized the importance of a conciliation service being vested with the credibility and authority of the court system, suggesting that it should be part of the administrative structure of the court.³³

The Los Angeles Court uses a reconciliation agreement which the parties voluntarily enter after counselling and which, when approved by a competent Judge, carries the force of a court order. The order may be revoked by either party at any time and any pre-agreement orders are automatically reinstated.³⁴

In Edmonton, the Service is physically attached to the Court with divorce jurisdiction,³⁵ and the counsellors are available in the courtroom on "uncontested divorce days" for immediate consultation. Also, the Chief Justice allows a pamphlet outlining the availability of counselling services to be included with the divorce petition when it is served upon the respondent.³⁶ It has been recommended that this be expanded to include petitioners as well.³⁷

A fourth similarity in the Courts is that both services stress the strict confidentiality of the sessions. All of the files, reports and communications of the Los Angeles services are secret and closed by law.³⁸ In fact, Judge Bowker's 1975 report concerning the Edmonton project contained the following recommendation:

10. That legislation be enacted that all counselling interviews and communications, written and oral be 'privileged communications', and that counsellors not be subpoenaed to give evidence in court.³⁹

This view was reiterated in President Hope's 1976 Report on the same project.⁴⁰

Fifth, both services are available at any time throughout the proceedings and often aid in establishing amicable post-divorce relations and equitable settlements concerning corollary relief.

Finally, both services are dedicated to augmenting and supplementing both the existing services and, more particularly, the existing legal system, in order to better deal with the parties to a faltering or failing marriage. Neither service was ever intended to *replace* any of the existing facilities.⁴¹

The prime movers of both projects concur on the role of the Courts in divorce proceedings. M. Elkin states: ". . . [S]ince a marriage cannot be terminated without recourse to a legal procedure, the judiciary is in an advantageous position to provide marital counselling services to estranged couples."⁴² Meanwhile J.M. Hope writes: ". . . [C]ourts have both the op-

33. H.H. Irving and J. Gandy, "Family Court Conciliation Project: An Experiment in Support Services" (1977), 25 R.F.L. 47, at 49.

34. *Supra* n. 23, at 11-12.

35. *Supra* n. 29, at 6.

36. *Supra* n. 24, at 21.

37. *Supra* n. 29, at 139.

38. *Supra* n. 23, at 15.

39. *Supra* n. 24, at 27.

40. *Supra* n. 29, at 7 and 137.

41. *Id.*, at 1 and *supra* n. 23, at 2.

42. *Supra* n. 23, at 3.

portunity and the duty to render affirmative and constructive assistance pending divorce"⁴³ In short, both the services and the Courts are deficient in each other's absence but efficient and effective in combination.

Academic and Judicial Response

In general, Judges and lawyers were reasonably quick to recognize the benefits of conciliation counselling. In its first three years of operations (1972-75), 46% of referrals to the Edmonton project came from lawyers and, in the period 1975-77, this figure rose to 50%.⁴⁴ In fact, in 1976 Judge Bowker stated unequivocally that "the principal means of reaching the divorcing population in terms of preventing divorce, reducing divorce, and conciliating differences created by divorce, is through lawyers"⁴⁵

It is commonly acknowledged by Judges, lawyers and academics alike that proper conciliation counselling can yield some or all of the following benefits:⁴⁶

(a) it can save time and money for Courts, lawyers and clients by reducing unnecessary litigation (both initial and repeated);⁴⁷

(b) it can mitigate conflict, bitterness and anxiety at the time of divorce by helping the parties reach mutual and voluntary agreements concerning ancillary matters in the more informal atmosphere of the conciliation interview room;

(c) it may permit a face-saving way to stop an unwanted divorce action which is already in progress;

(d) it can provide lawyers and Judges with "an effective means of satisfying the moral and ethical obligations under Sections 7 and 8 of THE DIVORCE ACT";⁴⁸ and

(e) it may even restore a measure of goodwill between the parties notwithstanding their decision to divorce.

It has been suggested further by J.C. MacDonald, Q.C. that such counselling can prepare the spouse and children for the future (including the prospects of loneliness) without the parent/partner and can also help the parties to accept and clarify their continuing obligations to themselves and to their children.⁴⁹

43. *Supra* n. 29, at 2.

44. *Supra* n. 28, at 10.

45. *Supra* n. 24, at 24.

46. See generally *supra* notes 17, 19, 23, 24, 29, 33.

47. For example, an item in the Canadian Bar Association *National* (December, 1979) states (at p. 15): "The wave of applications to vary or rescind divorce relief orders has reached epidemic proportions in Nova Scotia . . ." Chief Justice Cowan was quoted as saying he had 35 such applications upcoming in a two-week period in which he had only 5 other ordinary civil cases. It was also noted that there was a "three-month backlog in setting down hearing dates for corollary relief actions." In light of the successes in Los Angeles and Edmonton one tends to believe that many of these applications to vary or rescind could have been completely avoided by proper conciliation counselling at a much earlier point in time.

48. *Supra* n. 29, at 75.

49. *Supra* n. 17, at 8.

Conclusion

Conciliation services have proven their benefit and ought to be implemented in all centers across Canada where the population justifies the effort and the expense. In order to provide optimum benefits, they must continue to be inter-disciplinary and without cost to clients and they must retain their confidentiality, their short-term, crisis-oriented approach and, perhaps most importantly, their voluntary character;⁵⁰ a mandatory service would soon be reduced to a "a mere formality of path that one must take to eventual divorce."⁵¹ If one accepts the notion that family life is a Canadian institution worthy of preservation, conciliation services seem to be a positive and viable step toward fulfilling that goal. In the words of J.V. MacLean: ". . .[S]ome form of conciliation is not only a valuable social tool but an outright social obligation."⁵²

50. *Supra* n. 33, at 50.

51. *Supra* n. 17, at 12.

52. *Supra* n. 1, at 700.